

Statement for the Record of Human Rights First Authorization For Use Of Military Force After Iraq And Afghanistan

Before the Senate Committee on Foreign Relations

May 21, 2014

SUMMARY AND RECOMMENDATIONS

Human Rights First welcomes the Senate Foreign Relations Committee's attention to the status and future of the 2001 Authorization for the Use of Military Force (AUMF). The debate at hand raises profound legal and policy issues that are critical to our democracy and our security. Is the United States engaged in armed conflict as defined by international law? If so, does the 2001 AUMF meet domestic and international legal criteria for authorizing the types of use of force that the United States is now employing?

These questions may seem inessential at best to policy makers and operators intent on securing authorization to go after a suspect or push an interrogation in real time. And they may seem academic or a luxury when placed against the lives of comrades lost on the battlefield in Afghanistan, or the fate of 200 girls ripped from school into sexual servitude.

In fact, the strong wall between war and peace underpins the democratic stability that Boko Haram wants to keep out of Nigeria and Osama Bin Laden sought to undermine here at home. A state of perpetual warfare skews our policymaking framework towards decisions designed to eliminate – rather than manage – threats, an unrealistic goal that leads to unbalanced and unhealthy policy results. The longer the United States remains in a state of armed conflict to take advantage of the flexibility war allows, the more likely it is that extraordinary powers become the norm and, in the worst case, that policies creep in that are the hallmarks of dictatorships and enemies of human rights: detentions without charge or trial, extrajudicial killings, military tribunals, and mass surveillance.

In recent years, military and diplomatic leaders have documented the high increasing costs of prolonged and global armed conflict: partners and allies reluctant to cooperate on counterterrorism operations, authoritarian leaders cynically pointing to U.S. excesses to justify their own repressive policies, loss of support and trust in American efforts among publics in countries such as Yemen. At home as well, public controversy and distrust has risen around every aspect of our wartime activities. And counterterrorism professionals continue to point to a suite of core competencies – non-military policies that are essential to our security – that are under-emphasized and under-resourced.

To date, Congress, military leaders, and outside experts have debated reforms and transparency piecemeal. Below, Human Rights First reviews the legal and policy ramifications of maintaining the current AUMF, adopting a new one, or moving to reliance on non-war national security authorities, and makes the following recommendations:

- Congress and the administration should publicly debate and clarify the shifting nature of the threat posed by Al Qaeda, and the core competencies and additional legal authorities, if any, needed to keep Americans secure.
- The administration should remedy the lack of transparency about current U.S. policy under the AUMF, by disclosing to Congress and the American people:
 - With which groups the administration considers the United States to be at war;
 - Which groups the administration considers to be “associated forces;”
 - The countries in which military force is currently being used, the criteria it uses to classify targets and collateral damage; and
 - Any and all legal memoranda and policy guidance that govern lethal targeting operations.
- The administration should describe in concrete and specific terms the conditions necessary to bring an end to the armed conflict with Al Qaeda and associated forces.
- The administration should clarify and reform its legal and policy framework for the use of lethal force outside of active zones of hostilities to put it on more solid footing by bringing it further in line with the requirements of international human rights law.
- Congress should hold a series of hearings, with the cooperation of the administration, to examine the most effective way to narrow and ultimately repeal the 2001 AUMF. Congress should not pass any new AUMF that would expand the mandate contained within the 2001 AUMF.
- The administration and Congress should seek and implement a bi-partisan solution to remove one of the most problematic legacies of the AUMF – the detention facilities at Guantanamo Bay – by transferring all cleared detainees to their home or third countries, prosecuting detainees suspected of criminal conduct in Article III courts, and transferring the remaining detainees to the United States with a view toward their ultimate release or prosecution elsewhere.

INTRODUCTION

Is war the best way for the government to organize, and citizens to understand, a campaign that reflects few of the attributes of how we understood war for hundreds of years?

The law has much to say about this; America’s best lawyers and soldiers believed a clear separation between wartime and peacetime behavior was essential, and worked to codify it in our laws and international law.

This hearing has as its starting point a legal debate: is the United States engaged in armed conflict as defined by international law? If so, does the 2001 AUMF meet domestic and international legal criteria for authorizing the types of use of force that the United States is now employing?

These questions may seem inessential at best to policy makers and operators intent on securing authorization to go after a suspect or push an interrogation in real time. And they may seem academic or a luxury when placed against the lives of comrades lost on the battlefield in Afghanistan, or the fate of 200 girls ripped from school into sexual servitude.

In fact, the strong wall between war and peace underpins the democratic stability that Boko Haram seeks to keep out of Nigeria and Osama Bin Laden sought to undermine here at home. A state of perpetual warfare skews our policymaking framework towards decisions designed to eliminate – rather than manage – threats, an unrealistic goal that leads to unbalanced and unhealthy policy results. The longer the United States remains in a state of armed conflict to take advantage of the flexibility war allows, the more likely it is that extraordinary powers become the norm and, in the worst case, that policies creep in that are the hallmarks of dictatorships and enemies of human rights: detentions without charge or trial, extrajudicial killings, military tribunals, and mass surveillance.

Congress, military leaders, and outside experts have debated such reforms piecemeal, out of concern for fundamental rights and freedoms and a sense that U.S. counterterrorism efforts are warped by an over-emphasis on tools available in wartime.

Course correction must come with limiting the scope of the government's claimed armed conflict to situations that actually resemble war – the exchange of hostilities of sufficient intensity between the United States and another state or an organized armed group. They can begin when the administration sets out clearly where and against whom it believes the United States to be in an armed conflict, and works with Congress to decide whether such authority is the wisest choice to achieve its objectives. The United States clearly remains in an armed conflict in Afghanistan. However, counterterrorism operations far from any battlefield against groups that have limited to no connection to core Al Qaeda or the Taliban and the 9/11 attacks do not fall within an armed conflict framework, unless the facts on the ground meet the legal test for what constitutes an armed conflict under international law: ongoing hostilities of sufficient intensity with an organized armed group. Sporadic acts of violence or terrorist attacks by groups or individuals do not meet this test.

Despite the best efforts of intelligence and security agencies, the United States will likely continue to face threats from terrorism, which may result in successful terrorist attacks such as the attacks against our embassy in Benghazi on September 11, 2012. The response, however, cannot and should not be to declare war or authorize the use of military force against any terrorist group that presents a concern to the United States. To do so would not only be inconsistent with the fundamental principles of the

rule of law, but would also likely be ineffective in the long-term struggle against extremist groups that seek to goad the United States into overreaction.

WHAT IS THE AUMF?

Three days after the unprecedented attacks of September 11, 2001, Congress passed the most open-ended Authorization for the Use of Military Force (AUMF) in American history. This law's key sixty-word sentence granted then-President George W. Bush power to use "all necessary and appropriate force against those nations, organizations, or persons" that he determined either executed the attacks or aided those who did.¹

The AUMF does not specify whom its mandate is directed against, or what military objectives would satisfy the mandate. Perhaps consequently, in the nearly 13 years since its passage, the AUMF has been invoked not only to conduct the war in Afghanistan but also to justify targeted killings under the drone program reaching from Somalia to Yemen and the prolonged detention without charge of prisoners in Guantanamo Bay and Bagram Air Field. It has contributed to a wartime climate enabling expanded government powers such as the PATRIOT Act and the NSA's expansive domestic surveillance programs.

WHY REVISIT IT

The 2001 AUMF was passed by Congress within days of the 9/11 attacks, before the Bush Administration had identified with certainty the full universe of those perpetrators.

As the Obama Administration prepares to end combat operations in Afghanistan, numerous legal authorities have called into question the continued viability of the AUMF. The Supreme Court stated of the AUMF in *Hamdi v. Rumsfeld* that "If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding [of who may be detained until the cessation of hostilities] may unravel."² This concern has been echoed by Brigadier General Mark Martins,³ chief prosecutor for the military commission trials at Guantanamo Bay, and former Pentagon General Counsel Jeh Johnson,⁴ now Secretary of Homeland Security.

¹ Authorization for Use of Military Force § 2(a), 115 Stat. 224, 224 (codified at 50 U.S.C. § 1541 note) (2001).

² *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004).

³ Karen DeYoung, *Afghan War's Approaching End Throws Legal Status of Guantanamo Detainees into Doubt*, WASH. POST, Oct. 18, 2013, available at http://www.washingtonpost.com/world/national-security/afghan-wars-approaching-end-throws-legal-status-of-guantanamo-detainees-into-doubt/2013/10/18/758be516-2d0a-11e3-97a3-ff2758228523_story.html.

⁴ Hon. Jeh Charles Johnson, General Counsel, U.S. Dep't of Def., *The Conflict Against Al Qaeda and its Affiliates: How Will It End?*, Speech Before the Oxford Union (Nov. 30, 2012), available at <http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/>.

The 2001 AUMF is, on paper, confined to organizations responsible for committing or helping with the 9/11 attacks, or others who harbored them – generally understood to be core Al Qaeda, the group directly led by Ayman al-Zawahiri, and the Taliban in Afghanistan, and other groups directly engaged in hostilities with the United States. The administration has officially interpreted those organizations to include Al Qaeda and “associated forces,” including groups such as Al Qaeda in the Arabian Peninsula (AQAP), even though groups such as AQAP have little to no connection to the 9/11 attacks.

Terrorist organizations in the headlines today, and groups that now pose specific, credible threats to the United States, often have a loose or unclear connection to “core Al Qaeda” and the 9/11 attackers. Security professionals from across the political spectrum have commented that the 2001 AUMF bears little relevance to the shape of the struggle against terrorist groups that the United States remains engaged in.

At least as important, the greatly varying tactics and levels of competence and ambition of our adversaries do not lend themselves to the set of rules and policies set aside in law as “armed conflict,” or the all-or-nothing approach evoked for Americans by the word “war.”

“Armed Conflict” is no longer the most effective paradigm for U.S. counterterrorism policy

An over-reliance on our military does a disservice to the extraordinary economic, diplomatic, and human capital resources that the United States can marshal in support of policy goals. Moreover, pursuing an unachievable goal of complete security, contributing to an inability to contextualize threats appropriately and deploy a full range of counterterrorism strategies short of war-making contributes to a dangerous stagnation in the foreign policy making apparatus of the U.S. government.

Shifting away from the authorities created by the overstretching of the 2001 AUMF is the first step in reforming U.S. counterterrorism policy. By continuing institutional development of core competencies and acknowledging the shifting nature of the Al Qaeda threat, the U.S. government can move from the post-September 11th framework to a more nuanced and flexible approach to protecting our security. Given how our adversaries have evolved, where the existing approach has succeeded and where it has failed, such a shift will be more effective. Winding down controversial wartime activities will free resources and attention to remake our security assistance, promote security sector reform, the rule of law and democracy, and innovate in economic approaches. Those are changes that will ensure the United States can marshal its full military, economic, and human capital resources for ongoing efforts to thwart the tactics and perpetrators of terrorism.

The large-scale wars in Iraq and Afghanistan conducted under the AUMF have carried a heavy price tag for the U.S. military, particularly on equipment, personnel, and veterans. The Department of Defense can anticipate an extremely large price tag for the withdrawal of military forces from Afghanistan, and even more costly will be the

replenishing of obsolete or defective equipment. Linda J. Bilmes writes that “equipment, material, vehicles and other fixed assets have depreciated at an estimated 6 times the peacetime rate, due to heavy utilization, poor repair and upkeep in the field, and the harsh conditions in the region.”⁵ In 2008 testimony to the Senate Armed Services Committee, General Richard Cody drew attention to the wars' effects on readiness, arguing that because of heavy deployments, soldiers and marines lacked training for major combat operations using their entire range of weapons. In this testimony, Cody stated that the Army did not have fully ready combat brigades on standby should another threat or conflict occur.⁶ At a time of tight budgets, and national debate over how to meet our obligations to the members of our armed forces and maintain readiness for tomorrow's security threats, an existing AUMF which would permit a return to large-scale combat, and encourage the flow of resources into military counterterrorism as opposed to other policy options, is not in the nation's interest.

As a world leader that promotes prosperity, opportunity, and liberty, the United States should be actively seeking a state of affairs in which armed conflict is minimized and cabined, rather than a permanent state of war with occasional lulls in the fighting.

Asserting that we are entrenched in constant struggle and armed conflict projects to the world a lack of confidence in our ideals and institutions, and it sends the wrong message about the power of our opponents. As George Kennan wrote 68 years ago about another atypical international conflict, the Cold War, the central challenge facing the United States was to “create among the peoples of the world generally the impression of a country which knows what it wants, which is coping successfully with the problems of its internal life and with the responsibilities of a world power, and which has a spiritual vitality capable of holding its own among the major ideological currents of the time.”⁷

Instead, the continuation of the policies enacted within a war paradigm after 9/11—ramped-up levels of targeted killings, lack of transparency about targets and outcomes, continued questions around rendition, detention, surveillance, detention at Guantanamo and prosecutions by military commission – is damaging our global leadership and credibility on basic human rights and the rule of law.

Simply put, the war-based policies the United States has adopted are not popular with our allies or with civilians in the countries where we are engaged in a contest of ideals

⁵ Linda J. Bilmes, *The Financial Legacy of Iraq and Afghanistan: How Wartime Spending Decisions Will Constrain Future National Security Budgets* (Cambridge, MA: Harvard Kennedy School, 2013), p. 3.

⁶ Ann Scott Tyson, "Heavy Troop Deployments Are Called Major Risk," *The Washington Post* (Washington, D.C., United States), April 2, 2008, http://articles.washingtonpost.com/2008-04-02/news/36851181_1_stryker-brigade-readiness-iraq-troop.

⁷ George F. Kennan (“X”), *The Sources of Soviet Conduct*, FOREIGN AFF., July 1947, available at <http://www.foreignaffairs.com/articles/23331/x/the-sources-of-soviet-conduct>.

with extremists, and where the outcome may depend on people's belief that the United States is on their side.⁸

The unpopularity of these policies is cynically exploited by those who wish us ill, and those who benefit from the United States' diminished influence. Russian President Vladimir Putin, Zimbabwe's Robert Mugabe, Syria's Bashar al-Assad, and Iran's Mahmoud Ahmadinejad have all pointed to Guantanamo to deflect attention from human rights abuses in their own countries. When the United States advocates with other governments for respect for human rights, its words are instantly undermined when a newscast sets images of Guantanamo against the American assertions of human rights as universal values.

War-based policies have specific negative consequences for our security. Extremist groups use them to attract recruits; the *New York Times* has reported that "drones have replaced Guantanamo as the recruiting tool of choice for militants."⁹

These policies also undercut our ability to cooperate with crucial partners and allies. After a U.S. drone strike in Waziristan killed two German citizens in 2011, Germany restricted the type of information it shares with the United States, a sharp reversal from being an eager partner in America's fight against terrorism.¹⁰

Our insistence on using military commissions rather than federal courts to prosecute some terrorism suspects has also had negative consequences for the counterterrorism cooperation we depend upon. Attorney General Eric Holder said, "A number of countries have indicated that they will not cooperate with the United States in certain counterterrorism efforts — for instance, in providing evidence or extraditing suspects — if we intend to use that cooperation in pursuit of a military commission prosecution."¹¹

AUMF-based military detention policies also continue to have negative ramifications. For example, the administration has stated that Guantanamo, which is based on AUMF authority, "plagues our bilateral and multilateral relationships, creates friction with governments whose nationals we detain, provides cover for regimes whose detention

⁸ Pew has documented a marked decrease in global approval of the administration's international policy including drone strikes. See, e.g., *Global Opinion of Obama Slips, International Policies Faulted: Drone Strikes Widely Opposed*, PEW RES. GLOBAL ATTITUDES PROJECT (June 13, 2012), <http://www.pewglobal.org/2012/06/13/global-opinion-of-obama-slips-international-policies-faulted/>.

⁹ Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012, at A1, available at <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html>.

¹⁰ Holger Stark, *Drone Killing Debate: Germany Limits Information Exchange with US Intelligence*, SPIEGEL ONLINE INT'L (May 17, 2011), <http://www.spiegel.de/international/germany/0,1518,762873,00.html>.

¹¹ Eric Holder, Att'y Gen., Address at Northwestern University Law School (March 5, 2012), available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

practices we oppose, and provides our enemies with a symbol used to foster anti-U.S. sentiments around the world.”¹²

The choices made by Washington within an armed conflict framework are setting precedents that may harm our interests when used by other nations. John Brennan has said of drone use that the United States is "establishing precedents that other nations may follow, and not all of them will be nations that share our interests or the premium we put on protecting human life, including innocent civilians.”¹³

WHY NOT LIVE WITH THE EXISTING AUMF?

Many observers have suggested that, either because the existing AUMF has allowed for counterterrorism policies under which no massive attacks on the United States have been repeated, or because a polarized Congress in an election year is ill-suited to deliberate a new framework, the wisest course for the United States is to leave matters as they are. We disagree.

First, while concern over the AUMF’s validity after withdrawal from the Afghanistan theater is real, the president retains sufficient authority to counter future threats from terrorism without the AUMF, as we lay out below.

With respect to detention, the president and Congress should not allow the issue of Guantanamo to carry forward what has now become the longest war in American history. There is a reasonable path forward to dealing with Guantanamo, and legal experts agree that detainees must be prosecuted or transferred at the end of active hostilities.

Second, the legal framework created by the AUMF is ill-fitting for the current threats we face and does not satisfy human rights advocates, the military, or counterterrorism professionals. Both liberals and conservatives have expressed concerns about the growing disconnect between the authorities and our actions. The further we get from 9/11, there is every reason to expect that the fit will grow more awkward, pushback from our partners sharper, and possibilities for abuse greater.

Finally, standing war authorities are not needed for effective counterterrorism policy, and in some instances prove distorting and counter-productive to keeping Americans safe.

¹² White House Plan for Closing the Guantanamo Bay Detention Facility (July 24, 2013), available at <https://ia601005.us.archive.org/28/items/777815-white-house-plan-to-close-guantanamo/777815-white-house-plan-to-close-guantanamo.pdf>.

¹³ John O. Brennan, Assistant to the President for Homeland Sec. and Counterterrorism, Remarks at Woodrow Wilson Int’l Ctr. for Scholars: The Ethics and Efficacy of the President’s Counterterrorism Strategy (Apr. 30, 2012), <http://www.cfr.org/counterterrorism/brennans-speech-counterterrorism-april-2012/p28100>.

THE UNITED STATES CAN EFFECTIVELY COUNTER TERRORISM WITHOUT IT

Counterterrorism and military leaders agree that a successful U.S. policy will rely far less on the use of force, especially large-scale military engagements and occupations, than was the case in the years immediately following 9/11. From former Afghanistan commanders saying “we can’t bomb our way to victory” to recent media coverage of the difficulty the CIA is having transitioning away from wartime activities,¹⁴ evidence is mounting that Congress and the administration have much work to do to strengthen a comprehensive approach which leverages economic, diplomatic and human resources as well as intelligence and military assets. Continued emphasis on war authorities and the activities that flow from them has resulted in under-development and under-resourcing of some elements of a ‘whole-of-government’ approach. The best counterterrorism policy for the post-post-9/11 era will put more resources into these core competencies, resources gained by getting away from the financial and human costs of the war paradigm.

Conditional Security Assistance: The best way to keep America safe is to help partners ensure that terrorist threats are defeated in the countries where they start. This entails strong, effective support for military, intelligence, law enforcement and the rule of law. But too often over the last decade, resources for civilian security assistance have been stretched too thin, while counterterrorism training in Africa, the Middle East and Southeast Asia was carried out by contractors while the best U.S. counterterrorism troops were deployed in Iraq and Afghanistan.

Sustainable Democratic Institutions and the Rule of Law: Funding to support independent strong courts, police and local governments in countries facing the threat of terrorism has declined more sharply than military spending, while important parts of military assistance, such as vetting counterterrorism units for human rights abuse under the Leahy Law, remain grossly under-funded. The Leahy Law can also be used more robustly to resource and incentivize military justice in partner countries.

Counter Threat Finance as a Tool to Marginalize Extremists: Perhaps Washington’s greatest counterterrorism innovation in the post 9/11 years, this approach is most effective when enforced multilaterally under U.S. leadership – which requires international support for U.S. approaches.

Maximize the Role of the Criminal Justice System: More than 500 individuals have been convicted of international terrorism charges in federal court since 9/11.¹⁵

Improve Effectiveness, Focus of Intelligence Community: Observers continue to report that the intelligence community’s transition off a wartime footing is struggling and needs more emphasis from within and oversight from without.

¹⁴ Kimberly Dozier, *Exclusive: CIA Falls Back in Afghanistan*, THE DAILY BEAST (May 4, 2014), <http://www.thedailybeast.com/articles/2014/05/04/exclusive-cia-falls-back-in-afghanistan.html>.

¹⁵ Adam Serwer, *Courts Can Win Terror Convictions After All*, MSNBC (March 26, 2014), <http://www.msnbc.com/msnbc/courts-can-win-terror-convictions-after-all>.

CHALLENGES AND RECOMMENDATIONS

In both his National Defense University (NDU) speech and the 2014 State of the Union Address, President Obama committed to moving the United States away from a permanent war footing, arguing that “We must define the nature and scope of this struggle, or else it will define us.”¹⁶ His administration has since taken concrete steps towards transparency, oversight, and reform in specific areas including the targeted killing program and domestic surveillance efforts, and reinvigorated efforts to reduce the detainee population at Guantanamo and close the detention facility permanently. Ending reliance on the AUMF and the policies that go with it is crucial to shifting United States counterterrorism policy off of a permanent war footing.

To that end, Human Rights First urges Congress and the administration to work together to develop shared understandings about the shifting nature of the threat posed by terrorism; the current uses of wartime authorities and what they have accomplished; and the framework of an effective, whole-of-government counterterrorism policy that keeps Americans safe while reassuring our citizens and the world that we remain committed to human rights, liberty, and personal freedoms for ourselves and others.

Recognize and clarify the shifting nature of threat

Al Qaeda is no longer the same organization in terms of capability, structure, capacity, or ambition that launched the September 11 attacks against the United States. Policymakers no longer frame the counterterrorism challenge as hunting down a specific group of individuals responsible for specific attacks or protracted troop deployments in the Middle East.

The Al Qaeda core leadership that threatened the United States in the aftermath of the September 11th attacks was the highly centralized critical node of a financial, ideological, and human capital terrorist network. This node has since been vastly reduced in terms of capability and influence. As then-Secretary of Defense Leon Panetta said in 2012, “over the last few years, Al Qaeda’s leadership ranks have been decimated. This includes the loss of four of Al Qaeda’s five top leaders in the last two and a half years alone — Osama bin Laden, Sheikh Saeed al-Masri, Atiyah Abd al-Rahman and Abu Yahya al-Libi.”¹⁷

What has emerged in its wake is a complex web of groups, sharing at minimum an attraction to terrorist violence and a desire to trade on the Al Qaeda “brand.” Some, such as al-Nusra, have explicitly sworn allegiance to Al Qaeda’s core leadership and

¹⁶ President Barack Obama, Remarks by the President at the Nat’l Def. Univ. (May 23, 2013) [hereinafter NDU Speech], available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

¹⁷ Kate Brannen, *Leon Panetta: Al Qaeda’s Leadership ‘Decimated’*, POLITICO (Nov. 21, 2012), <http://www.politico.com/news/stories/1112/84131.html>.

take direction from Bin Laden's successor, Ayman al-Zawahiri;¹⁸ others appear to receive some training or financial support but limit their aims to internal or regional struggles, unlike Al Qaeda (Boko Haram appears to fit in this category);¹⁹ and some have little or no operational connection or, as is the case of the Islamic State of Iraq and Greater Syria (ISIS, previously known as Al-Qaeda in Iraq), have been thrown out of the Al Qaeda family."²⁰

The AUMF categories of 9/11 perpetrators, supporters, or associated groups thus lack relevance to the current challenge. Specific groups, be they legitimate 'franchises' of Al Qaeda core or merely imitators, must be assessed individually on the basis of their capabilities and ambitions, which vary significantly.

It is misleading to characterize the rise of these other groups – connected in varying degrees or not at all to core Al Qaeda – as more or even equally dangerous to the United States. President Obama remarked that "in the years to come, not every collection of thugs that labels themselves Al-Qaeda will pose a credible threat to the United States."²¹

Many pose an intense threat to their home governments and regional stability – in some cases American allies. Many, such as Boko Haram, ISIS, and al Nusra have carried out large-scale attacks on civilians. Their rise must not be a matter of indifference to Americans.

But that does not mean that a war footing – in legal terms, an armed conflict authorized by an AUMF – is the right policy response to most or all of them. It is simple logic that as Al Qaeda has changed, so must the U.S. response. By failing to recognize that many groups seeking to use the Al Qaeda label or connection for their own prestige do not constitute an imminent threat to the United States, we provide an overblown excuse to use far-reaching wartime policies that breed resentment in the international community and put our most fundamental rights and principles in jeopardy.

Enable intelligent debate by clarifying for Americans where our nation is using AUMF authorities and with what results

¹⁸ *Al-Nusra Commits to al-Qaida, Deny Iraq Branch 'Merger'*, NAHARNET (April 10, 2013), <http://www.naharnet.com/stories/en/78961-al-nusra-commits-to-al-qaida-deny-iraq-branch-merger/>.

¹⁹ Michael Stothard, William Wallis & Javier Blas, *West African Nations Pledge United Front against Boko Haram*, FIN. TIMES, (May 19, 2014), <http://www.ft.com/cms/s/0/e1ffe30c-de92-11e3-9640-00144feabdc0.html#axzz325tbbJvU>.

²⁰ Abu Bakr Al-Baghdadi, head of ISIS, scoffed that "I have to choose between the rule of God and the rule of Al Zawahiri, and I choose the rule of God. See, e.g. Aryn Baker, *Why Al-Qaeda Kicked out its Deadly Syria Franchise*, TIME (Feb. 3, 2014), <http://time.com/#3469/why-al-qaeda-kicked-out-its-deadly-syria-franchise/>.

²¹ NDU Speech, *supra* note 16.

Discussion of where armed conflict authorities are or are not needed is greatly hampered by the fact that the American people and many members of Congress do not know basic facts about what operations are currently conducted under the AUMF, what other authorities are used to underpin uses of force, and what the results are. To gauge the costs and benefits of war authorities versus other authorities, enact new laws or repeal existing provisions, and conduct proper oversight, Congress must have this information. As noted above, transparency with the American people and the civilians around the world we aim to protect is essential to the long-term credibility of American counterterrorism policy and American leadership. Some members of Congress have made requests, offered amendments, filibustered bills to acquire pieces of this information. Such a piecemeal approach will not achieve the goal of making America safer and counterterrorism activities more sustainable: Coherence and a commitment to an articulated standard of transparency will make the drone strategy more defensible and effective.

To that end, Human Rights First recommends that Congress connect its action on the AUMF, and its funding for the use of lethal force outside active zones of hostilities, to the release of the following information:

- 1) A list of organizations or groups the United States considers itself to be at war with;
- 2) A list of organizations or groups the United States considers to be “associated forces;”
- 3) The specific laws and legal interpretations each U.S. government agency involved relies upon in its use of lethal force, within and outside of armed conflicts, including: a) An unclassified version of the Presidential Policy Guidance referenced by President Obama in his May 23, 2013 speech at the National Defense University²² and b) all relevant Department of Justice legal memos;
- 4) Where, when and under what circumstances the United States believes it is using lethal targeting within an armed conflict, and where, when and under what circumstances it believes it is acting outside an armed conflict;
- 5) The countries where the United States has conducted targeted killings since September 11, 2001, and identities of all individuals killed, both in the past and going forward; how each U.S. agency involved determines who has been killed after a strike; how each agency classifies those killed as “civilian,” “militant” or “combatant;” and summaries of all post-strike investigations, including who was killed, who was killed erroneously or constitutes “collateral damage” and whether and when apologies and/or compensation were provided for mistaken or collateral killings;
- 6) The criteria each U.S. agency involved (read: Department of Defense and CIA) uses to decide whom it may target with lethal force – that is, who constitutes a targetable member of Al Qaeda, the Taliban, or an “associated force;” what signatures are used to justify “signature strikes;” and what exactly constitutes an “imminent threat” that justifies lethal force;

²² NDU Speech, *supra* note 16.

- 7) An explanation of how each relevant U.S. agency decides that capture of a target is not feasible and therefore warrants the use of lethal force, and explanations going forward why capture was not feasible in each instance.

Elucidate a framework for effective post-armed conflict authorities

U.S. and international law provide a comprehensive framework within which the United States can apprehend, detain, interrogate, prosecute, and—if necessary—use lethal force against, terrorism suspects without relying on AUMF-based law of armed conflict authorities. That framework also pertains to intelligence-gathering, an issue which is not discussed here, although Washington will face the same pressures to align its espionage and surveillance activities more closely with its partners' understanding of international and domestic law, in order to retain support for its counterterrorism agenda abroad as well as at home.

Transfer, Arrest, and Pre-Trial Detention

In many cases, terrorism suspects will be arrested and prosecuted by foreign law enforcement and security officials, acting with the assistance of the United States government and broader international community. Accordingly, building partner nation capacity to deal with threats must be the focus of a comprehensive counterterrorism strategy moving forward.

However, in some cases where the terrorism suspect is of particular interest to the United States, U.S. officials must act to effectuate the arrest, despite the fact that the suspect is located abroad and subject to foreign criminal jurisdiction.

In these cases, U.S. officials have authority to arrest terrorism suspects located abroad far before any terrorist attack has been committed or even planned. Several federal offenses apply extraterritorially, providing a basis for arresting individuals who have even limited connections to terrorist groups through providing training, money, logistical support, or other forms of assistance, irrespective of whether any terrorist attack has occurred.²³

Terrorism suspects are often transferred to U.S. custody pursuant to extradition agreements or other formal procedures agreed upon by the United States and the country in which the suspect is located. In circumstances that require it, the military may effectuate capture, or assist U.S. law enforcement assets in apprehending and detaining terrorism suspects abroad.

Interrogation

²³ See generally CHARLES DOYLE, CONG. RESEARCH SERV., 94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW (2012), available at <http://www.fas.org/sgp/crs/misc/94-166.pdf>.

While a terrorism suspect is in custody, nothing prevents government officials from interrogating that individual, and using any information secured for intelligence purposes. Some have warned that the *Miranda* requirement forces the government to tell the suspect that he may remain silent and is entitled to a lawyer, thereby compromising an ability to effectively interrogate the suspect. This is incorrect for a number of reasons.

First, in cases where there may be an ongoing terrorist threat, the public safety exception to *Miranda* would apply and government officials could interrogate the terrorism suspect and use the resulting information for any purpose, including prosecution, so long as the subject's statements are voluntary. Second, even where government agents elect to read a suspect the *Miranda* warnings, in the majority of cases the suspect waives his rights or otherwise cooperates to provide information to the agents.²⁴ Finally, *Miranda* violations occur, if at all, not at the point of interrogation, but only when and if the government attempts to introduce the "un-Mirandized" statements at the trial of the suspect. Therefore, government officials always retain the option of not reading a suspect the *Miranda* warnings and proceeding with an interrogation. The consequence of doing so is that government could use the information gained in such an interrogation for intelligence purposes, but not in a prosecution of the individual in question. The individual could still be prosecuted on the basis of other evidence, and even on the basis of subsequent interrogation by a "clean team" following *Miranda* warnings.²⁵ Intelligence gained through lawful interrogations and law enforcement interviews includes: Al Qaeda communication protocols, Al Qaeda recruiting techniques, information on Al Qaeda's finances, terrorist tradecraft used to avoid detection, information on Al Qaeda weapons programs and training, locations of Al Qaeda safe houses and training camps, information on Al Qaeda security protocols, identities of operatives involved in past and future planned attacks, and information about plots to attack U.S. targets.²⁶

Prosecution

The United States retains substantial flexibility to prosecute terrorism suspects irrespective of the circumstances surrounding their initial capture and interrogation. More than 500 individuals have been prosecuted and convicted in federal courts for international terrorism-related offenses. In dozens of these cases, the defendants were

²⁴ RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., IN PURSUIT OF JUSTICE: 2009 UPDATE AND RECENT DEVELOPMENTS 30, HUMAN RIGHTS FIRST (2009), *available at* <http://www.humanrightsfirst.org/wp-content/uploads/pdf/090723-LS-in-pursuit-justice-09-update.pdf>.

²⁵ See, e.g., Benjamin Weiser, *Hearing on Terror Suspect Explores Miranda Warning*, N.Y. TIMES, Dec. 13, 2011, at A31, *available at* <http://www.nytimes.com/2011/12/13/nyregion/us-terror-hearing-explores-use-of-miranda-warning.html>.

²⁶ See generally David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT'L SECURITY L. & POL'Y 1 (2011), *available at* http://jnslp.com/wp-content/uploads/2011/06/01_David-Kris.pdf.

initially apprehended abroad. A number of these cases involved substantial periods of pre-trial detention and interrogation, and in many cases cooperation has extended throughout the prosecution phase and into the post-conviction phase. One such case is that of Lackawanna Six defendant Yahya Goba, who pled guilty to providing material support to Al Qaeda and was sentenced to 120 months in prison, but as part of his plea agreement, continued to provide information to aid the government investigation, even testifying as a government witness in several other cases.²⁷

As noted above, military commissions have been a failure in every respect; they lack global credibility and have prolonged the wait for justice for victims. Recently, 23 senior retired military leaders called the military commissions “a poor substitute for justice.”²⁸ To the degree that an end to wartime authorities require a move away from military commissions, this will not result in the loss of an effective tool for justice but rather will prompt reliance on the more credible and effective tools of our Federal court system.

Post-Conviction Detention

Likewise, 13 years’ experience has not indicated a necessary role for wartime authority for post-conviction detention. Hundreds of individuals convicted of terrorism-related offenses after 9/11 remain incarcerated in high-security U.S. prisons. According to Attorney General Holder, “Not one has ever escaped custody. No judicial district has suffered a retaliatory attack of any kind.”²⁹ After serving their sentences, non-citizen U.S. terrorism suspects are subject to immediate post-conviction deportation and mandatory detention pending the conclusion of removal proceedings.

Lethal Targeting

The President has said that the number of instances in which lethal targeting is the chosen tool of counterterrorism should decline. Experts and military leaders have echoed this, for both moral and practical reasons.³⁰ In narrow circumstances in which a terrorism suspect poses an imminent threat to the lives of Americans that cannot be dealt with through detention or other means, the president retains the authority under domestic and international law to use force against such threats. Christine Wormuth,

²⁷ RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN FEDERAL COURTS 118-19, HUMAN RIGHTS FIRST (2008), *available at* <http://www.humanrightsfirst.org/wp-content/uploads/pdf/080521-USLS-pursuit-justice.pdf>.

²⁸ Letter from retired U.S. generals and admirals to Senators Richard Durbin and Ted Cruz, Chairman and Ranking Member, Senate Judiciary Committee, Re: Subcommittee on the Constitution, Civil Rights and Human Rights Hearing on Closing Guantanamo: The National Security, Fiscal, and Human Rights Implications (July 24, 2013), *available at* <http://www.humanrightsfirst.org/wp-content/uploads/HRF-Letter-RML-GTMO.pdf>.

²⁹ Eric Holder, Att’y Gen., Address at the Univ. of Cal. Berkeley School of Law Commencement (May 11, 2013), *available at* <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130511.html>.

³⁰ *See generally* JOSHUA FOUST, OVERSIGHT FOR EFFECTIVENESS: A COUNTERTERRORISM PERSPECTIVE ON THE TARGETED KILLINGS “WHITE PAPER”, NAT’L SEC. NETWORK (2013), *available at* <http://nsnetwork.org/wp-content/uploads/2013/02/FOUST-Drone-Paper-022713-FINAL2.pdf>.

Deputy Under Secretary of Defense, told Congress, “The President’s authority as Commander in Chief provides sufficient flexibility to respond to emerging terrorism threats posed by organizations not covered by the 2001 AUMF.”³¹ As a matter of domestic law, Article II of the Constitution provides clear authority for such operations, and Congress can and should play a role in further regulating and ensuring transparency, oversight, and accountability over such uses of force.

As a matter of international law, uses of force in self-defense against groups that committed an armed attack against the United States are permitted under Article 51 of the United Nations Charter.³² Further, international human rights law permits using force when it is required to save lives and there is no other means to deal with a threat.³³

The administration has made significant progress towards compliance with applicable international law in articulating through Presidential Policy Guidance (PPG) criteria governing the use of lethal force outside of active zones of hostilities. However, important questions remain. The release, with appropriate redactions, of the underlying Presidential Policy Guidance (PPG), Office of Legal Counsel (OLC) memoranda, or other information pertaining to such lethal strikes is essential for Congress to make wise decisions about how the administration is defining key terms such as “imminence” and “feasibility of capture,” whether those definitions are consistent with Article II and international law – and whether the administration is fully complying with the criteria that it has laid out.³⁴

Reject Proposals to expand the AUMF’s mandate.

The post-armed conflict framework outlined above is legally sustainable and provides operators with substantial discretion to investigate, detain, interrogate, prosecute, and—where necessary – use lethal force against terrorism suspects, irrespective of whether such individuals are connected to Al Qaeda or the 9/11 attacks. By contrast, under the current AUMF, the government is only permitted to use law of war detention to detain individuals who are determined to be part of or substantially supporting Al Qaeda, the Taliban, or an associated force in hostilities against the United States. Where the

³¹ Advance Questions for Christine E. Wormuth, Nominee for the Position of Under Secretary of Defense for Policy, S. Armed Serv. Comm. (Feb. 25, 2014), *available at* http://www.armed-services.senate.gov/imo/media/doc/Wormuth_02-25-14.pdf.

³² U.N. Charter art. 51, *available at* <http://www.un.org/en/documents/charter/chapter7.shtml>.

³³ Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions, Philip Alston, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010), *available at* <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>.

³⁴ In active zones of hostilities where the United States may be using force to aid a foreign government in an armed conflict against a local group with terrorism-related ties, broader law-of-war based lethal targeting authorities would continue to apply.

individual does not have a strong connection to core Al Qaeda, hostilities in the Afghanistan war, or the 9/11 attacks, this is a difficult legal case to make.

The weakness of the AUMF once applied beyond individuals with clear links to core Al Qaeda or 9/11 has called into question law of war detention and military commission trials at Guantanamo, as well as lethal targeting operations outside of the Afghan war theater against individuals and groups that have no connection to the 9/11 attacks.

Noting these limitations, some have argued that Congress should pass a new AUMF to provide even broader wartime authorities to use the military to detain, prosecute, and target terrorism suspects. For example, one proposal would confer onto the Executive Branch authority to add groups to a list that would be covered by a new AUMF, even if such groups have not attacked the United States, and are not connected to core Al Qaeda, 9/11, or the conflict in Afghanistan.³⁵

Congress should reject the idea of a new or expanded AUMF for three reasons:

We have little or no evidence that pre-emptive U.S. military action against groups that do not pose us an imminent threat is either desired by the American people or is an operationally-effective way of diminishing the long-term threat such groups do pose. Analysts have referred to groups such as Boko Haram in Nigeria, ISIS in Iraq, al-Nusra in Syria as “emerging threats.” There is no question that these groups are violent, anti-Western, and enormous threats to human rights and stability where they operate. But where such groups have not shown explicit capability or intention to target the security of the United States, the military activities permitted under an AUMF are the wrong response.

An expanded AUMF directed at emerging terrorist threats would pose serious legal problems without conferring clear operational benefits. An AUMF encompassing groups that have not attacked the United States, or do not pose an imminent threat of attack, would not be consistent with international law. So-called “preemptive” uses of force against groups and individuals are not permitted under self-defense criteria.

Similarly, authorizing AUMF-based wartime authorities in situations involving terrorist groups beyond active zones of hostilities would not be consistent with the laws of war, which can only be applied in “armed conflict”—situations involving hostilities of sufficient intensity with organized armed groups. Although some groups, such as Boko Haram or Al Qaeda in the Islamic Maghreb, pose a serious threat in areas in which they operate, the United States is not engaged in an armed conflict with these groups under the laws of war and thus an AUMF directed at these groups would not be appropriate.³⁶

³⁵ ROBERT CHESNEY, JACK GOLDSMITH, MATTHEW C. WAXMAN, & BENJAMIN WITTES, A STATUTORY FRAMEWORK FOR NEXT-GENERATION TERRORIST THREATS, HOOVER INST. (2013), *available at* <http://www.hoover.org/publications/monographs/141271>.

³⁶ Although an AUMF does not constitute a Declaration of War under domestic law and cannot create a state of armed conflict under international law, historically AUMFs have nonetheless constituted, in effect, war authorizations and signaled an intent to engage in armed conflict.

An AUMF directed at emerging threats also poses serious constitutional problems. Some have noted that an AUMF conferring authority to the Executive Branch to use force generally against emerging terrorist threats – without clear and specific limits – would run afoul of separation of powers principles, which require Congress to clearly define the scope of the authority conferred.³⁷ Similarly, providing to the Executive Branch authority to bring new groups within an AUMF could constitute a violation of the non-delegation doctrine because Congress would be unconstitutionally delegating authority that is committed by the Constitution to the Legislative Branch.

Finally, *the value of an AUMF must be weighed against the risk of its use as a future blank check*. The drafters of the 2001 AUMF have stressed that it is being used in ways they did not intend.³⁸ Nothing would prevent this or a future administration from using even a carefully crafted new AUMF to justify another large-scale invasion or costly war without further congressional debate or authorization.

SITUATIONS IN WHICH A NEW AUMF MAY BE APPROPRIATE

As noted, it is highly problematic as a matter of law and policy to expand the existing AUMF or pass a new one to target emerging terrorist threats that have not attacked the United States and do not pose an imminent threat of attack. Further, the United States has the authority under domestic and international law to use force to deal with imminent threats absent an AUMF. For these reasons, the administration has not requested additional AUMF authority and the president has indicated that he will not sign legislation that expands the AUMF's mandate.³⁹

However, there are circumstances in which an AUMF would be an appropriate and lawful response to a threat. The clearest example would be if the United States was attacked on a large-scale and Congress and the president intended to engage in a prolonged and sustained military campaign, which rose to the level of armed conflict, against one or more responsible armed groups. History also provides examples of presidents choosing to act under imminent threat, and then come to Congress for authorization for an extended engagement. Congress has proven itself able to move quickly and supportively in such instances, and there is no reason to believe that has changed.

³⁷ Jennifer Daskal & Steve Vladeck, *After the AUMF: A Response to Chesney, Goldsmith, Waxman, and Wittes*, LAWFARE (March 17, 2013), <http://www.lawfareblog.com/2013/03/after-the-aumf/>

³⁸ See Andrew Rosenthal, Op-Ed., *The Forever War*, N.Y. TIMES TAKING NOTE (MAY 17, 2013), <http://takingnote.blogs.nytimes.com/2013/05/17/the-forever-war/>; 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/>.

³⁹ NDU Speech, *supra* note 16.

In addition, in some situations, the United States may choose to engage on a prolonged basis in an ongoing armed conflict even if the United States has not yet been attacked. For example, if the United States were to decide to engage in military attacks on a sustained basis in the ongoing armed conflict in Syria, it would be appropriate for the Executive Branch to secure an AUMF from Congress before doing so. Similarly, most experts agree that there is an ongoing armed conflict in Yemen, and though Human Rights First does not take a position on whether that conflict is wise, the Congress may choose to authorize the United States to engage alongside the Yemeni government in that armed conflict.

CONCLUSION

The work of protecting the United States from terrorist violence is far from done. Yet it is increasingly clear that, both for effective counterterrorism and for preserving U.S. stature as a leader on human rights and the rule of law, the 2001 AUMF and the wartime attitudes and policies it has facilitated are outdated. The domestic and international laws that built a strong wall between wartime and peacetime have a vital policy purpose; absent them, powers that were once extraordinary become the norm, and policies that are the hallmarks of dictatorships become associated with America. Congress and the administration have the opportunity to move beyond piecemeal attempts at reform to set a clear legal and policy framework that combats terrorism effectively and makes clear to our friends and enemies that we will not be goaded into eroding our national strength through a permanent state of war. Human Rights First supports this goal and looks forward to engaging in the hard work of elaborating specific legal and policy understandings on these vital questions.