

Analysis of Recently Proposed ISIL AUMFs

As Congress prepares to debate the appropriate legal authorization for the Obama Administration's military campaign against the Islamic State in Iraq and the Levant (ISIL) it is crucial for Congress to learn the lessons from, and to correct the shortfalls of, the authorizations for the use of military force (AUMFs) from the past decade. In order to do so, Congress should pass a narrowly tailored and time-bound legal authorization that is consistent with international law and human rights norms, and that increases transparency on the part of the executive branch and oversight by the legislative branch. The vague, open-ended 2001 al Qaeda/Taliban AUMF and the 2002 Iraq AUMF have been over-stretched and contorted to support different missions against evolving threats and conflicts, without significant public debate or congressional oversight. This has weakened the effectiveness of U.S. efforts to combat terrorism, harmed U.S. standing in global public opinion, and undermined adherence to the rule of law.

Human Rights First endorses the "Principles to Guide Congressional Authorization of the Continued Use of Force Against ISIL,"¹ which were prepared by several prominent legal experts, including those who held senior legal positions in the U.S. government. These Principles share much in common with other proposals put forward by former Bush Administration lawyers.² The proposals represent an emerging consensus among national security law experts on the need for increased congressional debate and oversight on the authorization of military force, as well as the need to more narrowly tailor force authorizations, sunset the 2001 AUMF and repeal the 2002 AUMF.

We present an analysis of recently-proposed AUMFs targeting ISIL from Senators Rand Paul (R-KY) and Robert Menendez (D-NJ), against the standard articulated below:

1. A Force Authorization that is Narrowly Tailored

Clarity around a mission's scope is important for maintaining its legitimacy with the American public, with allied and partner countries, and with the people outside the United States in countries where terrorist groups operate. A narrowly crafted AUMF can also ensure that the president can only use force in ways that are consistent with congressional intent, international law, and human rights norms.

(a) Names Specific Organizations and Groups

Sen. Paul's AUMF includes a significant limitation on who the president may use force against, i.e. only ISIL (Sec. 2(c)(1)). It does not extend the force authorization to "associated forces" of ISIL—a particular problem with how the 2001 al Qaeda/Taliban AUMF has been interpreted—and specifically prohibits the use of force against any other organization, including one "based on an affiliation" with ISIL (Sec. 2(c)(1)(B)).

Sen. Menendez' AUMF includes a limitation regarding the groups which may be targeted (subsection (c)), however, this limitation is broader and potentially subject to the same interpretation that has been problematic in the case of the 2001 AUMF. It authorizes force against ISIL and "associated persons or forces." These are defined (in subsection (h)) as "individuals and organizations fighting for or on behalf of the Islamic State of Iraq and the Levant or a closely-related successor entity." While it is important in clarifying the mission to specify whether force is authorized against associated forces and to define what is meant by that term, the definition of "associated forces" should be limited to cover those groups that are actively fighting alongside ISIL as parties to the present armed conflict, in accordance with international

¹ Harold Koh, et. al., Principles to Guide Congressional Authorization of the Continued Use of Force Against ISIL, Nov. 10, 2014 [*hereinafter* *ISIL AUMF Principles*], available at <http://justsecurity.org/wp-content/uploads/2014/11/ISIL-AUMF-Statement-FINAL.pdf>; <http://justsecurity.org/17257/aumf-principles/>; Ryan Goodman & Steve Vladeck, *Avoiding Unnecessary Wars and Preserving Accountability: Principles for an ISIL-Specific AUMF*, Just Security, Nov. 10, 2014m available at <http://justsecurity.org/17257/aumf-principles/>.

² Jack Goldsmith, Ryan Goodman, & Steve Vladeck, *Five principles that should govern any U.S. authorization of force*, Wash. Post, Nov. 14, 2014, available at http://www.washingtonpost.com/opinions/five-principles-that-should-govern-any-us-authorization-of-force/2014/11/14/6e278a2c-6c07-11e4-a31c-77759f1eacc_story.html.

law.³ Sen. Menendez' definition of "associated persons or forces" is overly broad and unnecessarily vague, raising the prospect that this or a future administration could interpret it to refer to organizations or groups not intended by Congress.

This is what the Obama Administration has done with respect to the 2001 al Qaeda/Taliban AUMF. The administration has referred to ISIL as the "inheritor of Usama bin Laden's legacy"⁴ in order to justify invoking the 2001 AUMF to authorize force against ISIL—an assertion with which many scholars and members of Congress have strongly disagreed. By extending the application of his AUMF to including a "closely-related successor entity" of ISIL, a term synonymous with "inheritor," Sen. Menendez' AUMF risks enabling this or a future administration to extend the authorization's scope in the same way that the 2001 AUMF has been inappropriately extended to ISIL. Congress should not authorize the president to use military force against other groups that are not parties to the present armed conflict. The president has constitutional authority to use force without congressional authorization to repel imminent attacks. Congress should not authorize force pre-emptively against emerging threats or unknown enemies.

(b) Specifies the Mission

Any new congressional force authorization should specify any substantive conditions on the use of force that Congress deems appropriate be as specific as possible about the objectives for which force is being authorized. Because so much of American leadership is grounded in respect for the rule of law, it is vital that any AUMF be narrowly tailored to specified objectives and that force is limited to what is necessary to achieve these objectives. Clear standards set out by the president will avoid mission creep or prolonged military engagements, which could blur the lines between war and peace and therefore, undermine human rights norms. Pre-2001 force authorizations have included such objectives, along with the requirement that the president determine when these objectives have been fulfilled and report this determination to Congress.⁵

Sen. Paul's AUMF contains a specific mission, limiting the use of force "to protect the people and facilities of the United States in Iraq and Syria against the threats posed" by ISIL (Sec. 2(b)).

Sen. Menendez' AUMF does not articulate mission-specific objectives for the use of force. It authorizes the president "to use the Armed Forces of the United States as the President determines to be necessary and appropriate" against ISIL and "associated persons or forces" (subsection (c)). While Sen. Menendez' AUMF does require the administration to inform Congress of its specific military objectives within 30 days of enactment, these should be explicitly stated in the AUMF itself. Both Congress and the administration should be clear, at the outset, on the purposes for which force is being authorized. This is not something that the administration should be permitted to decide on at a later date, when U.S. forces have already been put in harm's way.

Both AUMFs include limitations on how U.S. armed forces can be used. Sen. Paul's AUMF prohibits the use of "ground combat forces" (Sec. 2(c)(3)) and Sen. Menendez' AUMF prohibits using forces for "ground combat operations" (subsection (e)). Both AUMFs provide for exceptions to this prohibition, to protect/rescue U.S. armed forces/citizens from imminent danger; to conduct limited operations against high value targets; or to conduct missions that are not intended to result in ground combat operations. Sen. Menendez' AUMF provides examples of these "missions not intended to result in ground combat

³ ICTY, *The Prosecutor v. Dusko Tadic*, Judgment, [hereinafter *Tadic*] IT-94-1-T, 7 May 1997 para. 561-568. The existence of an armed conflict against non-state groups is determined by two criteria: (1) there must be hostilities, which reach a minimum level of intensity, such as when hostilities are of a collective character or when the government is obliged to respond with military force, rather than with mere police forces; and (2) the non-state groups involved in the conflict must be considered "parties to the conflict", meaning that their armed forces are sufficiently organized, as evidenced by the existence of a certain command structure, and are capable of sustaining military operations.

⁴ Marty Lederman, *The legal theory behind the President's new military initiative against ISIL*, Just Security (September 10, 2014), available at: <http://justsecurity.org/14799/legal-theory-presidents-military-initiative-isil/>.

⁵ For example see Authorization To Employ the Armed Forces of the United States for Protecting the Security of Formosa, the Pescadores, and Related Positions, P.L. 84-4, 69 Stat. 7, January 29, 1955; Joint Resolution to Promote Peace and Stability in the Middle East, Public Papers of the Presidents of the United States. Dwight D. Eisenhower. 1957, Washington. U.S. Government Printing Office, 1958, pp. 6, 11-15; and Gulf of Tonkin Resolution, P.L. 88-408, 78 Stat. 384, August 10, 1964.

operations,” namely intelligence collection and sharing, enabling kinetic strikes, operational planning, or other forms of advice/assistance to forces fighting ISIS in Iraq and Syria.

(c) Includes Geographic Limits

Geographic limits have been included in many prior congressional force authorizations. An ISIL AUMF should limit the geographic location of the use of force to that associated with the current armed conflict between ISIL, Iraq and the United States [and to any other locations from which ISIL forces actively plan and/or launch attacks against the United States or Iraq]. Such limits can help ensure that the current or any future administration cannot interpret an ISIL AUMF to authorize force against other parties in other situations where the United States is not engaged in armed conflict, as required by international law (the international law standard for “armed conflict” being where hostilities are of sufficient intensity between one state and another, between two or more sufficiently organized armed groups, or between a state and one or more sufficiently organized armed group⁶).

There are no explicit geographic limits in either proposed AUMF. Sen. Paul’s AUMF does have an implicit limitation. It authorizes force only “to protect people and facilities of the United States in Iraq and Syria” (Sec. 2(b)). This does not necessarily limit the use of force to Iraq and Syria. For example, it is arguable that if ISIL were planning an attack against U.S. facilities in Iraq or Syria from another country, Sen. Paul’s AUMF would permit the president to attack ISIL in that country. In our view, this would still be consistent with international law.

Sen. Menendez’ AUMF contains no provision which specifically limits fighting to a geographic area. However, in a couple of provisions, reference is made to forces fighting in “Iraq and Syria” – advice and assistance can be given to “forces fighting in Iraq and Syria” (subsection (e)(3)(iv)) and in subsection (g)(2)), the president is required to submit reports to Congress on “the comprehensive strategy of the United States in Iraq and Syria.” Fighting in “Iraq and Syria” are also mentioned multiple times in the “Whereas” provisions. Any potential ambiguity in meaning stemming from these provisions can be clarified with the geographic limitation described above.

(d) Is Time-bound through a Sunset

The absence of temporal limits in the 2001 AUMF has proven to be a basis for uses of force over many years against an evolving set of threats, which most members of Congress could hardly have anticipated and about which Congress did not deliberate. Congress should include in any new ISIL AUMF a sunset clause, which would ensure future timely congressional debate on the nature of the threat and the appropriate response at that time. Such a requirement is not unprecedented: for example, the 1983 AUMF for Lebanon authorized the president to use force for up to 18 months, unless extended by Congress.⁷

Sen. Paul’s AUMF includes a sunset after one year (Sec. 6).

Sen. Menendez’ AUMF includes a sunset after three years (subsection (f)).

2. A Force Authorization that Ensures Greater Transparency and Congressional Oversight ...

One key lesson from the United States’ post-9/11 military engagements is the need for additional transparency on the part of the administration as well as oversight by the Congress regarding the use of force. It is a basic principle of democracy that the American public and Congress be informed of the scope, progress, and human cost of any conflict in which their armed forces are engaged. Any AUMF should mandate that the president provide to Congress and to the American people, in unclassified form, regular reports regarding the status of progress towards the mission’s objectives, the groups or nations that fall within the scope of the AUMF, the numbers of civilian and combatant casualties, and the legal

⁶ *Tadic*, *supra* note 3.

⁷ Multinational Force in Lebanon Resolution, P.L. 98-119, 97 Stat. 805, October 12, 1983 [S.J.Res. 159].

basis for targeting particular groups and individuals or using force in particular countries. This will provide transparency with respect to both the facts and the law.

Sen. Paul's AUMF does not include any reporting requirements.

Sen. Menendez's AUMF includes several reporting requirements (subsection (g)), as follows:

- **Periodic Report:** Requires the President to report to Congress at least every 60 days "on specific actions taken pursuant to this authorization."
- **Comprehensive Strategy Report:** No later than 30 days after the AUMF is passed, the President must submit an unclassified report – which may include a classified annex – on the "comprehensive strategy of the United States in Iraq and Syria." This must include:
 - **Political and diplomatic objectives** and the methods proposed to achieve them;
 - **Clearly defined military objectives**, including, but not limited to (i) a list of the organizations and entities to be targeted (ii) the **geographic scope** of military operations; and (iii) **methods for limiting civilian casualties**;
 - Actual and proposed contributions from coalition partners;
 - Humanitarian assistance and support for displaced civilian populations;
 - Benchmarks for assessing progress toward political, diplomatic, and military goals;
 - **A realistic end goal and exit strategy**; and
 - An estimate of the costs involved.

3. A Force Authorization that Complies with Domestic and is Consistent with International Law

The Constitution requires that Congress declare war, not the Executive Branch. If the AUMF is not narrowly tailored to a specific threat or threats, it risks creating a carte blanche for use of force by the executive that will undermine the Constitution's intention that this power rest with Congress. A broad law authorizing force against all alleged terrorists or against groups that espouse a particular ideology runs afoul of separation of powers principles. As noted above, international law demands that states exercise wartime authorities only when engaged in a fight whose intensity meets international criteria for an armed conflict, and only for the duration of that armed conflict. In addition, the United States must comply with the international rules governing the interstate use of force, as laid out in the United Nations Charter. Any new AUMF should send an important signal that the United States abides by the rule of law in using force by explicitly requiring compliance with international law. This will encourage cooperation in the mission from our allies, which has been withheld in some cases on account of concerns about U.S. compliance with international law. Neither the Sen. Paul nor the Sen. Menendez AUMF explicitly requires compliance with international law.

4. Repeal of the 2002 Iraq AUMF

The 2002 Iraq AUMF should be repealed. An ISIL-focused AUMF would provide the administration with the necessary authorities to use force against ISIL and would eradicate the need for the 2002 AUMF, which was designed for a different enemy in a different conflict.

Sen. Paul's AUMF would repeal the 2002 Iraq AUMF (Sec 3), as would Sen. Menendez' (subsection (j)).

5. Sunset the 2001 AUMF

The 2001 AUMF should sunset. The continuing viability of the 2001 AUMF is becoming increasingly questionable, particularly as combat operations in Afghanistan wind down. Establishing a sunset now will require Congress and the administration to consider, at some near future date, whether the 2001 AUMF is an appropriate and lawful authorization to deal with threats to the United States from al Qaeda and the Taliban.

Sen. Paul's AUMF provides a one-year sunset for the 2001 AUMF (Sec. 5). It also explicitly states that the 2001 AUMF does not provide authority for the use of force against ISIL (Sec. 4).

Sen. Menendez' AUMF would not sunset the 2001 AUMF. Subsection (i) does state that this AUMF against ISIS "shall supersede any preceding authorization for the use of military force."

Note on Declaration of War: Sen. Paul's AUMF includes an explicit declaration of war (Sec. 2(a)). A declaration of war gives the executive branch additional powers not granted through an AUMF.⁸ Many of these suspend civil liberties and the protection of privacy, and thus should be approached with extreme caution. Sen. Paul's AUMF currently contains a clause saying that the declaration of war grants no further powers not already contained in the AUMF, which may address the problem described above. Nevertheless, the inclusion of a formal declaration of war creates unnecessary ambiguity and confusion. A declaration of war is not necessary to authorize the use of military force for the current combat mission.

⁸ These include, but are not limited to, prohibiting all trade with the enemy, ordering manufacturing plants to produce weapons and seizing them if they refuse, giving military priority in transportation and communication systems, extending armed forces enlistments, making the Coast Guard part of the army, controlling the appointment of commanders, and prioritizing natural resources. A declaration of war can also trigger the Alien Enemy Act, which gives the executive authority over nationals of the enemy state, and the Foreign Intelligence Surveillance Act, which the gathering of foreign intelligence with electronic surveillance without a court order, see Jennifer K. Elsea & Richard F. Grimmett *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications*, Congressional Research Service, March 17, 2011, available at: <http://www.au.af.mil/au/awc/awcgate/crs/rl31133.pdf>.