

Essential Elements for an Effective Authorization to Use Force against ISIL

The introduction of special operation forces into Syria¹ and the string of attacks in California, France, Lebanon, Mali, and elsewhere have led to renewed calls for Congress to pass an Authorization for the Use of Military Force (AUMF) against the Islamic State of Iraq and the Levant (ISIL).² Should Congress move forward with an ISIL AUMF, it is crucial to U.S. security and standing in the world that any new law avoid the shortcomings of the 2001 AUMF and the 2002 Iraq AUMF. These authorizations fail to precisely identify the target and mission and lack sufficient transparency and reporting requirements. These overbroad authorizations enable policies that have eroded human rights protections and the rule of law for nearly a decade and a half.

To ensure that the United States is empowered to counter the terrorist threat while also upholding the rule of law and maintaining global legitimacy, Human Rights First recommends that any authorization to use force against ISIL satisfy the “Principles to Guide Congressional Authorization of the Continued Use of Force Against ISIL.”³ These Principles have garnered bipartisan support and articulate a prudent approach to drafting an effective ISIL AUMF.⁴

To satisfy these Principles, any new AUMF should include the following elements:

- ✓ **ISIL-specific:** A new AUMF should clearly state that ISIL is the target of the authorization to use force. Failing to name the enemy with sufficient specificity creates unnecessary ambiguity that can be misread to apply to groups that Members of Congress did not intend to authorize force against. Congress should ensure that ISIL is named in the AUMF to ensure that congressional intent cannot be overridden by future executive branch interpretation.
- ✓ **“Associated Forces” definition that complies with the laws of war:** If Congress authorizes the use of force against “associated forces” of ISIL, this term should be defined to apply only to groups that are parties to the armed conflict under the laws of war,⁵ and thus against whom use of force is both lawful and appropriate. Congress should not authorize force pre-emptively against emerging threats or unknown enemies. Experience under the 2001 AUMF has shown that uncertainty about who is a legitimate target has harmed U.S. efforts to win hearts and minds—the ultimate goal of counterterrorism—and damaged perceptions of American legitimacy globally.⁶ Currently unknown groups that pose an imminent threat to the United States in the future can be targeted pursuant to the president’s authority under Article II of the Constitution and under Article 51 of the U.N. Charter.
- ✓ **Mission objectives:** The ISIL AUMF should specify the mission objectives for which the use of force is authorized. Clear mission objectives prevent the executive from overstepping Congress’ intent behind the authorization, discourages mission creep, and ensures that the authorization will not be used to justify perpetual armed conflict, which erodes the important line between war and peace and undermines human rights protections around the world.

¹ https://www.washingtonpost.com/politics/obama-decides-on-small-special-operations-force-for-syria/2015/10/30/a8f69c0e-7f13-11e5-afce-2afd1d3eb896_story.html.

² See e.g. <https://www.washingtonpost.com/news/powerpost/wp/2015/11/01/boots-on-the-ground-in-syria-has-lawmakers-calling-for-a-new-aumf/>; <https://www.washingtonpost.com/news/post-politics/wp/2015/11/18/lindsey-graham-wants-war-on-the-islamic-state-with-no-limits/>.

³ <http://justsecurity.org/wp-content/uploads/2014/11/ISIL-AUMF-Statement-FINAL.pdf>; <http://justsecurity.org/17257/aumf-principles/>.

⁴ 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/>.

⁵ The existence of an armed conflict against a non-state armed group, like ISIL, under international law requires: (1) hostilities that have reached a minimum level of intensity, such as when they are of a collective character or when the government is obliged to respond with military force, rather than relying on police forces; and (2) the non-state groups involved must be considered “parties to the conflict,” meaning that their armed forces are sufficiently organized, shown by the existence of a certain command structure, and the ability to sustain military operations, ICTY, *The Prosecutor v. Dusko Tadic*, Judgment, IT-94-1-T, 7 May 1997 para. 561-568.

⁶ See e.g. <http://www.reuters.com/article/2013/01/07/us-usa-afghanistan-mcchrysal-idUSBRE90608O20130107>.

- Reporting requirements:** The authorization should require the president to provide regular reports that keep Congress and the public informed of the scope and progress of the mission. Reports should include information about the groups considered covered under the ISIL AUMF, the numbers of civilians and military personnel killed on all sides of the conflict, and related legal analysis, including the legal basis for targeting particular groups or using force in countries other than Iraq or Syria. Regular and thorough reporting is important to ensure compliance with domestic law and the laws of war, to ensure sufficient transparency, and to maintain legitimacy at home and abroad.
- Compliance with U.S. obligations under international law:** An explicit statement that the use of force must be carried out in compliance with U.S. obligations under international law would bolster global confidence in the United States as a nation that complies with the rule of law, will aid our effort to win hearts and minds, and will encourage cooperation from our allies in the fight against ISIL. One way to require compliance with international legal obligations is to authorize the president to use “necessary and appropriate” force.⁷
- Sunset clause:** An expiration date or sunset clause⁸ acts as a forcing mechanism, requiring Congress and the administration to reexamine the AUMF at some future date in light of more recent conditions, and if necessary, reauthorize and refine the legislation to suit those conditions.⁹ Sunset provisions have been included in nearly a third of prior AUMFs.¹⁰ As Secretary of Defense Ashton Carter recently testified to the Senate Foreign Relations Committee, an AUMF sunset clause is “a sensible and principled provision.”¹¹
- Supersession/sole source of authority provision:** The ISIL AUMF should include language that makes it clear that it is the sole source of statutory authority to use force against ISIL. As President Obama has claimed that the 2001 and 2002 AUMFs authorize military action against ISIL, without language clarifying that the ISIL AUMF supersedes these laws, a new AUMF could expand and confuse the administration’s war-making powers, rather than clarifying them.
- Set a sunset date for the 2001 AUMF:** The 2001 AUMF, which was passed to authorize the use of force against those responsible for the 9/11 attacks, has been interpreted to authorize the use of force against groups and in situations that were never intended by Congress.¹² Setting a sunset date for the 2001 AUMF would force a review by Congress and the administration to determine the appropriate scope of war authorities to fight al Qaeda and its “associated forces.” Setting a sunset date for this over-14-year-old law has bipartisan support.¹³
- Repeal the 2002 Iraq AUMF:** An ISIL-focused AUMF would provide the administration with the necessary authorities to use force against ISIL and would obviate the need for the 2002 Iraq AUMF, which was designed to target the Saddam Hussein regime.

⁷ <http://justsecurity.org/wp-content/uploads/2014/11/ISIS-AUMF-Statement-FINAL.pdf>; http://justsecurity.org/wp-content/uploads/2015/03/Background-Paper-Administrations-Proposed-ISIL-AUMF.2.24.Final_.pdf; <http://justsecurity.org/19928/suggestions-clarifying-amending-draft-aumf/>

⁸ *Myth v. Fact: Sunsets in AUMFs*, <http://www.humanrightsfirst.org/resource/myth-v-fact-sunsets-aumfs>.

⁹ Professor Robert Chesney recently testified that sunset provisions are “renewal or forcing function provisions” that “create an occasion after a certain period of time for the authorization, if appropriate, to receive the fresh imprimatur of a Congress and a president, acting on the most recent conditions.” Hearing before the House Armed Services Committee, February 26, 2015, video available at https://www.youtube.com/watch?v=FQd4w68QM_c.

¹⁰ http://nsnetwork.org/wp-content/uploads/2014/08/ENDING-THE-ENDLESS-WAR_2.2015-UPDATE.pdf.

¹¹ Secretary Carter, Hearing before the Senate Foreign Relations Committee, March 11, 2015, video available at <http://www.c-span.org/video/?324700-1/john-kerry-ashton-carter-general-martin-dempsey-testimony-use-force-isis>.

¹² See, e.g., 147 CONG. REC. H5654–H5676 (Sept. 14, 2001) (Rep. Jan Schakowsky: “This resolution has been carefully drafted to restrict our response to those we know to be responsible for this atrocity. It is not a carte blanche for the use of force.” Rep. Lamar Smith: “This resolution should have authorized the President to attack, apprehend, and punish terrorists whenever it is in the best interests of America to do so. Instead, the resolution limits the President to using force only against those responsible for the terrorist attacks last Tuesday.”).

¹³ Above, n 4. See also <https://www.justsecurity.org/17761/senator-rand-pauls-proposed-declaration-war-aumf-isis/>.