

ISIL AUMF: Including a 2001 AUMF Sunset

The Obama administration has now provided Congress with proposed legislative text for an Authorization for the Use of Military Force (AUMF) for the administration's military campaign against the Islamic State in Iraq and the Levant (ISIL). As Congress reviews and considers the administration's proposed text, it is crucial that Congress correct the shortfalls of the AUMFs left over from the last decade. In particular, Congress should use this opportunity to **sunset the 2001 AUMF**, passed to respond to the 9/11 attacks.

- ✓ **Leaving the 2001 AUMF on the books diminishes congressional oversight and erodes the rule of law.** The 2001 AUMF, passed three days after the unprecedented attacks of September 11, 2001, is, on paper, confined to the “nations, organizations, or persons” that either executed the attacks or harbored those who did. The administration has since interpreted the resolution to apply to al Qaeda, the Taliban, and their “associated forces,” and used the 2001 AUMF to justify the use of force against groups and in situations that Congress never intended.¹ Without temporal limits, the 2001 AUMF has proven to be the basis for uses of force over many years, which most members of Congress could hardly have anticipated and about which Congress did not deliberate. It has also eaten away at the rule of law, upon which human rights and successful U.S. leadership both rely. Establishing a future date for expiration of the 2001 AUMF would mandate a review by Congress and the administration, requiring the two branches of government to debate and agree on the appropriate scope of war authorities to fight al Qaeda and its so-called “associated forces.”
- ✓ **Restrictions in an ISIL AUMF could be rendered meaningless without a 2001 AUMF sunset.** The Obama administration has stated that the 2001 AUMF already authorizes the current military campaign against ISIL.² Without a 2001 AUMF sunset in the ISIL AUMF, any restrictions in the ISIL AUMF—such as a sunset or limitation on the groups that can be targeted—could be rendered meaningless; once the ISIL AUMF sunsets, if it was not reauthorized by Congress, this or a future administration (depending on the sunset date) could still claim that it has the authority to target ISIL under the 2001 AUMF. The only way to ensure that congressional intent cannot be disregarded in this manner is to include a sunset for the 2001 AUMF in the ISIL AUMF.
- ✓ **Nearly a third of prior AUMFs had sunsets.** Sunset provisions have been included in nearly a third of prior AUMFs,³ as well as other post-9/11 legislation, such as the USA PATRIOT Act. As several members of Congress have noted, the sunsets in the PATRIOT Act has given Congress the opportunity to exercise important oversight and tailor the legislation over time.⁴
- ✓ **Sunsetting the 2001 AUMF has bipartisan support.** A bipartisan consensus has emerged among national security law experts—including those who have held senior positions in both Democratic and Republican administrations—that any ISIL AUMF should include a sunset of the 2001 AUMF.⁵

Congress should seize the opportunity presented by an ISIL AUMF to insist on a sunset of the 2001 AUMF. This would rectify one of the most glaring shortfalls of the 2001 AUMF and provide the opportunity for much-needed congressional oversight.

¹ See, e.g., 147 CONG. REC. H5654–H5676 (Sept. 14, 2001), 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.” 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.”

² http://www.nytimes.com/2014/09/11/world/middleeast/white-house-invites-congress-to-approve-isis-strikes-but-says-it-isnt-necessary.html?_r=1.

³ See http://nsnetwork.org/wp-content/uploads/2014/08/ENDING-THE-ENDLESSWAR_FINAL.pdf.

⁴ See, e.g. Sen. Cardin and Sen. Murphy, in Senate Foreign Relations Committee Markup, *Authorization for the Use of Military Force against the Islamic State of Iraq and the Levant*, S.J. Res. __, 113th Cong. (2014).

⁵ Jack Goldsmith, Ryan Goodman, & Steve Vladeck: http://www.washingtonpost.com/opinions/five-principles-that-should-govern-any-us-authorization-of-force/2014/11/14/6e278a2c-6c07-11e4-a31c-77759fc1eacc_story.html; Harold Koh, et. al: <http://justsecurity.org/wp-content/uploads/2014/11/ISIL-AUMF-Statement-FINAL.pdf>; <http://justsecurity.org/17257/aumf-principles/>.

ISIL AUMF: Other Necessary Inclusions

- ☑ **Sunset the ISIL AUMF:** A time limit or sunset of the ISIL will—like a 2001 AUMF sunset—allow additional opportunities for Congress to evaluate whether force is being used consistently with congressional intent and to ensure that, if the mission changes over time, the authorization matches it.
- ☑ **Repeal the 2002 AUMF:** 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.
- ☑ **Specify which groups may be targeted:** An AUMF should be limited to groups that are engaged in armed conflict under international law,⁶ and thus against whom U.S. use of force may be valid and appropriate. Groups that are not engaged in armed conflict but who pose an imminent threat to the United States remain targetable under the president's inherent Article II authority.
- ☑ **Mission objectives:** An ISIL AUMF should limit the use of force to what is necessary to achieve specific objectives, such as degrading the group's capacity so that it can no longer pose a continuing threat of armed attacks against regional partners or the United States. 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.
- ☑ **Increased transparency:** Requiring regular reports from the president ensures that Congress is kept informed of the scope and progress of the mission and encourages ongoing dialogue between the legislative and executive branches. The president should be required to submit reports to Congress, on which groups or nations are considered covered under the AUMF, the numbers of civilians and military personnel killed, the groups targeted, and the legal basis for targeting particular groups and individuals or using force in particular countries. This is important both to ensure compliance with domestic and international law and to provide transparency to global publics about who we are fighting and our concerns with civilian lives and rights.
- ☑ **Geographical limits:** Explicitly limiting war authorities to active zones of hostilities in an ongoing armed conflict will help ensure compliance with international norms and public understanding that the United States is fighting a specific group.
- ☑ **Compliance with international law:** Much of American prestige and power rests on global confidence that ours is a nation that complies with the rule of law. U.S. counterterrorism activities, such as drone strikes, that are potential violations of international law, have negatively affected views of the United States worldwide.⁷ Congress can improve this perception, and take a major step to strengthen the impact of U.S. counterterrorism activities, by adding to any new AUMF a requirement that any force used under the authorization will comply with applicable international law.

⁶ The existence of an armed conflict against a non-state armed group (like ISIL) under international law 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, ICTY, *The Prosecutor v. Dusko Tadic*, Judgment, [hereinafter *Tadic*] IT-94-1-T, 7 May 1997 para. 561-568.

⁷ Richard Wike, "What Pakistan Thinks," PewResearch, May 10, 2013, available at <http://www.pewglobal.org/2013/05/10/what-pakistan-thinks/> (accessed Sept. 22, 2014).