



Considerations for a New Authorization for the Use of Military Force



A Policy Note by the Center for Ethics and the Rule of Law

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Introduction

In the aftermath of the attacks on September 11, 2001, the United States Congress passed legislation known as the 2001 Authorization for the Use of Military Force (AUMF) to enable President George W. Bush to retaliate against, and to defend America from, the individuals and entities who perpetrated and materially supported the horrific attack.¹ The authorization states in relevant part that:

the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

The 2001 AUMF has come under scrutiny since the passing of the legislation due to its ambiguous language, which renders it vulnerable to broad interpretations and overexpansive applications. Its replacement must address these shortcomings and reassert control over the executive's authority to wield military force abroad. As a baseline, a successfully developed new AUMF should (1) include parameters governing the geographic and temporal scope of authorized military operations; (2) contain politically defined end-state objectives; (3) provide guidance on operational appropriations of manpower, material, and money; and (4) comport with international humanitarian law and jus ad bellum principles.

Background On Prior AUMFs

The 2001 AUMF's immediate intent was clear: to dismantle al-Qaeda and the Taliban in Afghanistan. On October 7, 2001, the Bush Administration commenced military operations under this authority. Some 16 years later, despite President Obama formally ending combat operations in Afghanistan in 2014,² approximately 14,000 US troops are still deployed there under 2001 AUMF authorities and the United States Army has recommended sending another 1,000 troops.³

Since 2001, successive administrations have interpreted the 2001 AUMF to justify military operations against both al-Qaeda and the Taliban outside of Afghanistan, and for targeting

¹ <https://www.congress.gov/107/plaws/publ40/PLAW-107publ40.pdf>

² <https://www.cnn.com/2014/12/28/politics/obama-afghanistan-end-of-combat/index.html>

³ <http://thehill.com/homenews/administration/370017-us-military-considering-additional-1000-troops-for-afghanistan-report>

“associated forces,” also known as co-belligerents.⁴ This expansive interpretation has led to the United States Armed Forces conducting operations targeting organizations and individuals in Afghanistan, Iraq, Libya, Pakistan, Somalia, Syria, Niger, Kenya, and Yemen, among elsewhere. The associated forces doctrine has raised concerns that the 2001 AUMF is too elastic, allowing mission creep to potentially drag the US into a “Forever War” against entities that arguably pose little or no direct threat to US national security.⁵

In late 2016, President Obama decided to add the Somalia-based Islamist terrorist organization al-Shabaab to the list of associated forces.⁶ Al-Shabaab, established in 2006, formally declared allegiance to al-Qaeda in 2012, though factions have pledged fealty to the Islamic State (ISIS) since that time.⁷ So far during the Trump Administration, drone strikes in Somalia have more than doubled, US troop levels have increased from 50 to 500, and United States Navy SEAL Kyle Milliken was killed in action.⁸ Perhaps fighting al-Shabaab is worth its cost in American blood and treasure, but its justification runs far afield of any reasonable interpretation of the 2001 AUMF. Some have charged that such a surge in forces comes with little Congressional or public oversight and high-level decision making has been delegated from the President to the Department of Defense.⁹

Further obscuring what falls under the 2001 AUMF authorities, the Executive Branch has cited it in conjunction with other legal justifications for military action, e.g. the President’s Article II authority as Commander-in-Chief and authorities under the War Powers Resolution, to provide an overall rationale for a particular mission or deployment.¹⁰ Notably, prisoners are detained at Guantanamo Bay, Cuba under the 2001 AUMF,¹¹ and until the Supreme Court case of *Hamdan v. Rumsfeld* it provided the sole legal justification for using military commissions in the prosecution of detainees at Guantanamo.¹²

⁴ <https://fas.org/sgp/crs/natsec/R43983.pdf>

⁵ <https://www.cfr.org/expert-roundup/debating-legality-post-911-forever-war>

⁶ <http://www.businessinsider.com/obama-aumf-trump-al-shabab-2016-11>

⁷ <https://www.cfr.org/background/al-shabab>; <https://www.cnn.com/2015/10/22/africa/al-shabaab-faction-isis/index.html>

⁸ <https://www.pbs.org/newshour/show/somalia-sees-enemy-al-shabab-weaken-under-u-s-military-pressure>

⁹ <https://www.politico.com/agenda/story/2017/04/trumps-dangerous-expansion-of-executive-war-powers-000387>

¹⁰ *Id.*

¹¹ <https://fas.org/sgp/crs/natsec/pres-aumf.pdf>

¹² <https://fas.org/sgp/crs/natsec/R43983.pdf>. Further legal justification for the use of military commissions was codified into law by the passage of the Military Commissions Act of 2006; <https://www.gpo.gov/fdsys/pkg/BILLS-109s3930es/pdf/BILLS-109s3930es.pdf>; <https://fas.org/sgp/crs/natsec/R43983.pdf>; <https://fas.org/sgp/crs/natsec/R43983.pdf>; <https://fas.org/sgp/crs/natsec/R43983.pdf>. The use of military commissions was codified into law with the passage of the Military Commissions Act of 2006.¹³ <https://www.congress.gov/107/plaws/publ243/PLAW-107publ243.pdf>

In October 2002 the 107th United States Congress enacted the “Authorization for Use of Military Force Against Iraq Resolution of 2002.”¹³ The 2002 AUMF authorized the Bush Administration to undertake military actions intended to disarm and dismantle the regime of Iraqi President Saddam Hussein, thought to be in possession of a dangerous stockpile of weapons of mass destruction. As a consequence, the 2002 AUMF states in relevant part that, “The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to...defend the national security of the United States against the continuing threat posed by Iraq.”

Sec. 3 of the law provides for the use of force to defend the United States against threats posed by Iraq. A liberal reading of this authorization includes those *continuing* threats that exist as a result of either the Iraqi government *or the territory or Iraq*.¹⁴ This reading conflicts with Sec. 2 of the 2002 AUMF which limits the relevant threats to those that exist as a direct result of the *Iraqi regime*.¹⁵ The comparatively narrow scope of the 2002 AUMF has reduced its application to contemporary military operations. For this reason, the analysis contained within this brief pertains solely to the 2001 AUMF and does not intend to directly address the 2002 AUMF.

Why Current Operations Require A New AUMF

In late 2014, President Obama relied on the 2001 AUMF to provide a legal basis for military action against ISIS in both Iraq and Syria.¹⁶ As ISIS could no longer be considered an “associated force” of al-Qaeda, and had no connection to the Taliban or 9/11, the required nexus to the 2001 AUMF was not satisfied.¹⁷

The Obama administration sent Congress proposed wording for a new authorization in 2015 that would have provided explicit authorization for ongoing operations against ISIS.¹⁸ The Obama proposal would have (1) limited any military campaign to three years, (2) curtailed the deployment

¹³ <https://www.congress.gov/107/plaws/publ243/PLAW-107publ243.pdf>

¹⁴ <https://www.lawfareblog.com/2002-iraq-aumf-almost-certainly-authorizes-president-use-force-today-iraq-and-might-authorize-use>

¹⁵ <https://www.lawfareblog.com/congressional-intent-2002-aumf-and-isis>

Sec. 2(1) reads in part, that Congress supports the President’s actions intended to “obtain prompt and decisive action by the Security Council to ensure that Iraq abandons its strategy of delay, evasion, and noncompliance....” This passage supports the understanding of “Iraq” within the context of this authorization to pertain to the State of Iraq and not the territory of Iraq.

¹⁶ President Obama also invoked the 2002 Iraq AUMF as legal authority.

¹⁷ ISIS has roots in al-Qaeda, it was initially an offshoot of al-Qaeda Iraq (AQI). However, these ties were officially severed in February 2014 when al-Qaeda leader Ayman al-Zawahiri, the leader of al-Qaeda, “publicly disavowed” Abu Bakr al-Baghdadi’s so-called Islamic State. <https://www.brookings.edu/articles/isis-vs-al-qaeda-jihadisms-global-civil-war/>

¹⁸ https://obamawhitehouse.archives.gov/sites/default/files/docs/aumf_02112015.pdf

of ground troops by not authorizing “enduring offensive ground operations,” and (3) would have repealed the 2002 AUMF.¹⁹ Notably, the proposal would have left the 2001 AUMF intact. Republican leaders in Congress criticized Obama’s draft language as too restrictive, while top Democrats deemed it not restrictive enough.²⁰ Ultimately, Obama’s suggestions were not voted upon in either the House or the Senate.

The debate over war authorization is not new. Clarification regarding the role of the US military within Iraq and Syria is urgent in part because of the President’s own equivocation and the apparent lack of policy and strategic cooperation between the White House, the Department of Defense, and the Department of State.²¹ The recent appointment of Ambassador John Bolton to the position of National Security Advisor further intensifies these concerns as Bolton, a longtime proponent of preventive war, favors actions that many would consider an unauthorized use of military force.²²

Over the years, various proposals have been tabled to repeal or amend the 2001 and 2002 AUMFs, however none of them has been successful. Proposals in recent years have included broader definitions of the target of the use of military force, to include “associated forces” or “associated persons” to Al Qaeda, the Taliban and ISIS/ISIL,²³ thus compounding the problem of expansive interpretation and application. None of them has specified territorial application, and some of the proposals do not even specify a purpose for the AUMF.²⁴

Specifically, in January 2018, Senate Foreign Relations Committee Chair Senator Bob Corker said progress was being made toward creating a new AUMF.²⁵ The bill, soon ready for “mark-up,” will

¹⁹ Id.

²⁰ <https://www.cnn.com/2015/02/11/politics/isis-aumf-white-house-congress/index.html>;

https://www.nytimes.com/2015/02/13/us/congress-shows-a-lack-of-enthusiasm-for-giving-obama-war-powers-to-fight-isis.html?_r=0

²¹ https://www.washingtonpost.com/world/national-security/even-as-trump-urges-syria-exit-the-military-says-its-not-finished-with-isis/2018/04/06/e18daf08-3906-11e8-acd5-35eac230e514_story.html?utm_term=.831bc244e391;

²² <https://www.nytimes.com/2018/04/06/opinion/john-bolton-north-korea.html?rref=collection%2Fsectioncollection%2Fopinion&action=click&contentCollection=opinion®ion=rnk&module=package&version=highlights&contentPlacement=8&pgtype=sectionfront>

²³ For a comparison of the AUMF proposals tabled in the 115th congress, 2017-2018, see

<https://www.justsecurity.org/wp-content/uploads/2017/06/Just-Security-AUMF-Chart-June-19-2017fin.pdf>. The proposals specified in the last year are: H. Res. __ [Rep Eliot Engel Discussion Draft],

https://www.justsecurity.org/wp-content/uploads/2017/06/ENGEL_Discussion-Draft-AUMF-2017.pdf; S.J. Res 43,

<https://www.congress.gov/bill/115th-congress/senate-joint-resolution/43/>; H.J. Res 100,

<https://www.congress.gov/bill/115th-congress/house-joint-resolution/100/>; S.J. Res. 31,

<https://www.congress.gov/bill/115th-congress/senate-joint-resolution/31/>; H.Con.Res 2;

<https://www.congress.gov/bill/115th-congress/house-concurrent-resolution/2/>; H.J. Res 63,

<https://www.congress.gov/bill/115th-congress/house-joint-resolution/63/>.

²⁴ H.Con.Res 2; <https://www.congress.gov/bill/115th-congress/house-concurrent-resolution/2/>; H.J. Res 63,

<https://www.congress.gov/bill/115th-congress/house-joint-resolution/63/>.

²⁵ <https://www.defensenews.com/congress/2018/01/11/corker-touts-progress-to-replace-war-authorizations/>

be based on the 2017 draft introduced by Senators Tim Kaine and Jeff Flake. The Kaine-Flake bill specifically identifies ISIS, al-Qaeda, and the Taliban as the targeted threat. It also contains a definite termination after five years, establishes congressional “disapproval resolutions,” repeals and replaces the 2001 AUMF, and repeals the 2002 Iraq AUMF.²⁶

On the House side, Representative Adam Schiff introduced a bill in 2017 quite similar to the Kaine-Flake bill²⁷ that identifies al-Qaeda, ISIS, and the Taliban as the targeted threat, yet contains a three year sunset provision and establishes clear congressional notification requirements.²⁸ Schiff’s bill allows for a modification or repeal of executive authority regarding the “deployment of ground forces in a combat role” through congressional resolution and repeals both the 2001 AUMF and the 2002 Iraq AUMF.²⁹

Officials within the Trump administration have expressed support for a new AUMF, however, this has not been consistent across senior administration officials. In October 2017, Secretary of Defense James Mattis warned the Senate Foreign Relations Committee about dangers inherent in any repeal and replace process: “If the enemy hopes we are going to quit on a certain day, or if they know we won’t deal with them if they step over a certain border, then the enemy is going to do exactly that.”³⁰ At the same Committee hearing, then-Secretary of State Rex Tillerson declared that there is no need for a new AUMF, saying “The 2001 AUMF provides statutory authority for ongoing U.S. military operations against al-Qaeda; the Taliban; and associated forces, including against the Islamic State in Iraq and Syria, or ISIS.”³¹

What A New AUMF Must Take Into Account And The Path To Implementation

Consistent with the preceding background and analysis, it is evident that an updated AUMF must be carefully constructed in such a way that appropriately provides for the following four criteria:

²⁶ Id; <https://lawfareblog.com/senators-jeff-flake-and-tim-kaine-introduce-new-aumf/>; <https://www.scribd.com/document/349417741/5-25-17-AUMF-Resolution>; <https://www.justsecurity.org/41399/annotated-important-features-senators-kaine-flakes-proposed-war-authorization-isis/>

²⁷ <https://www.congress.gov/bill/115th-congress/house-joint-resolution/100/committees?q=%7B%22search%3A%5B%22schiff%22%5D%7D&r=1>; <https://lawfareblog.com/section-analysis-rep-schiffs-aumf-proposal>

²⁸ Id.

²⁹ Id.

³⁰ <https://www.reuters.com/article/us-usa-defense-authorization/trump-administration-does-not-want-limits-on-war-authorization-idUSKBN1CZ0CC>

³¹ Id.

1) Geographic and Temporal Limitations

Explicit identification of the particular geographic areas of operation authorized by a new AUMF will prevent geographic expansion and force deliberation of where and why the President is authorized to engage the United States military.³² “Sunset provisions” or legislated reauthorization requirements would require Congress to reauthorize or revise a new AUMF at routine intervals consistent with the then-prevailing security environment. Temporal limitations, in conjunction with geographic limitations, will serve to check the perpetuation or expansion of strategically, financially, or politically unnecessary military engagements.

2) Politically Defined End-State Objectives

Successful military campaigns require fundamentally sound politico-strategic guidance. Accordingly, a new AUMF should include politically defined end-state objectives which serve to govern the overall conduct of the approved operations. Properly articulated end-state objectives will begin with an explicit identification and thorough characterization of the national security threat to which the new AUMF is a response and culminate with an expression of how exactly that threat is to be overcome—and at what point those objectives may be considered achieved. Clearly articulating the end-state the new AUMF is intended to achieve will guard against the prolonged application of the legislation to increasingly unrelated military operations.

3) Guidance on Operational Appropriations

Congress has provided much of the past annual funding for operations in Afghanistan and Iraq through the use of emergency supplemental bills.³³ Specific operational appropriations (either manpower, material, or monetary) should demarcate the overall scale and scope of the military actions authorized by the new AUMF. Manpower and material limitations serve to govern the overall level of commitment authorized by Congress, while monetary limitations restrict the scale of the operations as well as the length and overall investment of American political, financial, and societal capital. Congress’s inherent authorities to control federal appropriations already allow such limitation and oversight responsibilities.

³² Under the auspices of the current AUMF the United States military is currently engaged in combat operations in seven countries according to the Trump Administration’s recent self-reporting. This is exceedingly far from the original intent of Congress when it enacted the 2001 AUMF.

<https://assets.documentcloud.org/documents/4411804/3-18-War-Powers-Transparency-Report.pdf?platform=hootsuite>

³³ <https://www.heritage.org/budget-and-spending/report/time-move-iraq-and-afghanistan-funding-the-regular-budget-process>

4) Respect for International Law and Ad Bellum Principles

Any new AUMF must satisfy international legal criteria for the use of force. To be consistent with international law, AUMFs should consider principles of *jus ad bellum*, which are incorporated into the UN Charter. Any use of force that falls outside the scope of international law would erode the authority of legal regimes that govern the use of force to the detriment of global stability, would hamper the US' ability to retain and forge alliances, and would present political and legal challenges both domestically and from abroad. This has already become a point of contention with the recent strikes on Syria.³⁴ Apart from risking future cooperation of our NATO allies, there would be risks to US troops who were fighting a war perceived as illegal from the standpoint of international law.

The UN Charter maintains that states must refrain from the threat or use of force against the territorial integrity or political independence of another state.³⁵ An exception to this rule arises in the case of self-defense against armed attack.³⁶ The UN Security Council may also authorize the use of force pursuant to that body's powers under Chapter VII of the Charter, where it deems necessary due to a threat to international peace and security.³⁷ Some experts maintain that there is an emerging customary international law norm that allows for humanitarian interventions and interventions made on the basis of the Responsibility to Protect doctrine, which is intended specifically to prevent genocide, ethnic cleansing, war crimes and crimes against humanity.³⁸ The question of whether current authorizations meet international legal standards for the use of force is critical, but it will be reserved for a future occasion. For current purposes, we assume that Congress is aligned with international law as it applies to current troop deployments under the 2001 AUMF.

A new AUMF must avoid the ideological and operational shortcomings of the existing 2001 AUMF. The new AUMF should exclude explicit or implicit ideological motivations. Ideological motivations have underpinned subsequent legal and political interpretations of the 2001 AUMF fueling continued fruitless counterterrorism campaigns. Intangible objectives, such as the defeat of an ideology like terrorism or radical Islam, are tantamount to open-ended war without bounds. Additionally, a new AUMF will have to straddle the difficult balance between providing political

³⁴ <https://www.justsecurity.org/54698/downsides-bombing-syria/>; <http://theconversation.com/yes-syrias-assad-regime-is-brutal-but-the-retaliatory-air-strikes-are-illegal-and-partisan-95140>; <https://www.ejiltalk.org/the-syria-strikes-still-clearly-illegal/>; <https://www.thenation.com/article/trump-just-launched-another-illegal-attack-against-syria/>

³⁵ <http://www.un.org/en/sections/un-charter/chapter-i/index.html> (Article 2, paragraph 4)

³⁶ <http://www.un.org/en/sections/un-charter/chapter-vii/> (Article 51)

³⁷ <http://www.un.org/en/sections/un-charter/chapter-vii/> (Articles 39-51)

³⁸ <https://www.redcross.org.au/getmedia/d0338aa5-27c9-4de9-92ce-45e4c8f4d825/IHL-R2P-responsibility-to-protect.pdf.aspx>

guidance necessary for military leaders to develop strategy and campaign plans and avoiding infringement upon the operational and organizational decision-making independence necessary for effective military planning and execution.

Another challenge in drafting a new AUMF is that terrorist organizations often rebrand themselves, shed or feign to shed their affiliation with groups like al-Qaeda and ISIS, and merge, sometimes temporarily for tactical advantage, with militias that the US does not consider an enemy. For example, Jabhat al-Nusra, a terrorist organization that emerged in Syria in 2012, pledged an oath to al-Qaeda in 2013, in effect, becoming al-Qaeda's Syrian branch.³⁹ However, in 2016, the group announced its split from al-Qaeda.⁴⁰ The de-affiliation, which was confirmed by al-Qaeda and included a name change to Jabhat Fateh al-Sham, was at least, in part, an effort to remove the group from the crosshairs of both the US and Russia.⁴¹ It had no effect on US policy targeting the organization under the 2001 AUMF.⁴² The group then rebranded again in early 2017, merging with other militant factions in Syria to form Hayat Tahrir al-Sham.⁴³ Adding to the complexity, one of the groups involved in the merger, Nour al-Din al-Zenki, was a recipient of US aid until 2015. This example illustrates the need for a fluid mechanism that allows for engaging appropriate targets as events unfold, but which guards against the executive having carte blanche to engage new targets that fall outside the legal parameters of a use of force authorization. To that end, a new AUMF should not specifically identify enemies as the president will have sufficient guidance from the robust scoping framework mentioned above.

Contemporary threats to United States national security include some that are objectively more immediate than others. Despite the apparent urgency of destabilizing actions by North Korea, Iran, and other hostile actors, no new AUMF should authorize the use of military force against an actor not currently engaged in hostilities against the United States, its overseas interests, or allies—there should be no interpretation of a legislative “blank check.” A new AUMF should be an improvement upon the existing authorizations and should not appear to provide any legal, political, or strategic pretense for the just or unjust use of military force against any other actor not authorized within the new legislation or by the existing laws governing the executive use of force.

³⁹ <http://www.bbc.com/news/world-middle-east-18048033>

⁴⁰ <http://www.bbc.com/news/world-middle-east-36916606>

⁴¹ Id.

⁴² Id.

⁴³ <http://www.bbc.com/news/world-middle-east-38934206>

Conclusion

The 2001 AUMF is outdated and fails to provide appropriate legal authorization or characterize the threats to American national security with adequate precision. Perpetually relying on the 2001 AUMF creates scenarios whereby statutory language is constantly being reinterpreted and expanded to suit new strategic and political ends. If troops are to remain engaged in combat operations abroad a new AUMF is needed to clarify their scope, and more importantly, to provide appropriate legal authorization.

Repealing and replacing the existing 2001 AUMF represents a challenging legislative and operational undertaking. It must be done in a way that promptly supersedes the existing authorities while not hindering the effectiveness of the United States Armed Forces. Given these concerns, any repeal and replace procedure will require close political and strategic cooperation between Congress and the national security apparatus to ensure a transition that maintains (and improves upon) legal clarity while allowing the current campaigns to proceed without endangering the lives of American service-members or the effectiveness of their operations.

Transparency, accountability, and preserving the separation of powers should be the foundational objectives of any new AUMF. A new AUMF should establish explicit geographic, temporal, and operational restrictions, crafted with respect to international law and ad bellum principles, which render it less vulnerable to overly broad readings by the Executive Branch.

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