

Drafting an Effective Authorization for Use of Military Force

To ensure that the United States is empowered to counter the terrorist threat effectively while upholding the rule of law and maintaining global legitimacy, any authorization to use military force against ISIS should include the following essential elements. These elements have garnered bipartisan support and reflect an effective approach to drafting an AUMF that clearly identifies the enemy and mission for which force is authorized and enables meaningful oversight of the war effort by Congress.¹

- ✓ **Enemy-specific:** A new AUMF should clearly state that ISIS 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.
- ✓ **“Associated Forces” definition that complies with the laws of war:** If Congress authorizes the use of force against “associated forces” of ISIS, it should define this term to include only groups that are parties to the armed conflict under the laws of war,² 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.³ The president has authority to target groups that are currently unknown but that pose an imminent threat to the United States in the future under Article II of the Constitution and under Article 51 of the U.N. Charter.
- ✓ **Mission objectives:** The ISIS 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, discourage mission creep, and ensure 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.
- ✓ **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 ISIS 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.

¹ 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/>; <http://justsecurity.org/wp-content/uploads/2014/11/ISIL-AUMF-Statement-FINAL.pdf>; <http://justsecurity.org/17257/aumf-principles/>.

² The existence of an armed conflict against a non-state armed group, like ISIS, 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.

³ See e.g. <http://www.reuters.com/article/2013/01/07/us-usa-afghanistan-mcchrysal-idUSBRE90608O20130107>.

- ☑ **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. This will also aid the effort to win hearts and minds and encourage cooperation from allies in the fight against ISIS. One way to require compliance with international legal obligations is to authorize the president to use “necessary and appropriate” force.⁴
- ☑ **Sunset clause:** An expiration date or sunset clause⁵ 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.⁶ Sunset provisions have been included in nearly a third of prior AUMFs.⁷ As Secretary of Defense Ashton Carter testified to the Senate Foreign Relations Committee, an AUMF sunset clause is “a sensible and principled provision.”⁸
- ☑ **Supersession/sole source of authority provision:** The ISIS AUMF should include language that makes it clear that it is the sole source of statutory authority to use force against ISIS. As President Obama has claimed that the 2001 and 2002 AUMFs authorize military action against ISIS, without language clarifying that the ISIS AUMF supersedes these laws, a new AUMF could expand and confuse the administration’s war-making powers, rather than clarify 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.⁹ Setting a sunset date for this over 15-year old law would mandate a review by Congress and the administration to determine the appropriate scope of war authorities to fight al Qaeda and its “associated forces.” A 2001 AUMF sunset also has bipartisan support.¹⁰
- ☑ **Repeal the 2002 AUMF:** An ISIS-focused AUMF would provide the administration with the necessary authorities to use force against ISIS and would obviate the need for the 2002 AUMF, which was designed for a different enemy in a different conflict.

⁴ <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-clarifyingamending-draft-aumf/>

⁵ *Myth v. Fact: Sunsets in AUMFs*, <http://www.humanrightsfirst.org/resource/myth-v-fact-sunsets-aumfs>.

⁶ 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.

⁷ http://nsnetwark.org/wp-content/uploads/2014/08/ENDING-THE-ENDLESS-WAR_2.2015-UPDATE.pdf.

⁸ 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>.

⁹ 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.”).

¹⁰ Above, n 4. See also <https://www.justsecurity.org/17761/senator-rand-pauls-proposed-declaration-war-aumf-isis/>.