

Gaining Global Legitimacy and Promoting the Rule of Law: Necessary Inclusions for an AUMF to Combat ISIL

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 learn the lessons from, and correct the shortfalls of, the AUMFs left over from the last decade. Experience has shown that the vagueness of these instruments and their failure to ensure adherence to international law and human rights norms have weakened the effectiveness of U.S. efforts to combat terrorism and harmed U.S. standing in global public opinion. They have also eaten away at the rule of law, upon which human rights and successful U.S. leadership both rely.

While Human Rights First does not take a position on the appropriateness of the use of military force in any specific instance, it is important to ensure that the administration is operating under an appropriate legal authorization that adheres to international law and human rights norms—and strengthens U.S. global legitimacy as a result. 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 They represent a consensus that has emerged 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 al Qaeda/Taliban AUMF and repeal the 2002 Iraq AUMF.

The Constitution requires that Congress declare war, not the executive branch. An AUMF that is not narrowly tailored to a specific threat or threats risks creating a *carte blanche* for the executive to use force, which undermines the Constitution's intention that this power rest with Congress. Where a group poses an imminent threat to the United States, the president has the authority to target that group under his inherent Article II authority. This authority may be sufficient to provide the domestic legal justification for U.S. strikes against the al-Nusra Front and the Khorasan Group in Syria on September 22, 2014 based on official statements suggesting the groups were plotting imminent attacks. However, Article II does not provide a sufficient basis to conduct an extended bombing campaign to “degrade and destroy” ISIL.

Before the end of the last congressional term, several members of the House and Senate offered draft AUMFs targeting ISIL, and in December 2014, the Senate Foreign Relations Committee (SRFC) voted to approve an amended version of the ISIL AUMF proposed by SFRC Chairman, Robert Menendez.³ There has also been one ISIL AUMF proposal released this year, by Rep. Adam Schiff.⁴

¹ Harold Koh, et. al., Principles to Guide Congressional Authorization of the Continued Use of Force Against ISIL, Nov. 10, 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-77759fc1eacc_story.html.

³ *Authorization for the Use of Military Force against the Islamic State of Iraq and the Levant*, S.J. Res. __, 113th Cong. (2014) available at <http://www.lawfareblog.com/wp-content/uploads/2014/12/ISIL-AUMF-As-Reported.pdf>.

⁴ *Authorization for Use of Military Force Against ISIL Resolution*, available at <http://schiff.house.gov/press-releases/rep-adam-schiff-introducing-narrowlytailored-authorization-for-use-of-military-force-against-isil/>. Rep. Schiff also released an ISIL AUMF proposal in 2014, which was very similar to his

This document outlines which of the ISIL AUMF proposals meet the exacting standards and which fall short and could harm the United States' ability to successfully counter the terrorist threat and maintain global legitimacy.

1. *Explicit limits in scope*

The experience of the 2001 AUMF has demonstrated that how, where, and when the United States intends to use military force in accordance with domestic and international law can easily become unclear—and that clarity is important for maintaining the legitimacy of a military mission both with the American public and with the peoples who themselves are first affected by terrorist groups. Because so much of American power is grounded in the perception of American respect for the rule of law, it is vital that any future AUMF ensure that force is used in ways that are consistent with congressional intent, international law, and human rights norms.

Below we explore a number of ways through which, consistent with a well-understood strategy, this aim might be accomplished:

- Temporal limits:* A time limit, or sunset clause, allows 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. The authorization granted in Rep. Darrell Issa's (R-CA) proposed AUMF⁵ expires after 120 days; Sen. Tim Kaine's⁶ (D-VA) and Sen. Paul's⁷ expire after one year; Rep. Adam Schiff's (D-CA) proposal expires after three years, as do the AUMFs proposed by Sen. Bill Nelson⁸ (D-FL) and Sen. Robert Menendez⁹ (D-NJ), and the SFRC-passed AUMF. There are no sunset clauses in the AUMFs proposed by Rep. Frank Wolf¹⁰ (R-VA) and Sen. James Inhofe¹¹ (R-OK).
- Specifying which groups may be targeted:* An AUMF should be limited to groups that are engaged in armed conflict under international law,¹² 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. Rep. Schiff's, Rep. Issa's, Sen. Paul's, and Sen. Nelson's bills only authorize the use of force against ISIL—a group that is clearly engaged in an armed conflict in Iraq and Syria. Sen. Paul's AUMF also specifically states that no groups may be targeted based on their affiliation with ISIL. Sen. Kaine's AUMF includes a similar statement, authorizing the use of force against ISIL and prohibiting the use of force against "forces associated with ISIL." However

2015 proposal. The 2015 proposal differs by increasing the sunsets for both the ISIL AUMF and 2001 AUMF to three years (previously 18 months), including a statement that the geographical limitation to Iraq and Syria does not apply to the training of "indigenous Syrian or regional military forces," and adding preambular language on executions of hostages and redeployment of U.S. forces from Afghanistan.

⁵ *To authorize the use of United States Armed Forces against the Islamic State of Iraq and the Levant (ISIL)*, available at http://issa.house.gov/wp-content/uploads/2014/09/ISSA_120_xml.pdf.

⁶ *Authorization for Use of Military Force against the Islamic State in Iraq and the Levant*, available at <http://www.kaine.senate.gov/press-releases/kaine-introduces-authorization-for-use-of-military-force-against-isil>.

⁷ *Declaration of War against the Organization Known as the Islamic State*, available at http://www.paul.senate.gov/?p=press_release&id=1249.

⁸ *Authorization for Use of Military Force against the Islamic State in Iraq and the Levant*, available at <http://www.billnelson.senate.gov/newsroom/press-releases/congress-faced-with-decision-on-airstrikes-in-syria>.

⁹ *Authorization for Use of United States Forces*, available at <http://go.bloomberg.com/assets/content/uploads/sites/2/Menendez-2nd-Degree-2-to-Paul-Amendment-1.pdf>.

¹⁰ *Authorization for Use of Military Force against International Terrorism Act*, available at <http://wolf.house.gov/sites/wolf.house.gov/files/Terrorism%20AUMF.pdf>.

¹¹ *Authorization for Use of Force against the Organization Called the Islamic State*, available at <https://beta.congress.gov/bill/113th-congress/senate-joint-resolution/43/text>.

¹² 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.

this provision is qualified, permitting the president to target other forces that are “immediately and directly fighting alongside ISIL in Iraq and Syria.” Given that the 2001 AUMF did not specifically authorize the president to target “associated forces” of al Qaeda and the Taliban but has since been interpreted to include these groups, these limitations in Sen. Paul’s and Sen. Kaine’s bills are crucial to limiting the scope of an AUMF in practice.

Several other proposals authorize the use of force against other actual or hypothetical groups without regard to whether they are involved in an armed conflict as defined by international law. Sen. Inhofe’s AUMF authorizes force against ISIL and any unidentified successor groups. Sen. Menendez’s bill and the SFRC-passed AUMF allow force against “associated persons or forces,” which are defined as “individuals and organizations fighting for or on behalf of (ISIL) or a closely related successor entity”. This definition” 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. Rep. Wolf’s AUMF applies broadly to any countries, organizations, or individuals involved with or supporting any terrorist groups, or even any groups that “share a common violent extremist ideology” with terrorists. Experience under the 2001 AUMF has shown that uncertainty about who is a legitimate target and why has harmed the efforts to win hearts and minds that are the ultimate goal of counterterrorism—and harmed perceptions of American legitimacy globally.¹³ Moreover, such an AUMF would be tantamount to the United States declaring war on these groups in a way that violates international law. Failure to specify the particular group against which force is authorized also risks providing this or any future administration an open-ended authorization to engage in conflicts for which Congress did not intend to authorize the use of force.

- ☑ *Geographic limits:* Rep. Schiff’s and Sen. Kaine’s bills limit the use of force to Iraq and Syria, although Rep. Schiff’s bill states that this limitation does not apply to the training of “indigenous Syrian or regional military forces.” Sen. Paul’s AUMF includes an implicit geographic limitation, as it authorizes force only “to protect people and facilities of the United States in Iraq and Syria.” 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. While Sen. Menendez’ AUMF and the SFRC-passed AUMF do not explicitly limit fighting to a geographic area, they do include several references to forces fighting in “Iraq and Syria.” Whether or not international law imposes geographic 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.

2. *Repealing or limiting the use of the 2001 and 2002 AUMFs*

Neither the 2001 AUMF nor the 2002 Iraq AUMF clearly applies to ISIL. The 2001 AUMF—which was meant to authorize the use of force against the groups responsible for the 9/11 attacks—has been interpreted to apply to groups and situations that Congress never intended.¹⁴ The confusion that has emerged around whether and how one or both might apply demonstrates that it is past

¹³ David Alexander, “Retired General Cautions against Use of ‘Hated’ Drones,” Reuters, Jan. 19, 2013, available at <http://www.reuters.com/article/2013/01/07/us-usa-afghanistan-mochystal-idUSBRE90608O20130107> (accessed Sept. 19, 2014).

¹⁴ 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. David Wu: “I would have strong reservations about a resolution authorizing the use of force in an open ended manner reaching far beyond responding to this specific terrorist attack on America. This is not that resolution.” Rep. Diane Watson: “I should also note that the resolution is not a carte blanche endorsement for the use of force against any suspected terrorist group anywhere in the world, but is more narrowly crafted to endorse all necessary and appropriate use of force against nations, organizations, and persons that participated in the attacks that occurred on September 11.” 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.”) See also Jennifer Daskal and Stephen I. Vladeck, “After the AUMF,” Lawfare, available at <http://www.lawfareblog.com/wp-content/uploads/2013/05/After-the-AUMF-Final.pdf> (accessed Sept. 22, 2014).

time to sunset both authorizations and clarify that this or any future president cannot claim broad war authorities to engage in future unforeseen hostilities with unknown groups without further congressional authorization. As Jack Goldsmith, former legal counsel under the Bush Administration, has said, "If Congress wants to limit its authorization of force as applied to the Islamic State concerning geography, ground troops, and associated forces, it must also specifically amend the 2001 AUMF to make plain that the 2001 AUMF itself does not authorize force against the Islamic State outside of Iraq and Syria, or against associated forces of the Islamic State, or involving ground troops against the Islamic State."¹⁵ The SFRC-passed AUMF and Rep. Schiff's AUMF proposal both repeal the 2002 AUMF and sunset the 2001 AUMF after three years. Sen. Paul's AUMF also repeals the 2002 AUMF and sunsets the 2001 AUMF after one year. Sen. Nelson's, Sen. Kaine's, and Sen. Menendez's bills repeal the 2002 AUMF only.

3. *Increasing 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, and include information about what groups or nations are considered covered under the AUMF. Regular public reporting, including 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, 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. This is another core goal of counterterrorism that the lack of transparency under the 2001 AUMF has obscured.

Under Rep. Schiff's bill, the president is required to issue reports to the speaker of the House and the president pro tempore of the Senate every 60 days. Reports must outline what was accomplished in the last reporting period and what is planned for the next 60 days. Sen. Menendez's bill and the SFRC-passed AUMF also require reports to Congress every 60 days on the "specific actions taken pursuant to" the AUMF, as well as a "comprehensive strategy" report submitted within 30 days of the bills' passage. This report must include information on the objectives of the mission, a list of organizations to be targeted, the geographic scope, methods for limiting civilian casualties, contributions from coalition partners, humanitarian assistance, benchmarks for assessing the mission's progress, an exit strategy, and estimates of costs. Sen. Kaine's bill requires a progress report every 90 days, as well as a list of any individuals or organizations fighting with ISIL for the purposes of the AUMF. Rep. Issa's bill requires that the president submit a plan of action within 60 days after the passage of the AUMF, which includes a description of any action already taken, any proposed actions, and any information about engagement of allies. These reports must also be submitted to the Committee on Foreign Affairs, Committee on Armed Services, and Committee on Oversight and Government in the House and the Committee on Foreign Relations, Committee on Armed Services, and Committee on Homeland Security and Governmental Affairs in the Senate. Sen. Inhofe's bill requires that the president must submit a comprehensive strategy 15 days after it is passed and progress reports every 90 days thereafter. Any changes in strategy must also be reported. No such requirements are included in Rep. Wolf's, Sen. Paul's, or Sen. Nelson's proposed AUMFs, though Rep. Paul's expires after one year, at which time the administration would need to report to Congress in order to justify any reauthorization.

4. *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, and that U.S. leadership around the world aims to combat lawlessness and empower those who seek to implement the rule of law in their own societies. U.S. counterterrorism activities, such as drone strikes, that are potential violations of international law, have negatively affected views of the United States worldwide.¹⁶ Congress can improve this perception, and take a major step to

¹⁵ Jack Goldsmith, "The Draft AUMFs for the Islamic State Do Not Limit Congressional Authorization on Ground Troops, or Geography, or Associated Forces," *Lawfare*, Sept. 18, 2014, available at <http://www.lawfareblog.com/2014/09/the-draft-aumfs-for-the-islamic-state-do-not-limit-congressional-authorization-on-ground-troops-or-geography-or-associated-forces/> (accessed Sept. 19, 2014).

¹⁶ 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).

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. None of the currently proposed bills includes language to this effect.

5. *Explicit mission goals*

In addition to clauses limiting the bill's scope with regard to time, geography, groups targeted, and type of military operation, the bill 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. The president should determine these specific objectives, and the AUMF should limit force to what is necessary to achieve the commander in chief's goals. 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.

Only Sen. Paul's AUMF includes a relatively narrowly defined mission goal: to protect U.S. personnel and facilities in Iraq and Syria. While several other proposals include clauses that state the goals of the mission, these goals are extremely broad, and it is unclear how—or if—they could be fulfilled. For example, Sen. Kaine's and Sen. Nelson's bills authorize force to prevent terrorist attacks, Sen. Inhofe's and Rep. Issa's bills allow force to protect U.S. national security, and Rep. Wolf's bill authorizes force to not only prevent future acts of terrorism but also to eliminate all extremist groups, a dangerous authorization that could allow widespread use of force against groups that pose no threat to the United States. Congress should not authorize the president to use military force against groups that are not parties to the present armed conflict against ISIL. The president has constitutional authority to use force without congressional authorization to repel imminent attacks. Congress should not authorize force preemptively against emerging threats or unknown enemies.

Note on Declaration of War: Sen. Paul's AUMF includes an explicit declaration of war. A declaration of war gives the executive branch additional powers not granted through an AUMF.¹⁷ Many of these suspend civil liberties and protection of privacy, and thus should be approached with extreme caution. Sen. Paul's bill currently contains a clause saying that the declaration of war grants no further powers not already contained in the AUMF, which may address this problem. 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 mission against ISIL.

¹⁷ 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/r131133.pdf>.

Summary

	Time limit	Who may be targeted	Geographic limits	Effect on 2001 and 2002 AUMFs	Reporting requirements	Ensures compliance with international law	Specific mission goals
SFRC-passed AUMF (2014)	Three years	ISIL and “associated persons or forces,” defined as those fighting for or on behalf of ISIL or a “closely-related successor entity”	None	Repeals 2002 AUMF and sunsets 2001 AUMF after three years	President reports to Congress every 60 days; President must submit a “comprehensive strategy” report 30 days after the bill passes	No	None
Schiff (2015)	Three years	ISIL only	Iraq and Syria only (except for training of “indigenous Syrian or regional military forces”)	Repeals 2002 AUMF and sunsets 2001 AUMF after three years	President reports every 60 days on the efforts taken and the plans for the next 60 days	No	No
Menendez (2014)	Three years	ISIL and “associated persons or forces,” defined as those fighting for or on behalf of ISIL or a “closely-related successor entity”	None	Repeals 2002 AUMF	President reports to Congress every 60 days; President must submit a “comprehensive strategy” report 30 days after the bill passes	No	None
Paul (2014)	One year	ISIL only, and no groups based on affiliation with ISIL	To protect U.S. people and facilities in Iraq and Syria	Repeals 2002 AUMF and sunsets 2001 AUMF after one year	None	No	Protect U.S. people and facilities in Iraq and Syria
Kaine (2014)	One year	ISIL and “individuals or organizations that are immediately and directly fighting alongside ISIL in Iraq and Syria”	Iraq and Syria only	Repeals 2002 AUMF	President reports the progress of the effort and submits list of organizations fighting with ISIL within 90 days of the bill passing and every 90 days thereafter	No	Protect the United States and others from terrorist attacks, and protect individuals from violence
Nelson (2014)	Three years	ISIL only	None	Repeals 2002 AUMF	None	No	Prevent terrorist attacks on the United States and allies

	Time limit	Who may be targeted	Geographic limits	Effect on 2001 and 2002 AUMFs	Reporting requirements	Ensures compliance with international law	Specific mission goals
Issa (2014)	120 days	ISIL only	None	None	President submits plan of action and report of any action taken within 60 days. Reports must also be submitted to appropriate House and Senate committees	No	Defend the national security of the United States
Inhofe (2014)	None	ISIL and any successor groups	None	None	President submits plan of action within 15 days and then reports every 90 days on the implementation of the strategy. Any changes in strategy must also be submitted	No	Defend the national security of the United States
Wolf (2014)	None	"[C]ountries, organizations, or persons" associated with or supporting terrorist groups, and any groups that "share a common violent extremist ideology" with terrorist groups	None	None	None	No	Eliminate terrorist groups and prevent future acts of terrorism on the United States or allies