

Statement for the Record of Human Rights First

United States Senate Committee on Foreign Relations on

“The Authorizations for the Use of Military Force: Administration Perspective”

Introduction

The recent deaths of 4 U.S. service members in Niger have prompted members of Congress to give renewed attention to the scope of war authorities that govern U.S. counterterrorism military operations abroad.¹ Within days of the 9/11 attacks, Congress passed an authorization for use of military force (“AUMF”) against those who “planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 or harbored such organizations or persons.”² This language is widely understood as authorizing force against al Qaeda, who planned and committed the attacks on the United States on 9/11, and the Afghan Taliban, who had harbored al Qaeda before and after the attacks.

The 2001 AUMF is also expressly limited to using force to prevent future acts of terrorism against the United States by the entities responsible for 9/11, not their associated forces, successor entities, or unaffiliated terrorist organizations. Indeed, Congress expressly rejected the executive branch’s request for broad and open-ended authority to use military force against other terrorist groups without specific authorization from Congress.³

Yet for nearly 16 years, longer than any war in the nation’s history, the executive branch has been using the 2001 AUMF as the primary legal basis⁴ for military operations against an array of terrorist organizations in at least seven different countries around the world.⁵ Some of these groups, like ISIS and al Shabaab, not only played no role in the 9/11 attacks, but did not even exist at the time Congress authorized the use of force in 2001.⁶

1 Connor O'Brien, Niger attack fuels new push for war vote, Politico, Oct. 20, 2017, available at <https://www.politico.com/story/2017/10/20/niger-attack-war-vote-244012>

2 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note), available at <https://www.congress.gov/107/plaws/publ40/PLAW-107publ40.pdf>.

3 See David Abramowitz, The President, the Congress, and the Use of Force: Legal and Political Considerations in Authorizing the Use of Force Against International Terrorism, 43 Harv. Int'l L.J. 71 (2002); Gregory D. Johnsen, 60 Words And A War Without End: The Untold Story Of The Most Dangerous Sentence In U.S. History January 16, 2014, Buzzfeed, available at https://www.buzzfeed.com/gregorydjohnsen/60-words-and-a-war-without-end-the-untold-story-of-the-most?utm_term=.yfdMEX3qa#.clg0N7zOo.

4 The executive branch has also relied on the 2002 Iraq AUMF to justify its counter-ISIS 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/>.

5 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.

6 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,

The executive branch's continued reliance on the 2001 AUMF for military operations far beyond what Congress originally authorized undermines Congress' important constitutional role as the branch responsible for the decision to go to war. As Senator Todd Young noted during a keynote speech at the Heritage Foundation in May of this year, the founders entrusted Congress with the decision to go to war to "avoid foolish, hasty, unnecessary, and perpetual wars that tend to accrue debt and erode liberty."⁷ The lack of any sunset provision or reporting requirements in the 2001 AUMF also restricts the ability of Congress to conduct meaningful oversight over military operations and the foreign affairs of the United States.⁸

This untenable state of affairs has other dangerous consequences as well. Continued reliance on outdated and ill-defined war authorizations that blur the line between war and peace undermine national security, U.S. leadership in the world, and human rights both at home and abroad.

Ill-Defined War Authorities Undermine National Security, U.S. Global Leadership, and Human Rights at Home and Abroad

War authorizations confer extraordinary powers on the president, powers that outside of war would amount to egregious violations of human rights. Wartime rules were designed for the unique circumstances of armed conflict between opposing armed forces. As a result, the laws of war sometimes permit killing as a first resort, detention without charge or trial, and the use of military tribunals—actions that are otherwise contrary to basic American values and human rights.

The United States has long been a global leader on human rights, leveraging its example to influence other nations to improve their own human rights records. The United States has rightly criticized other nations for improperly invoking wartime authorities in the name of national security. But the ability of the United States to level this criticism effectively demands that it demonstrate that its own use of wartime authorities is lawful and appropriate. Continued reliance on ill-defined authorities or questionable legal theories that enable the use of wartime authorities outside the lawful boundaries of war not only harms U.S. leadership on human rights, but U.S. national security as well.

The current status quo puts the United States at odds with allied nations, counterterrorism partners on the ground, and local populations whose help is critical to effective counterterrorism. As a result of doubts about the lawfulness or legitimacy of U.S. actions or policies, allies and partners withhold critical cooperation, consent, and intelligence information. Local populations turn against the United States, fueling terrorist recruitment and propaganda and increasing attacks against U.S. and allied forces. Assuring U.S. allies, counterterrorism partners, and local populations that the United States respects human rights and the rule of law—including important limits

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 stable or sustainable reading of the law." See Ben Wittes, *Not Asking the Girl to Dance*, 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*, 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.

7 Is it Time for Congress to Pass an ISIS-Specific AUMF?, The Heritage Foundation, May 1, 2017, available at <http://www.heritage.org/defense/event/it-time-congress-pass-isis-specific-aumf>.

8 Recent entanglements with Iranian and Russia-backed pro-Assad forces in Syria, where the U.S. is fighting ISIS, demonstrate just how far the 2001 AUMF has been stretched. See Kate Brannen et al., *White House Officials Push for Widening War in Syria Over Pentagon Objections*, *Foreign Policy*, June 16, 2017, available at <http://foreignpolicy.com/2017/06/16/white-house-officials-push-for-widening-war-in-syria-over-pentagon-objections/>.

on where, when, and against whom wartime authorities may be employed—will improve cooperation, undermine terrorist recruitment and propaganda, and reduce attacks against U.S. forces.

Setting the country on a new course is also needed to ensure that the United States does not set dangerous precedents that are detrimental to its long-term interests. The policies, practices, and legal justifications used by the United States today will be used by other states tomorrow. Expansive interpretations of a state's authority to use wartime powers—such as lethal force as a first resort, military tribunals, and detention without charge or trial—embolden other states to use such practices. Constraining the use of these exceptional authorities to circumstances meeting the legal threshold for armed conflict and to where their use is militarily necessary, will provide a model for other states on how to use wartime authorities lawfully, strategically, and responsibly.

Not only is it unlawful to apply wartime authorities to address terrorist threats off the battlefield, it is not necessary. The United States has a robust array of diplomatic, law enforcement, and intelligence resources to mitigate the threat of terrorism. And ultimately, partner nations in which terrorist threats reside must take the lead to address those threats head on, and effectively, with the support of the United States. The United States also retains the authority to act in self-defense, including through the use of military force, when there is an imminent threat that cannot be addressed through other means. Wartime authorities such as an AUMF are not necessary to take such action.

By tailoring congressional war authorizations to the conflicts to which they are intended to apply and conducting regular oversight of war, Congress provides a crucial check on the executive branch, ensuring that presidents do not stretch wartime killing, detention, and trial authorities beyond the bounds of armed conflicts authorized by Congress.

Recommendations for Drafting Authorizations for Use of Military Force

Any new war authorization passed by Congress should be clear, specific, carefully tailored to the situation at hand, and aligned with the international legal obligations of the United States to respect state sovereignty, human rights, and the boundaries of wartime rules. Careful drafting is critical to prevent any new AUMF from being stretched to justify wars not authorized by Congress, to ensure ongoing congressional engagement and an informed public as the conflict proceeds, and to prevent the authorization from being used in ways that undermine human rights or U.S. national security.

To meet this standard, Human Rights First recommends that any new authorization for use of military force include the following elements⁹:

Specify the enemy and the mission objectives

Any new AUMF should clearly specify the entity against which force is being authorized, the mission objectives or purpose for authorizing force, and where force may be used. These elements prevent the executive branch from overstepping Congress's intent, discourage mission creep, and ensure that the authorization will not be used to justify unlawful or perpetual armed conflict. Authorizing the president to use force against unknown future

⁹ 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. 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>.

enemies,¹⁰ for undefined purposes, or in unknown locations is an unconstitutional delegation of Congress's power to declare war. It is also unnecessary for national security. The president has authority to defend the nation from sudden attacks under Article II of the Constitution and Article 51 of the U.N. Charter. Moreover, Congress can authorize force against new threats when and if such threats arise.

Reporting requirements:

Regular and detailed reporting helps promote democratic accountability, maintain legitimacy both at home and abroad, ensure compliance with domestic and international law and enables Congress to fulfill its critical oversight functions. To properly keep Congress and the public informed of the scope and progress of the mission, the president should provide regular reports detailing at minimum: the entities the administration believes are covered under the new AUMF, the factual and legal basis for including these entities in the AUMF, the number of civilian and military personnel killed, and the legal analysis the administration is relying on for undertaking new actions. This information is critical for proper public transparency and engagement and enabling Congress to exercise its constitutional oversight responsibilities over a continuing armed conflict.

Compliance with U.S. obligations under international law

For over 200 years the Supreme Court has held that domestic statutes must not be interpreted to conflict with U.S. obligations under international law if there is any other plausible interpretation.¹¹ An explicit statement in an AUMF that operations must only be carried out in compliance with U.S. international legal obligations would bolster global confidence in the United States as a national that complies with the rule of law and is committed to its obligations to respect state sovereignty under the U.N. Charter and customary international law, treaty and customary law-based human rights law, and the requirements of the law of armed conflict, where applicable. Such a statement would enhance the legitimacy of the mission, aid the effort to win hearts and minds, and encourage cooperation from allies, and partners.

Supersession/sole source of authority provision

Any new AUMF should include language that makes it clear that it is the sole source of statutory authority to use force against the named enemy in the authorization. This is important to avoid overlap, confusion, or loopholes that could be used to evade the requirements of either an existing or new AUMF. For example, as the executive branch has claimed that the 2001 AUMF and 2002 Iraq AUMF already provide authority to use force against ISIS, a new ISIS AUMF should either repeal the 2001 AUMF and 2002 Iraq AUMF, or include language that makes it clear that the new ISIS AUMF is the sole source of statutory authority for using force against ISIS.¹² Failing to include such clarifying language or to repeal old AUMFs opens the door for the executive branch to rely on the 2001 AUMF to avoid the requirements of the new ISIS AUMF.

¹⁰ Should Congress choose to authorize force against the associated forces of a group named in the authorization, it should carefully define the term associated forces in a manner that complies with the laws of war. Congress should not authorize force against so-called "successor entities." See Human Rights First, *Authorizing the Use of Force Against ISIS: How to Define "Associated Forces"*, available at <http://www.humanrightsfirst.org/sites/default/files/AUMF-Associate-Forces-Issue-Brief.pdf>.

¹¹ *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

¹² The Obama Administration claimed that the 2001 and 2002 AUMFs already authorize force against ISIS. Failing to clarify that a new ISIS AUMF supersedes these authorizations confuses rather than clarifies the administration's powers. See Jen Daskal, *Why Sunset and Supersession Provisions Are Both Needed in an Anti-ISIL AUMF*, *Just Security*, March 18, 2015, available at <https://www.justsecurity.org/21220/sunsets-supersession-alternatives-another-cpc/>.

Sunset clause

Sunset provisions have been included in nearly a third of prior AUMFs.¹³ They act as a forcing mechanism that guarantees continued congressional oversight and approval as the conflict evolves, providing a safeguard against perpetual armed conflict or executive branch overreach. Sunsets require Congress and the administration to come together to reexamine the AUMF at a future date in light of current conditions, and if necessary, reauthorize and/or refine the legislation to suit those new conditions. As former general counsel for the CIA and Department of Defense Stephen Preston has explained, requiring Congress to reauthorize an ongoing conflict does not signal to the enemy that the United States plans to walk away from the fight at a set date.¹⁴ Rather, he explained, a properly structured reauthorization provision with a mechanism for renewing the authority in advance of the sunset would signal to our partners and adversaries that the United States is committed to its democratic institutions and will fight the fight for as long as it takes.

Conclusion

The founders of this nation recognized the profound significance of going to war and wisely assigned this power to Congress. If and when Congress passes a new war authorization, that authorization should reflect the hard lessons of the last decade and a half by including the above elements. If Congress cannot reach agreement on an authorization that meets these requirements, it should not pass one.

¹³ Ending the Endless War, National Security Network, February 2015, available at http://nwnetwork.org/cms/assets/uploads/2014/08/ENDING-THE-ENDLESS-WAR_2.2015-UPDATE.pdf.

¹⁴ Is it Time for Congress to Pass an ISIS-Specific AUMF?, The Heritage Foundation, May 1, 2017, available at <http://www.heritage.org/defense/event/it-time-congress-pass-isis-specific-aumf>.