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United States House Congressional Progressive Caucus Peace and Security Task  
Force and House Liberty Caucus

“Ad-Hoc Hearing on Authorizations for Use of Military Force”

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**Introduction**

Thank you Congresswoman Lee and Congressman Amash for the invitation to be here today for this important bipartisan hearing. Congress passed the 2001 Authorization for Use of Military Force, known as an “AUMF,” within days of the September 11<sup>th</sup> terrorist attacks. In the years since, the 2001 AUMF has been interpreted as authorizing military operations that Congress never intended, as well as to justify a range of human rights abuses from detention without charge or trial to extrajudicial killings via drone strikes far from any battlefield.

Congress did not authorize force against “associated forces,” successor groups, or any other terrorist organizations other than those responsible for 9/11. Congress also expressly limited the purpose for which force could be used under the 2001 AUMF to preventing future acts of terrorism against the United States by those responsible for 9/11.

Despite these limits, the executive branch has used the 2001 AUMF for nearly 17 years as the primary legal basis<sup>1</sup> for military operations against an array of terrorist organizations in more than a dozen countries around the world.<sup>2</sup> Many of these groups, like ISIS and al Shabaab, played no role in the 9/11 attacks, and did not even exist in 2001.<sup>3</sup>

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<sup>1</sup> The executive branch has also relied on the 2002 Iraq AUMF to justify its counter-ISIL campaign. See e.g., Stephen Preston, *The Legal Framework for the United States' Use of Military Force Since 9/11*, Remarks at the American Society for International Law, Washington, DC, April 10, 2015, *available at* <https://www.defense.gov/News/Speeches/Speech-View/Article/606662/>.

<sup>2</sup> Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related Operations, December 2016, *available at* [https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report\\_Final.pdf](https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf).

<sup>3</sup> It is worth recalling that in 2014 when the claim that the 2001 AUMF applied to ISIS was first made, national security law experts from both sides of the aisle were astounded. See e.g. Robert Chesney, *The 2001 AUMF: From Associated Forces to (Disassociated) Successor Forces*, Lawfare Blog, September 10, 2014, *available at* <https://www.lawfareblog.com/2001-aumf-associated-forces-disassociated-successor-forces>. Before the announcement, law professor Ryan Goodman had noted the “remarkable consensus of opinion” among experts “that ISIS is not covered by the 2001 AUMF.” See Ryan Goodman, *The President Has No Congressional Authorization to Use Force against ISIS in Iraq*, Just Security, June 19, 2014, *available at* <https://www.justsecurity.org/11873/president-congressional-authorization-force-isis-iraq/>. National security expert Ben Wittes commented that extending the 2001 AUMF to ISIS “is not a

Continued stretching of the 2001 AUMF undermines Congress' role in the decision to go to war, blurs the line between war and peace in counterterrorism efforts, and undermines national security, U.S. leadership in the world, and human rights at home and abroad. Countering terrorist threats effectively requires a range of tools and approaches. The use of military force is just one of those tools, and one that should be employed only when such force is a necessary, lawful, proportionate, and effective response to a particular threat.

Using wartime powers to detain without charge or trial and target with lethal force unlawfully or unnecessarily, puts the United States at odds with allied nations, counterterrorism partners, and local populations; fuels terrorist recruitment and propaganda; and casts doubt on the legitimacy of U.S. actions.

Under the U.S. Constitution, it is Congress that holds the power to decide when the nation goes to war. It is Congress that must discuss and debate the difficult question of whether the war-centered approach of the past 16 and a half years has been effective. It is Congress that must determine whether—and to what extent—the continued use of military force is necessary and appropriate for today's threats.

Should Congress decide, after discussing and debating these questions, that continued use of military force is warranted, it should ensure that any new AUMF it considers is clear, specific, carefully tailored to the situation at hand, and aligned with U.S. legal obligations. Careful drafting is critical to prevent any new AUMF from being stretched to justify unauthorized wars, to ensure ongoing congressional engagement and an informed public as the conflict proceeds, and to prevent any new AUMF from being used in ways that undermine human rights or national security.

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stable or sustainable reading of the law.” See Ben Wittes, Not Asking the Girl to Dance, Lawfare Blog, September 10, 2014, *available at* <https://lawfareblog.com/not-asking-girl-dance>. And former State Department legal advisor Harold Hongju Koh considered a new AUMF to be the only “lawful way to fight the Islamic State” and prevent a “constitutional battle over the president’s prerogative to conduct unilateral war.” See Harold Hongju Koh, The Lawful Way to Fight the Islamic State, Politico, August 29, 2014, *available at* [http://www.politico.com/magazine/story/2014/08/the-lawful-way-to-fight-the-islamic-state-110444\\_full.html#.WUXKrhPyut9](http://www.politico.com/magazine/story/2014/08/the-lawful-way-to-fight-the-islamic-state-110444_full.html#.WUXKrhPyut9).

## **Recommendations for Any New AUMF:**

To that end, any new AUMF should include the following five elements<sup>4</sup>:

First, any new AUMF should name the specific enemy that military force is authorized against and specify the permitted mission objectives to prevent the executive branch from overstepping Congress's intent.

Second, any new AUMF should include robust reporting requirements to promote democratic accountability and enable Congress to fulfill its critical oversight functions.

Third, any new AUMF should require compliance with U.S. obligations under international law to demonstrate to our allies and enemies alike that the United States is a nation that complies with the rule of law and is committed to its obligations to respect state sovereignty, human rights, and the law of armed conflict.

Fourth, any new AUMF should include language that makes it clear that it is the sole source of statutory authority to use force against the enemy named in the authorization to avoid overlap, confusion, or loopholes.

And last, but perhaps most importantly, any new AUMF should include a sunset provision that sets a timetable for ensuring continued congressional approval and oversight as the conflict evolves, providing a safeguard against perpetual armed conflict or overly expansive executive interpretations.

## **Conclusion**

The founders of this nation recognized the profound significance of going to war and wisely assigned this power to Congress. If, after careful consideration, Congress decides that continued use of military force is warranted, any authorization it considers should reflect the hard lessons of the 2001 AUMF by including the above provisions. If Congress cannot reach agreement on an authorization with a clearly defined scope and firm limits, it should not pass one.

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<sup>4</sup> These elements have been recommended and endorsed by numerous national security experts from across the political spectrum. See e.g., Goldsmith et al., *Five principles that should govern any U.S. authorization of force*, Washington Post, available at [https://www.washingtonpost.com/opinions/five-principles-that-should-govern-any-us-authorization-of-force/2014/11/14/6e278a2c-6c07-11e4-a31c-77759fc1eacc\\_story.html?utm\\_term=.334aca4237fa](https://www.washingtonpost.com/opinions/five-principles-that-should-govern-any-us-authorization-of-force/2014/11/14/6e278a2c-6c07-11e4-a31c-77759fc1eacc_story.html?utm_term=.334aca4237fa). These elements have also gained the support of a coalition of human rights, civil liberties, and faith groups. See "Re: Authorizing the Use of Military Force," Letter to Senator Bob Corker and Senator Ben Cardin, June 19, 2017, available at <http://www.humanrightsfirst.org/sites/default/files/AUMF-letter-final-text-June-19-2017.pdf>.