THE CONSTITUTION PROJECT

Safeguarding Liberty, Justice & the Rule of Law

July 24, 2017

Rep. Ed Royce
U.S. House of Representatives
2310 Rayburn House Office Building
Washington, DC 20515

Rep. Eliot Engel
U.S. House of Representatives
2462 Rayburn House Office Building
Washington, DC 20515

Re: Constitution Project Statement for the Record, House Foreign Affairs Committee Hearing on "Authorization for the Use of Military Force and Current Terrorist Threats"

Dear Chairman Royce, Ranking Member Engel, and Members of the Foreign Affairs Committee:

Thank you for holding this hearing. The Constitution Project does not take a position on whether or when the United States should use military force, but we are deeply committed to restoring the division of war powers set out in the Constitution, which makes clear that Congress is the branch of government vested with the power and responsibility to decide on war. Your hearing is a welcome step toward that end.

As a threshold matter, if Congress disagrees that U.S. service men and woman should be engaged in battle, those men and women should come home. If, however, Congress believes that there are specific entities against which the use of force is necessary and appropriate, it is Members' constitutional duty to say so. Of course, *how* Congress says so matters tremendously.

We write now to underscore some war powers first principles, and to suggest what fidelity to those principles demands in any effort to revise the 2001 Authorization for Use of Military Force (AUMF), or to craft a new one.

We are concerned that many recent AUMF proposals seem to be written on the assumption that Congress needs to figure out how best to provide the executive branch with greater flexibility to use force, particularly for counterterrorism purposes. But given the context in which Members would be legislating (described below), the problem is not that Congress has tied the president's hands too tightly in this area. The problem is that Congress has failed to tie the President's hands tightly enough.

Why the Framers assigned Congress the war power

The Constitution could have given the President primacy in deciding whether to take the country to war. Save for a narrow set of defensive circumstances (i.e., to repel a sudden or actually imminent attack), it does not. Congress was assigned that power. The reasons why are important.

First, human nature compels our constitutional separation of war powers. As James Madison cautioned, if those powers were accumulated in the executive branch, "the temptation would be too great for any one man." Second, it is central to our democracy that Members be politically accountable when the government sends young Americans into harm's way. Third, collective judgment about whether and when the United States should use force—fashioned through a full, serious and transparent debate among our elected representatives—is superior to that of any one person.

All of these reasons share the same animating principle: constraint. Our system of checks and balances was designed to guard against war; to ensure it is the carefully limited exception, peace the rule.

Important context for the current AUMF debate

If Congress decides to weigh in—to address pre-existing war authorities, pass a new one, or both—it will not be doing so in a vacuum. In order to meaningfully fulfill their constitutional obligation, Members must be clear-eyed about the backdrop against which they would be legislating. The following three factors, in particular, should weigh heavily in Members' decision-making:

Both Presidents Obama and Trump have stretched the 2001 AUMF far beyond its breaking point

There is a growing acknowledgment that the United States cannot, or at least should not, rest the legal authority for so many military engagements—the ISIS war in particular—on a 15-year-old statute that was intended specifically to target those responsible for the September 11, 2001 terrorist attacks. We agree. Through the concepts of "associated forces" and "successor entities," first President Obama and now President Trump have stretched the 2001 AUMF—which nowhere mentions "associated forces" or "successor entities"—beyond its breaking point. Indeed, the 60-word statute is the purported legal basis for current military operations against some groups that had no role in 9/11, and against others that did not even exist on 9/11. Had the 2001 AUMF been drafted more clearly, specifically, and narrowly, it might very well have precluded the interpretive gymnastics necessary to grounding those operations in that law.

The executive branch has become increasingly hostile towards congressional oversight, and Congress has largely failed to push back

This is neither a partisan phenomenon, nor one confined to a particular subject area. In the aftermath of 9/11, President George W. Bush's administration argued that Congress could not regulate the President's actions *at all* when he was acting pursuant to the Commander-in-Chief power. President Obama took the United States to war in Libya in 2011, without prior congressional approval, and in the process claimed unilateral authority to send up to 20,000 troops into battle on the theory that doing so would not constitute "war" in the constitutional sense. President Obama also presided over the expansion of the 2001 AUMF beyond any plausible reading of its text, a legal and policy decision that President Trump has continued.

In the oversight context more generally, the executive branch has over time come to treat Congress less and less as a co-equal branch of government. For example, the Justice Department has taken the position that neither the House nor the Senate has the constitutional authority to enforce a subpoena against an executive branch official through criminal or inherent contempt proceedings, even if there is no claim of executive privilege. The practical result of that stance is to deny Congress timely access to the information it needs to do its job, and to incentive agency obstructionism when responding to congressional requests for information.

For its part, the Trump administration has explicitly told federal agencies not to respond to oversight requests from Members of the minority. That instruction was accompanied by a May 1, 2017 Office of Legal Counsel opinion concluding that "such requests do not trigger any obligation to accommodate congressional needs and are not legally enforceable through a subpoena or contempt proceedings."

The Trump administration has delegated significant war making authority to national security agencies

Shortly after taking office, President Trump reportedly restored CIA authority to conduct lethal drone strikes. In March, the press reported that the administration is considering weakening current policy standards for the use of force in counterterrorism operations. In April, the President delegated to Secretary of Defense James Mattis the authority to set troop levels in Iraq and Syria. In June, he gave Mattis the same authority for Afghanistan.

Entrusting these kinds of decisions solely to the warfighters—and intelligence personnel who have come to perceive themselves as such—carries serious risk of unchecked escalation. The absence of clear, congressionally-imposed limits on where and when force can be used heightens the risk.

How Members should approach revising the 2001 AUMF or crafting a new one

There is no shortage of current proposals—most of them drafted by Members of Congress—for a new statute that would authorize force against (at least) ISIS, and in some cases also address one or both of the 2001 AUMF and the 2002 Iraq AUMF. Unfortunately, as noted at the outset, many of the proposals accommodate a degree of executive unilateralism that the Constitution was designed explicitly to reject. This is especially troubling given the context described above, coupled with technological advances that have drastically reduced the barriers to the United States waging global war.

On July 24, a coalition of human rights, civil liberties, and faith groups sent a letter to Committee Members "urging you to ensure … that any new AUMF is clear, specific, tailored to the particular situation for which force is being authorized, and comports with the international law obligations of the United States." The signatories then set out a list of provisions we all believe would help Congress achieve clarity, specificity, and narrow tailoring if and when it next authorizes force.

Congress should view this list as a floor, not a ceiling. Members legislating in today's environment need to prioritize strict limits and robust oversight for executive branch uses of force. In other words, they need to rein the executive branch back in. By doing so, Members can meaningfully fulfill the role that Article I, Section 8, of the Constitution envisions for them.

Sincerely,

/S/ Scott Roehm

Vice President for Programs and Policy

July 24, 2017

Rep. Ed Royce
U.S. House of Representatives
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Washington, DC 20515

Rep. Eliot Engel
U.S. House of Representatives
2462 Rayburn House Office Building
Washington, DC 20515

Re: Authorizing the Use of Military Force

Dear Chairman Royce and Ranking Member Engel:

We, the undersigned, represent a wide swath of the human rights, civil liberties, and faith communities. While we do not have a coalition position on whether or when a nation should use military force, we share a common view on the appropriate procedures for considering a new authorization for use of military force (AUMF) and on the critical elements that any new AUMF that is passed should meet.

We commend you for addressing the issue of a new use-of-force authorization in the Foreign Affairs Committee. Deciding to send the nation into war is Congress' gravest responsibility. To fully perform its constitutional role in authorizing military force and providing oversight over ongoing military operations, Congress should evaluate the administration's plans to identify and address where current or proposed missions lack adequate authorization. The Foreign Affairs Committee is the appropriate forum to begin that evaluation, followed by a full and transparent debate in the full House if the Committee moves forward with an AUMF.

We urge you to ensure as well that any new AUMF is clear, specific, tailored to the particular situation for which force is being authorized, and comports with the international law obligations of the United States. We all agree that vague and overbroad war authorizations undermine accountability, frustrate effective oversight, invite mission creep, and risk embroiling the nation in unauthorized or perpetual wars that threaten human rights and the rule of law.

The following types of provisions would help Congress achieve clarity, specificity, and narrow tailoring if and when it next authorizes force:

Repeal or Supersede Other AUMFs: Any new AUMF should repeal old AUMFs or include "supersession" language. Such language would prevent old AUMFs from being interpreted beyond their original purpose, and prevent them from being used to circumvent the limitations and requirements of any new authorization. If, for instance, Congress fails to address both the 2001 AUMF and the 2002 Iraq AUMF in any new ISIS-focused AUMF it risks adding to what has become a tangled and ambiguous web of war authorities, and claims of war authorities, from

which a president might pick and choose without explanation, and invoke to engage in unlawful wars.[1] AUMFs that are no longer necessary should be repealed.

Clearly Specify the Mission Objectives and the Enemy: To prevent current or future administrations from overstepping Congress' intent, engaging in mission creep, and using the authorization to justify unlawful or perpetual armed conflict, a new AUMF should clearly specify the mission objectives, the entity against which force is being authorized, and geographic limits. Clear mission objectives will make it clear when the mission against the specified enemy is achieved and authorization has thus expired. Delegating Congress' authority to authorize war to the executive branch by authorizing force against unknown future threats or enemies is both unconstitutional and unnecessary for national security. Congress can specifically authorize force against threats that arise in the future and the president has authority under the Constitution to defend the nation from sudden attacks.

Increase Transparency and Reporting: Regular and thorough reporting sufficient to keep both Congress and the public informed is important for democratic accountability, ensuring compliance with domestic and international law, and enabling Congress to fulfill its critical oversight functions. For instance, requiring the president to provide regular reports on the specific organized armed groups considered covered under the new AUMF (including the factual and legal basis for this finding), the number of civilian and military personnel killed, relevant legal justifications for new actions, and other similar information, is critical for keeping the public informed and enabling Congress to exercise its war powers duties as the conflict unfolds.

Require Compliance with International Law: The Supreme Court has long held that domestic statutes must not be interpreted in a way that conflicts with the United States' international legal obligations if any other plausible interpretation exists. Nevertheless, explicitly stating that the force being authorized by Congress must comply with U.S. obligations under international law (including the U.N. Charter, international human rights law, and the law of armed conflict where applicable) will underscore that when Congress authorizes the use of force, the president is required to abide by the terms of the authorization as well as the international legal obligations of the United States.

Require Reauthorization: Setting a sunset or review date for use of force authorizations ensures continued congressional oversight and approval as the conflict evolves. A sunset is also an important safeguard against perpetual armed conflict or executive branch overreach. Sunsets act as forcing mechanisms, requiring Congress and the administration to reexamine the AUMF at a future date in light of more current conditions, and if necessary, reauthorize and/or refine the legislation to suit those new conditions. Sunset provisions have been included in

[1] Several of the undersigned organizations have previously written to Congress regarding the importance of any new war authorizations either repealing existing authorizations or containing explicit supersession language. *See, e.g.*, http://www.constitutionproject.org/wp-content/uploads/2014/11/141119-ISIL-AUMF-Coalition-Letter.pdf; http://www.constitutionproject.org/wp-content/uploads/2015/02/150224_ISIL_AUMF_Coalition_Letter.pdf.

nearly a third of prior AUMFs. The 2001 AUMF, which was passed to authorize the use of force against those responsible for the 9/11 attacks, did not contain a sunset clause. That law has since been claimed to authorize the use of force for nearly 16 years, including against groups against which Congress did not intend to authorize force.

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Provisions aimed at ensuring that use of force authorizations are sufficiently clear, specific, and tailored to particular conflicts are critical for the fulfillment of Congress' constitutional role. Congress is the branch that this country's founders entrusted with the solemn decision to send the country and its men and women to war. Broad, vague, or open-ended authorizations fail to fulfill Congress's role. While there are different ways to ensure that use of force authorizations are clear, specific, and narrowly tailored, any new authorization should meet this standard by including the above critical elements.

Sincerely,

American Civil Liberties Union
Appeal for Justice
The Constitution Project
Council on American-Islamic Relations
Defending Rights & Dissent
Government Information Watch
Human Rights First
National Religious Campaign Against Torture
OpenTheGovernment
Win Without War

Statement for the Record of Human Rights First

United States House Foreign Affairs Committee Hearing on
"Authorization for the Use of Military Force and Current Terrorist Threats"

July 25, 2017

Introduction

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."[1] 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.[2]

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 basis[3] for military operations against an array of terrorist organizations in at least seven different countries around the world.[4] 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.[5]

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[1] 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.

[2] *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.

[3] The executive branch has also relied on the 2002 Iraq AUMF to justify its counter-ISIL 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/.

[4] 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.

[5] 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

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 last month, 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."[6] 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.[7]

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.

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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*, 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.

[6] *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.

[7] 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/.

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 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 elements[8]:

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 enemies,[9] 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

[8] 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.

[9] Should Congress to 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.

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.[10] 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.[11] 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.

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

[11] 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.[12] 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.[13] 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.

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

July 20, 2017

Representative Ed Royce
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2170 Rayburn House Office Building
Washington, DC 20515

Representative Elliot Engel
United States House of Representatives
2066 Rayburn House Office Building
Washington, DC 20515

Re: Authorizing the Use of Military Force

Dear Chairman Royce and Ranking Member Engel:

One of the most pressing global security challenges is the threat posed by the Islamic State of Iraq and al Sham (ISIS) to the United States and its allies. Candidate Trump argued that he had a secret plan to defeat ISIS and said his generals would provide a plan within 30 days of inauguration. Yet, over 180 days in, the Trump Administration has failed to articulate a coherent, unified strategy to deal with this threat. In fact, the Administration's current ISIS strategy lacks any sense of clarity and threatens to sink the U.S. further into a conflict that could squander our blood and treasure.

To avoid this outcome, Third Way believes Congress should use the need for a new Authorization for Use of Military Force (AUMF) to force the Administration to develop and articulate a clear strategy for dealing with ISIS without dragging the country into a broader conflict with the Syrian regime or the Russian Federation. Developing such a measure will ensure that the Administration has the statutory authority to fight ISIS. Additionally, a new AUMF will give the American people, military, and Congress a greater sense of clarity as to the U.S.'s long-term goals in the conflict, helping to avoid mission creep and excessive U.S. entanglement in a potential quagmire. Most importantly, passing a new AUMF will reassert Congress's constitutional authority over matters of war, limiting the potential for unilateral action and unintentional escalation, and encourage the series of checks and balances on Presidential military authority intended by the Founding Fathers.

Background

The Islamic State of Iraq and al Sham (ISIS), a violent extremist movement, grew out of the ashes of Al Qaeda in Iraq and the Syrian civil war. In 2014, the group shocked the world by seizing vast sections of Iraq and Syria and incorporating them into a self-declared state. It also engaged in a concerted campaign of war crimes and genocide against minorities in its captured territory.

At the request of the Iraqi government, President Obama sent over 1,500 military advisors into Iraq and conducted over 150 airstrikes there to break ISIS's momentum, protect U.S. personnel, and save thousands of Iraqi religious minorities. On September 10, 2014, President Obama announced a four

part plan for an expanded effort against ISIS. This plan included: (1) a systematic campaign of airstrikes; (2) increased military assistance to forces on the ground; (3) a regional political effort to work with allies; and (4) humanitarian assistance to populations targeted by ISIS.

At the time, the President welcomed Congressional support for this effort and affirmed "we are strongest as a nation when the President and Congress act together." However, despite the President's openness to legislative action, Congress never passed a measure authorizing operations against ISIS.

Since 2014, the U.S. has continued the campaign that President Obama launched against ISIS, with more than 7,000 troops currently deployed in Iraq and Syria[1] and 17,632 air strikes having been conducted.[2] This involvement has only increased under the Trump Administration, which recently announced its plans to "accelerate" the conflict and grant U.S. commanders more flexibility in conducting anti-ISIS operations.[3] Further, the Trump Administration is reportedly deploying an additional 3,000 to 5,000 troops to Afghanistan to combat ISIS elements and other militants in that country.[4]

The conflict in Syria has become more perilous recently, as ISIS has been driven from its strongholds and clings to a few last cities. ISIS's reduced land holdings mean that the various forces combatting it, many with conflicting agendas, are now fighting in relatively close quarters, raising the possibility of conflict escalation. Nowhere is such a risk more clear than in Deir ez-Zor, one of the last strongholds of ISIS in Syria. There, the proximity of Kurdish and U.S.-supported forces to those of the Syrian regime and its Russian and Iranian supporters, not to mention ISIS militants, creates a proverbial powder keg that could easily erupt into broader conflict. Recent Iranian strikes against U.S.-backed groups in the area and the downing of a Syrian jet by U.S. forces further warn of the potential for broader conflict.

Given the increasing involvement of U.S. forces in the fight against ISIS, and the risk of escalation, now is the time for Congress to consider and pass legislation that provides necessary tailored authorization for the nation's effort against ISIS.

1. Left unchecked, ISIS will continue to threaten the U.S. and its allies

As of December 2016, ISIS controlled around 23,300 square miles of territory in Iraq and Syria (an area roughly the size of West Virginia) and had 12,000 to 15,000 battle-ready fighters.[5] Although these numbers are a substantial decrease from 2014 levels, they represent an entity with an established presence that can be used to project violence against civilians abroad.

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[1] http://www.cbsnews.com/news/trump-- -gives-- -pentagon-- -power-- -to-- -determine-- -u-- -s-- -troop-- -levels-- -in-- -iraq-- -syria/

[2] https://www.defense.gov/News/Special-- -Reports/0814_Inherent-- -Resolve/

[3] https://www.theguardian.com/us-□-news/2017/may/28/james-- -mattis-- -defense-- -secretary-- -us-- -isis-- -annihilation

[4] https://www.nytimes.com/2017/06/18/world/asia/us-- -troops-- -afghanistan-- -trump.html

[5] http://www.bbc.com/news/world-- -middle-- -east-- -27838034; http://www.cnn.com/2016/12/14/politics/white-- -house-- isis-□-numbers/index.html

ISIS can export violence abroad because, despite recent setbacks, it still commands substantial resources. Although U.S. airstrikes destroyed around $500 million of ISIS's cash reserves in early 2016, the group still has vast amounts of capital.[6] Recent reporting from the British organization Conflict Armament Research reveals that ISIS has been manufacturing tens of thousands of weapons on "an industrial scale."[7] ISIS has also begun developing and using weaponized drones, and it likely still possesses many of the Soviet-made tanks, U.S.-made armored vehicles, and small arms that it has captured from Syrian and Iraqi government forces.[8]

That ISIS will keep threatening civilians abroad can be readily inferred from its lack of restraint in dealing with civilians in its territory. Its fighters have slaughtered, kidnapped, and enslaved members of ethnic and religious minorities, subjecting them to barbaric punishments like crucifixion and immolation. Further, it has trumpeted the beheadings of two American journalists, James Foley and Steven Sotloff, American aid worker Abdul-Rahman Kassig, Japanese nationals Haruna Yukawa and Kenji Goto, and British aid worker David Haines.

Recent attacks and revelations lend further credence to the assertion that ISIS will continue threatening the U.S. and Europe. Individuals directed, inspired, or enabled by ISIS have conducted terrorist attacks in locations as far-flung as Orlando, San Bernardino, Paris, and Berlin. Intelligence sources also believe that ISIS is currently developing "laptop bombs" which could target the U.S. and Europe by evading airport security screenings. This threat is only compounded by the fact that many of ISIS's fighters have European or American passports, making it easier for them to return home to conduct terrorist operations.

In order to stop this threat, Congress should pass an Authorization for the Use of Military Force (AUMF) against ISIS as part of a broader political plan for Iraq and Syria. But in doing so, Congress must act strategically and deliberately.

2. Because defeating ISIS will be a difficult, long-term effort, it is incumbent on Congress to pass a new Authorization for the Use of Military Force

In his September 10, 2014 remarks, President Obama asserted that he had all the authority he needed to attack ISIS under the 2001 AUMF and Article II of the Constitution. President Trump has also relied on the 2001 AUMF as justification for his operations against ISIS. However, some legal experts have raised concerns about relying on the 2001 AUMF, as ISIS is not an associated force of al Qaeda and did not exist at the time that authorization was passed.

Whether one believes that the President currently has full authority, limited authority, or no authority to act against ISIS, Congress should provide a new, specific AUMF against ISIS. In fact, President Obama welcomed such an action and asked Congress to update the AUMF to address

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[6] http://abcnews.go.com/International/us--airstrikes--destroy--500--million--isis--cash--reserves/story?id=37010061

[7] http://www.independent.co.uk/news/world/middle--east/isis--islamic--state--weapons--manufacturing--rockets--bombs--ammunition--iraq--factories--mosul--mortars--a7473321.html

[8] http://www.independent.co.uk/news/world/middle--east/isis--weapons--drones--uav--programme--development--weaponised--explosives--surveillance--terrorist--groups--a7371491.html; http://www.dailysabah.com/mideast/2014/07/03/isiss--weapon--inventory--grows

emerging terrorist threats. More recently, Secretary of Defense Jim Mattis also expressed his support for Congress passing a new AUMF. Yet despite such executive branch support, Congress has done almost nothing to enact a new authorization.

Although Congress has refrained from passing a new AUMF over the last three years, Congress should now make passing one a priority for three primary reasons:

1. The campaign against ISIS will not be over quickly. We will have victories and suffer setbacks. Before our military commits more troops and resources to a sustained and difficult conflict, America's leaders should reach consensus about the need to send our troops into harm's way.
2. Congress will have to repeatedly make decisions about action against ISIS, from funding the military, to reprogramming existing funds, to explaining the campaign to their constituents. Members of Congress should be on record with their position on a war of this magnitude.
3. The President's efforts to strengthen the international coalition to defeat ISIS will be enhanced if Congress has clearly shown its support for this action. Currently, U.S. allies may question the nation's commitment to fighting ISIS, given divisions within Congress. However, Congressional authorization would assuage such concerns and ensure a more robust approach to fighting terrorism.

3. Congress must assert its constitutional authority over matters of war to provide needed checks and balances against unilateral military action by the President.

Congress should assert its authority as a co-equal branch of government to debate and vote on plans for war and, through authorizations and appropriations legislation, define and clarify the scope and limits of what is certain to be an extended military campaign.

The Constitution provides in Article I, Section 8 that "Congress shall have the power to declare war." Alexander Hamilton expanded on this point arguing "the plain meaning of which is, that it is the peculiar and exclusive duty of Congress, when the nation is at peace, to change that state into a state of war."[9] Though we may already be in an armed conflict with ISIS, any potential moves toward war with the Syrian government, or its supporters Russia and Iran, would represent a clear move into a new military paradigm, and raise the potential for the President to push us into a new war without any prior congressional approval.

This is not the first time Congress has run into issues of vague authorities or of President's starting a war without prior approval that expands far beyond original intent. The conflicts in Korea and Vietnam began without clear objectives in mind, and led to military quagmires that took decades longer than originally envisioned. The War Powers Resolution of 1973 represented a reassertion of congressional authority. This resolution made this very clear, stating its purpose was "to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgement of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such

[9] http://press-pubs.uchicago.edu/founders/documents/a1_8_11s11.html

situations."[10] As a final example of the intention of this legislation, the resolution even overcame a veto by President Nixon, illustrating a strong assertion of congressional authority.[11]

In the decades after the War Powers Resolution passage, Congress has often acted swiftly to approve a President's request for authorizations of military force as evidenced by the 1990 Gulf War. More recently, Congress has taken a back seat in the debate of how and when to authorize the use of military force to combat terrorism. With the fight against ISIS changing from a battle over territory to a battle against an insurgent group, and the high risk of unintentional escalation with the Syrian government or its supporters, it is critical for Congress to take a page out of recent history and reassert its role in military matters.

4. Congress should pass a new, tailored authorization as part of a broader political and military plan to degrade and ultimately destroy ISIS.

While reasserting its constitutional authority, Congress must avoid the mistakes of the past and pass an authorization that clearly defines the scope and limits of anti-ISIS action. Third Way recommends that Congress focus on the following parameters:

- Specificity: The authorization should be limited to ISIS and should not be used to justify going after a wider range of terrorist groups.

- Geographic limits: The authorization should be limited to areas where there are active ISIS involved armed conflicts. Congress should not authorize military action everywhere, but only where necessary to defeat ISIS on the battlefield.

- Avoiding a ground war: The authorization should specify that no ground troops are to be used in direct combat operations. If a President were to deem it necessary to send ground troops, the Administration should be required to return to Congress for further authorization.

- Reporting requirements: At regular intervals, the Administration should be required to report to Congress on the broader political, military and humanitarian plan for the military campaign, including the legal rationale for such action.

- Expiration: The authorization should expire so that each session of Congress would vote on authorizing continued action—every 18 months or two years.

When drafting a new AUMF, lawmakers should be cognizant of thorny questions, foremost among them, "What should be the scope and end goal of U.S. involvement in Syria?" Because the United States has the consent of the Iraqi government, strikes in that country are clearly in keeping with international law. But in Syria, strikes or support of opposition forces against ISIS could metastasize into conflict with Russia, Iran, the Assad regime, or anti-Western forces battling Assad. Therefore, before giving the Administration the go-ahead to continue intervening in Syria, Congress should press the President to clearly define a long-term strategy for U.S. military involvement. Specifically, Congress should condition a Syria-oriented AUMF on the Administration articulating its stance on

[10] http://avalon.law.yale.edu/20th_century/warpower.asp
[11] https://www.loc.gov/law/help/war-powers.php

whether Assad should remain in power, whether it envisions a partitioned Syria, and how it proposes to manage tensions between Syria's multiple ethnic groups and between Syrian Kurds and Turkey.

Conclusion

ISIS is a barbaric terrorist group. Its growth and recent actions have made it a paramount threat to our allies, our people in the region, and the U.S. homeland. President Obama was right to strike ISIS and then present a plan to combat them, and President Trump is right to continue Obama's campaign against the group. However, before immersing U.S. troops further in the conflict, Congress should pass legislation further specifying and defining the goals and extent of continued military action.

All too often since the invasion of Iraq, U.S. policy has been shaped by a pursuit of means, not ends. This lack of clearly defined objectives—regional, national, and local—has hamstrung the effective implementation of policies in the Middle East. Given this history, future military action must come in the context of a broader political strategy that addresses the underlying drivers behind the growth of ISIS. One critical component of this is Congress exercising its constitutional war powers to check Presidential unilateral action and require public debate about objectives and strategy during conflict. By doing so, Lawmakers can work to clearly define such strategic ends and political objectives while providing a tailored authorization for military force.