

An AUMF for ISIL:

The Six Key (Missing) Elements*

This synopsis includes the six most important elements of an authorization for use of military force (AUMF) against ISIL – some of which are already included in the Obama administration’s proposed legislation, but many of which will need to be added by Congress. Our analysis reflects the “Principles to Guide Congressional Authorization of the Continued Use of Force Against ISIL,”¹ which reflect lessons learned from experiences with previous AUMFs and represent an effort to ensure compliance with domestic and international law and an appropriate balance of powers between the political branches in wartime.

1. Sunset provisions: The Administration’s draft authorization, pursuant to Section 3, sunsets after three years, unless re-authorized. We support this provision—which aims not to terminate the campaign, but to ensure that three years from now, Congress affirmatively decides whether and under what conditions to support military actions under the next President.

Such a sunset provision, however, would be pointless if the 2001 AUMF remained on the books. The Administration has long claimed that the 2001 AUMF provides all the authority it needs to use force against ISIL. A future administration could simply revert to the 2001 AUMF as a means of continuing the conflict against ISIL even after this bill were to expire. Any ISIL AUMF should therefore also include a corresponding sunset for the 2001 AUMF.

2. Supersession language: The final authorization also should specify that the ISIL AUMF supersedes the 2001 AUMF as the sole source of statutory authority to use military force against ISIL (as did the SFRC proposal adopted in December). This is necessary to ensure that any limitations included in an ISIL-specific authorization are not rendered meaningless by the separate source of authority provided by the 2001 AUMF.

3. Definition of “associated persons or forces”: Section 2 of the Administration’s proposal authorizes the use of force against “associated persons or forces” of ISIL -- defined as “individuals and organizations fighting for, on behalf of, or alongside ISIL or any closely-related successor entity in hostilities against the United States or its coalition partners.” While we have differing views on the merits of authorizing force against so-called associated forces, we all agree that the definition of “associated forces” proposed by the Obama administration should be narrowed. First, the proposal essentially asks Congress to give its imprimatur to the widely criticized notion of a “successor entity,” which the Administration invoked to claim ISIL was covered by the 2001 AUMF. Second, the proposal excludes long-standing and judicially accepted

* Source: Jennifer Daskal, Ryan Goodman, Harold Hongju Koh, and Steve Vladeck. Prepared in conjunction with a Senate briefing on the Administration’s Proposed AUMF, Friday, Feb. 24th.

¹ <http://justsecurity.org/wp-content/uploads/2014/11/ISIS-AUMF-Statement-FINAL.pdf>

limits on the concept of associated forces, thereby raising the specter of lethal US operations against individuals with an ideological affinity to ISIL in many different countries.

This broader definition stands in sharp contrast to the Obama administration's own long-standing definition of "associated force" used in connection with the 2001 AUMF: an (1) organized, armed group that has entered the fight alongside al-Qa'ida or the Taliban that is *also* (2) a co-belligerent with al-Qa'ida or the Taliban in hostilities against the United States or its coalition partners. Should the ISIL AUMF authorize force against associated forces, it should apply this definition, thereby authorizing force against armed organizations that have actually joined up with ISIL as parties to the conflict against the United States or our coalition partners.

This does not mean that the United States is helpless in the face of threats by lone wolves or other loosely affiliated groups, if and when they emerge. The President retains constitutional authority to use force in the nation's self-defense against any future group or individual that attacks or poses an imminent threat against the United States, and Congress could of course authorize force against a new terrorist threat, if and when the situation demands it.

- 4. Authorization for "necessary & appropriate" force:** Section 2(a) authorizes the President "to use the Armed Forces of the United States *as the President determines* to be necessary and appropriate against ISIL or associated persons or forces." The final text should omit the clause "as the President determines," It should, like the 2001 AUMF, simply authorize the "use of necessary and appropriate force" without reference to a presidential determination as to what is necessary and appropriate.

In interpreting the 2001 AUMF, a plurality of the Supreme Court concluded that the proviso "necessary and appropriate force" authorizes the President to use only those means that are fundamental and accepted incidents of war and are thus consistent with international law. Including an added presidential determination can rob the provision of its purpose.

- 5. Objectives:** An ISIL-specific AUMF should include the specific objectives for which Congress is authorizing the use of force. Absent a clear understanding of the shared national objectives of this military campaign, it will be impossible to determine whether the new AUMF will be appropriately tailored to the specific threat and whether and in what situations the objectives have been met.
- 6. Reporting:** Section 4 requires the President to "report to Congress at least once every six months on specific actions taken pursuant to this authorization." This language lacks the specificity required for proper transparency and congressional oversight.

This provision should be amended to require that every six months, the President provide to Congress as a whole, and to the American people to the greatest possible extent, reports (1) describing the progress toward the mission's objectives; (2) identifying any groups or nations other than ISIL that have joined the armed conflict; and (3) detailing information about civilian and combatant casualties on all sides. The President should also be required to share with Congress, and make public to the greatest possible extent, any significant legal analyses regarding the scope of, and legal authority for, uses of force by the United States.