

**House Foreign Affairs Committee Hearing**  
**on**  
**“Authorization for the Use of Military Force and Current Terrorist Threats”**

**July 25, 2017**

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Thank you, Chairman Royce, Ranking Member Engel, and distinguished members of the committee. I am honored to have this opportunity to appear before you to address the critical issue of authorizing the use of military force in the context of the evolving terrorist threat.

I am pleased to participate in the hearing today along with such distinguished witnesses, former Attorney General Michael Mukasey and former Legal Counsel to the Chairman of the Joint Chiefs of Staff Richard Gross. I was privileged to work for Judge Mukasey at the Justice Department when he was the Attorney General.

I approach these issues from the perspective of my years of service as a national security lawyer and counterterrorism official in the executive branch. From this vantage point, the importance of updating and clarifying the 2001 Authorization for Use of Military Force (“AUMF”) is clear. By renewing this authority in light of the current terrorism landscape, Congress can provide explicit authority for our counterterrorism efforts, while exercising responsible oversight consistent with Congress’s role under the Constitution.

I dedicated more than two decades to public service as a government attorney and official on a range of national security, intelligence, and law enforcement matters under both Republican and Democratic administrations. Most recently, I was the Director of the National Counterterrorism Center, an agency responsible for operating as the government’s hub for terrorism intelligence and analysis. In this capacity, I was responsible for briefing the President and National Security Council on terrorism threats and trends and for the strategic operational planning of counterterrorism activities to help ensure we implemented a whole-of-government approach to our counterterrorism efforts.

Prior to NCTC, I served as the General Counsel of the National Security Agency, where I was the agency’s chief legal officer. At the Department of Justice, I held several leadership positions, including Acting Assistant Attorney General and Deputy Assistant Attorney General for National Security. Under President Obama, I served as Special Counselor to the Attorney General and led the review of detainees held at Guantanamo Bay. During Director Robert Mueller’s tenure at the FBI, I served as his Special Counsel. I also worked as a federal prosecutor in Washington, D.C., for over a decade, and as a Trial Attorney in the Justice Department’s Civil Rights Division.

I will begin by describing the current threat landscape and why continued reliance on the 2001 Authorization for Use of Military Force (“AUMF”) for dealing with today’s threats is problematic. Next, I will address the importance of carefully crafting any new AUMF to ensure that the government has sufficient authority and operational flexibility to achieve the mission without ceding Congress’ power over declaring and overseeing war, and without eroding American values. Finally, I will offer some thoughts on how Congress can draft a new AUMF to achieve these ends.

## **Today’s Threat Landscape**

The need to update and clarify the 2001 AUMF stems directly from the dynamic and persistent nature of terrorism threats to the United States. Over the past several years, the range of threats we face from terrorist groups has become increasingly diverse, fragmented and geographically expansive. The continuing appeal of the jihadist narrative and the adaptive nature of these groups have led to the emergence of new threats and pose substantial challenges to the efforts of our counterterrorism community.

By any measure, the so-called Islamic State or ISIS presents the most urgent threat to our security today. The group has exploited the conflict in Syria and sectarian tensions in Iraq to entrench itself in both countries. Using both terrorist and insurgent tactics, the group has seized and is governing territory, while at the same time securing the allegiance of allied terrorist groups across the Middle East and North Africa. ISIS’s sanctuary—while significantly diminished under pressure from the U.S.-led military coalition—has enabled the group to recruit, train, and execute external attacks, as we have seen in Europe, and to incite assailants around the world. ISIS has recruited thousands of militants to join its fight in the region and uses its propaganda campaign to radicalize others in the West. And at the same time, we continue to face an enduring threat from al-Qaida and its various affiliates, who maintain the intent and capacity to carry out attacks in the West.

More broadly, the rise of ISIS should be viewed as a manifestation of the transformation of the global jihadist movement over the past several years. We have seen this movement diversify and expand in the aftermath of the upheaval and political chaos in the Arab world since 2010. Instability and unrest in large parts of the Middle East and North Africa have led to a lack of security, border control, and effective governance. In the last few years, four states—Iraq, Syria, Libya, and Yemen—have effectively collapsed. ISIS and other terrorist groups exploit these conditions to expand their reach and establish safe havens.

As a result, the threat now comes from a decentralized array of organizations and networks. Specifically, al-Qaida core continues to support attacking the West and is vying with ISIS to be the recognized leader of the global jihad. There is no doubt that sustained U.S. counterterrorism pressure has led to the steady elimination of al-Qaida’s senior leaders and limited the group’s ability to operate, train, and recruit operatives. At the same time, the core leadership of al-Qaida continues to wield influence over affiliated and allied groups, such as Yemen-based al-Qaida in the Arabian Peninsula (“AQAP”). Indeed, on three occasions over the past several years, AQAP has sought to bring down an airliner bound for the United States. And

there is reason to believe it still harbors the intent and substantial capability to carry out such a plot.

In Syria, veteran al-Qaida fighters have traveled from Pakistan to take advantage of the permissive operating environment and access to foreign fighters. They are focused on plotting against the West. Al-Shabaab also maintains a safe haven in Somalia and threatens U.S. interests in the region, asserting the aim of creating a caliphate across East Africa. The group has reportedly increased its recruitment in Kenya and aims to destabilize parts of Kenya. Finally, al-Qaida in the Islamic Maghreb (“AQIM”), its splinter groups, and Boko Haram—now an official branch of ISIS—continue to maintain their base of operations in North and West Africa and have demonstrated sustained capabilities to carry out deadly attacks against civilian targets.

### **The Need to Update the 2001 AUMF**

Against this backdrop, it is clear that the 2001 AUMF is not well-suited to today’s evolving terrorist threats. Enacted just days after the nation was attacked on September 11, the 2001 AUMF provided the president the authority to use “all necessary and appropriate force” against those responsible for the attacks.<sup>1</sup> As Congress and the White House were negotiating the scope of this authorization, smoke was still rising from the ashes of the Pentagon, the number of dead was still being tallied, and fears of another attack were palpable.<sup>2</sup> Even under these circumstances, Congress rejected calls for an open-ended AUMF that would have given the President untethered authority “to deter and pre-empt any future acts of terrorism or aggression against the United States.”<sup>3</sup> The 60-word authorization that Congress ultimately passed provided authority for using military force only against the perpetrators of 9/11 for the specific purpose of preventing those perpetrators from attacking the country again.

Almost 16 years later, the 2001 AUMF has now been invoked over 37 times in at least 14 different nations against more than half a dozen terrorist groups.<sup>4</sup> It is unlikely that members of Congress who voted for the 2001 AUMF would have contemplated that the law would authorize

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<sup>1</sup> 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> (“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.”).

<sup>2</sup> For a detailed accounting of the circumstances of the drafting and vote on the 2001 AUMF see Gregory Johnsen, *60 Words and a War Without End: The Untold Story of the Most Dangerous Sentence in U.S. History*, BuzzFeed, Jan. 16, 2014, *available at* [https://www.buzzfeed.com/gregoryjohnsen/60-words-and-a-war-without-end-the-untold-story-of-the-most?utm\\_term=.dmGmgRyAP#.kn97pNXrR](https://www.buzzfeed.com/gregoryjohnsen/60-words-and-a-war-without-end-the-untold-story-of-the-most?utm_term=.dmGmgRyAP#.kn97pNXrR).

<sup>3</sup> *Id.*

<sup>4</sup> Congressional Research Service, May 11, 2016 Memorandum, *available at* <https://fas.org/sgp/crs/natsec/pres-aumf.pdf>.

the current war with ISIS. And two thirds of the House and three quarters of the Senate were not in office when the 2001 AUMF was passed.<sup>5</sup>

The legal and policy reasons for applying the 2001 AUMF to “associated forces” of al-Qaida and the Taliban and to ISIS have been well-documented.<sup>6</sup> In my experience, the executive branch has approached the decision to apply the 2001 AUMF with deliberate care and seriousness. Such a determination has been made at the most senior levels of the government, following factual reviews based on input from the intelligence community.

In particular, the decision to apply the 2001 AUMF to ISIS was based largely on the group’s historic roots and close connection to al-Qaida. The government further determined that the more recent rift in leadership between ISIS and al-Qaida did not undermine this conclusion. However, this decision has been viewed skeptically by some, and there have been good faith disagreements about the application of the 2001 AUMF to ISIS. This controversy has highlighted the fact that, as terrorist groups threatening the United States continue to splinter, evolve, and emerge, it will become increasingly difficult to encompass them under the 2001 AUMF. The legal and policy arguments for applying the 2001 AUMF to groups that threaten the United States are not “infinitely elastic.”<sup>7</sup>

Indeed, the language in the 2001 AUMF requiring a nexus to the 9/11 attacks may unduly constrain the executive’s ability to use military force in certain circumstances and invite legal challenges, including to the scope of detention authority, that complicate our counterterrorism efforts.<sup>8</sup> At the same time, the 2001 AUMF’s lack of time limits, open-ended definition of who is covered, and omission of reporting requirements have undermined Congress’s ability to conduct responsible oversight of the executive in its use military force against terrorist groups.

The Founders wisely entrusted the legislative branch with the power to declare war. They recognized that war authorities confer extraordinary powers on the president and that war should not be entered into lightly nor conducted secretly. But Congress’ duties do not end with

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<sup>5</sup> See Senator Jeff Flake Press Release, June 20, 2017, *available at* <https://www.flake.senate.gov/public/index.cfm/2017/6/flake-nearly-two-thirds-of-congress-not-yet-elected-when-current-aumf-enacted>.

<sup>6</sup> See 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/wpcontent/uploads/2016/12/framework.Report\\_Final.pdf](https://www.justsecurity.org/wpcontent/uploads/2016/12/framework.Report_Final.pdf); see also 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/>.

<sup>7</sup> *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>.

<sup>8</sup> See Charles Stimson & Hugh Danilak, The Case Law Concerning the 2001 Authorization for Use of Military Force and Its Application to ISIS, The Heritage Foundation, *available at* <http://www.heritage.org/defense/report/the-case-law-concerning-the-2001-authorization-use-military-force-and-its>.

authorizing war, whether through a formal declaration of war or the passage of an AUMF. Congress is also charged with overseeing the executive branch and making funding decisions. Regular oversight of military activities, including monitoring any changes on the ground and the adequacy of legal authorities, is required for Congress to fully discharge its constitutional duties.<sup>9</sup>

In light of changed circumstances, and with the benefit of 16 years of experience, Congress should reassess and clarify the authorities the President needs to defeat the terrorist groups we face today and the checks that are necessary to maintain an appropriate balance between the executive and legislative branches of our government.

### **Drafting an AUMF for Today's Threats**

In drafting our Constitution, the Framers entrusted Congress with the decision to send the country into war for good reason. As James Madison famously wrote to Thomas Jefferson in 1798, "[t]he constitution supposes, what the History of all Governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care vested the question of war to the Legislature."

In exercising its constitutional responsibility, Congress should begin by conducting a careful assessment of the extent of military force necessary and appropriate for addressing today's terrorist threats. The government has a range of powerful and effective tools for fighting terrorism. Military force is certainly one of those tools, but it is not the right tool for all national security threats. Nor is military force, when it is needed, sufficient on its own. As Defense Secretary James Mattis recently testified before the Senate, "[o]ur recent experiences have reminded us that we should engage more using all components of our national power, and use military force only when it is in the vital interest of the United States, when other elements of national power have been insufficient in protecting our national interests, and generally as a last resort."<sup>10</sup>

In updating the authority for using military force against certain terrorist groups, Congress should assess key issues such as whom force should be authorized against, for what purpose, where, for how long, and subject to what reporting and transparency requirements. Congress should draft any new authorization to reflect Congress's intent with respect to such issues. Clear drafting and thoughtful limitations are critical to ensuring the operational effectiveness of the authority and to prevent the authorization from being used beyond the scope of Congress' intent or in ways that undermine American values or our long-term security interests.

Key issues that Congress should consider in drafting a new AUMF include:

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<sup>9</sup> Deciding to Use Force Abroad: War Powers in a System of Checks and Balances, The Constitution Project, *available at* [http://constitutionproject.org/pdf/War\\_Powers\\_Deciding\\_To\\_Use\\_Force\\_Abroad1.pdf](http://constitutionproject.org/pdf/War_Powers_Deciding_To_Use_Force_Abroad1.pdf).

<sup>10</sup> Nomination Hearing Statement for James N. Mattis to be Secretary of Defense, Senate Armed Services Committee, Jan. 12, 2017, *available at* [https://www.armed-services.senate.gov/hearings/17-01-12-confirmation-hearing\\_-mattis](https://www.armed-services.senate.gov/hearings/17-01-12-confirmation-hearing_-mattis).

## Whom Can Force Be Used Against

Armed conflicts with non-state entities like ISIS are more difficult to define than traditional wars against nations. The failure to carefully delineate the non-state entities subject to a statutory grant of authority for the use of force may lead to uncertainty and the kind of controversies that we have seen under the 2001 AUMF. This undermines Congress' role in determining whom the country goes to war against and makes it more likely that wartime authorities to kill and detain will be used beyond their appropriate scope. Congress should name the specific groups it is authorizing military force against in such a way that is precise enough to prevent unintended expansion of the authority, while also retaining sufficient flexibility to encompass groups, such as ISIS, that may go by more than one name, or may in the future rebrand themselves under another name.

For example, in authorizing force against “associated forces,” Congress should clearly define the term to allow the executive branch to use military force against groups that join ISIS in the armed conflict against the United States. The definition of the term should be tailored to the requirements of the current conflict and include only those groups that have entered the fight as a party to the conflict with the United States, not groups that merely express allegiance to ISIS or could hypothetically enter the fight in the future. Defining “associated forces” too broadly would allow the AUMF to be expanded beyond congressional intent, and could allow for detention and targeting authorities beyond what is permitted under the laws of war.<sup>11</sup>

In this context, it is critical to remember that preemptively authorizing the president to use force against currently unknown groups is generally not necessary for our security. Under Article II of the Constitution, the president has independent authority to use military force to defend the nation from attack. If Congress believes that a more expansive use of military force is needed, it can, and should, provide the executive with the appropriate authorization at that time based on the particulars of any new threat. In addition, law enforcement and other measures short of war may be used at all times to protect the nation from newly emerging threats.

## Specifying the Purposes for Authorizing Military Force

Terrorism is a persistent threat that requires an active government response at all times. Wartime authorities, however, are necessary when terrorist groups pose a sufficient threat that justifies the use of military force. It is important not to confuse our ongoing effort to fight terrorism, and the need to use force against specific terrorist groups at certain times. For example, AUMF-based military authorities are needed for the armed conflict against al-Qaida and ISIS. They are not currently needed, and should not be conferred to the executive branch, for other groups that do not pose a similar threat.

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<sup>11</sup> Benjamin Wittes & Jennifer Daskal, *The Intellectual—But Not Political—AUMF Consensus*, Lawfare Blog, Mar. 2, 2015, available at <https://www.lawfareblog.com/intellectual-not-political-aumf-consensus>.

To avoid this problem, Congress should clearly specify the purpose or purposes for which military force is authorized. In doing so, Congress should consult with the executive branch regarding its counter-ISIS strategy and tailor authorities to support that strategy. For instance, military force could be authorized for the purpose of protecting the national security of the United States from the threat posed by ISIS until that threat can be adequately addressed by non-military means. Failure to include a clear purpose, or authorizing force for a mission that can never be fully achieved, such as preventing all future attacks, blurs the distinction between counterterrorism and war, and risks embroiling the nation in never-ending armed conflict.

### Specifying Where Military Force Can Be Used

One of the challenges that Congress currently faces in drafting a new AUMF is reaching a consensus about where the new authorities will apply. Given that non-state terrorist organizations like ISIS can move across national boundaries with relative ease, the executive branch needs the operational flexibility to use force against imminent terrorist threats and groups engaged in armed conflict with the United States, wherever they may reside.

As a result, some leaders are understandably wary of geographic limitations that will restrict the executive branch's ability to take the fight to ISIS. Others, however, are concerned about supporting an authorization that could be used to authorize the use of force anywhere in the world subject only to the constraints of international law.<sup>12</sup> Some AUMF proposals offer creative solutions to these competing concerns by specifying the countries where Congress is currently authorizing force and providing a mechanism for the executive branch to seek expedited approval for expanding the use of force to additional countries.

### Specifying the Type of Force that Is Authorized

The question of whether to place limitations on the use of ground troops has posed a substantial challenge to Congress in considering a new AUMF. As a policy matter, on one side of the debate are those who are concerned about tying the Commander-in-Chief's hands in a fluid situation, and on the other side are those who do not want to vote for an ISIS authorization that may be used to start another ground war on the scale of Afghanistan or Iraq, at least not without an explicit vote from Congress.

Legally, some mistakenly assume that Congress simply does not have the constitutional authority to limit the use of ground troops. Neither the history of past war authorizations<sup>13</sup> nor U.S. case law<sup>14</sup> supports this view. While the Commander-in-Chief has wide strategic latitude

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<sup>12</sup> See e.g., Remarks by Senator Rand Paul, Reviewing Congressional Authorizations for the Use of Military Force, Senate Foreign Relations Committee, June 20, 2017.

<sup>13</sup> For a detailed analysis finding that 37 percent of past war authorizations have included limitations on the type or amount of force that can be used, see Bill French & John Bradshaw, Ending the Endless War, at 23-26, National Security Network, February 2015, available at [http://nlnetwork.org/cms/assets/uploads/2014/08/ENDING-THE-ENDLESS-WAR\\_2.2015-UPDATE.pdf](http://nlnetwork.org/cms/assets/uploads/2014/08/ENDING-THE-ENDLESS-WAR_2.2015-UPDATE.pdf).

<sup>14</sup> *Bas v. Tingy*, 4 U.S. 37 (1800).

once force has been authorized, Congress has the power in the first instance to decide whether to authorize “all out war” or to authorize more limited uses of the armed forces for specific purposes.

### Sunsets and Renewal Provisions: Limiting the Duration of the Authority

Another issue in Congress has been whether to include an expiration date, known as a sunset. Some fear that a sunset will signal to the United States’ enemies that we plan to end hostilities at that time. However, as national security experts across the political spectrum have repeatedly explained, a sunset does not end the war—unless Congress and the American people decide it is time to do so. A sunset imposes a time limit for revisiting the authorities to assess whether any adjustments are necessary. As the sunset approaches, Congress would be required to assess any changed circumstances that warrant expanding, narrowing, or, at some point, ending the use of military force. This forcing mechanism, which was lacking in the 2001 AUMF, is critical for ensuring continued congressional approval, engagement, and oversight as conflicts evolve.<sup>15</sup>

Such good government practices reflect our nation’s strength and should not be viewed as a sign to our enemies that we plan to give up the fight. As former General Counsel of the Department of Defense and CIA recently explained, a properly structured reauthorization provision with a mechanism for revising and 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.<sup>16</sup> And former Secretary of Defense Ash Carter said that a 3-year AUMF sunset was a “sensible and principled provision,” though the conflict would very likely last far longer.<sup>17</sup> A sunset is important for preventing the new authorization from being used in unforeseen ways, and I believe that a 3-year sunset is reasonable from a national security perspective.

### Requirements for Keeping Congress and the Public Informed

One of the most significant improvements that Congress can make over the 2001 AUMF is to include relevant reporting requirements. Regular and detailed reporting to Congress and the

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<sup>15</sup> See Benjamin Wittes & Jennifer Daskal, *The Intellectual—But Not Political—AUMF Consensus*, Lawfare Blog, Mar. 2, 2015, available at <https://www.lawfareblog.com/intellectual-not-political-aumf-consensus>; see also Jack Goldsmith et al., *Five Principles That Should Govern any U.S. Authorization of Force*, The Washington Post, Nov. 14, 2014, 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=.597ab37f6d3f](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=.597ab37f6d3f).

<sup>16</sup> *Is it Time for Congress to Pass an ISIS-Specific AUMF?*, Remarks of Stephen Preston, The Heritage Foundation, May 1, 2017, available at <http://www.heritage.org/defense/event/it-time-congress-pass-isis-specific-aumf>.

<sup>17</sup> Secretary of Defense Ash Carter, Statement on the President’s Request for Authorization to Use Military Force Against ISIL before the Senate Foreign Relations Committee, Mar. 11, 2015, available at <https://www.defense.gov/News/Speeches/Article/606652/>.



public about the war effort is vital to our democracy, necessary for Congress to fulfill its oversight functions, and strengthens the legitimacy of the mission. Many existing AUMF proposals include model reporting and transparency provisions that should be considered. Examples include reporting on the legal and factual basis for any expansions of the conflict to new groups or locations, the number of civilians and combatants killed, and any changes to key legal interpretations.

### Ensuring Compliance with International Law

Demonstrating to our allies and enemies alike that we are nation of laws and that we abide by our international commitments is critical to winning the fight against terrorism. As Secretary Mattis recently testified, “we must also embrace our international alliances and security partnerships. History is clear: nations with strong allies thrive and those without them wither. Strengthening our alliances requires finding common cause, even with imperfect partners; taking no ally for granted; and living up to our treaty obligations. When America gives its word, it must mean what it says.”<sup>18</sup>

Complying with our commitments is not only important for maintaining allies and the legitimacy of the mission, but also because we want other countries to be bound by those same rules. As my friend John Bellinger told the Senate last month, “It is important that the United States observe international law rules governing the use of force not only because the U.S. has agreed to be bound by the U.N. Charter but because we want other countries like Russia and China to follow the same rules...If the United States violates or skirts international law regarding use of force, it encourages other countries—like Russia or China—to do the same and makes it more difficult for the United States to criticize them when they do so.”<sup>19</sup>

While all statutes must already be interpreted, whenever possible, consistently with the international obligations of the United States,<sup>20</sup> explicitly stating in the authorization that force used under it must comply with international law would send a strong message to our allies and enemies alike about the enduring values of our country.

### Dealing with Existing AUMFs

Two AUMFs remain on the books today. The 2001 AUMF passed after 9/11 and the 2002 Iraq authorization that targeted the Saddam Hussein regime. Passing a new AUMF could mean repealing these old authorities and passing one new consolidated authority; leaving the 2001 AUMF in place and passing a new authorization for ISIS; or amending the 2001 authorization to include ISIS.

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<sup>18</sup> Nomination Hearing Statement for James N. Mattis to be Secretary of Defense, Senate Armed Services Committee, Jan. 12, 2017, *available at* [https://www.armed-services.senate.gov/hearings/17-01-12-confirmation-hearing\\_-mattis](https://www.armed-services.senate.gov/hearings/17-01-12-confirmation-hearing_-mattis).

<sup>19</sup> Statement by John B. Bellinger III, Reviewing Congressional Authorizations for the Use of Military Force, Senate Foreign Relations Committee, June 20, 2017, *available at* [https://www.foreign.senate.gov/imo/media/doc/062017\\_Bellinger\\_Testimony.pdf](https://www.foreign.senate.gov/imo/media/doc/062017_Bellinger_Testimony.pdf).

<sup>20</sup> *See Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

Whichever approach Congress takes, it should not leave any ambiguity about how the remaining authorities apply. The 2002 Iraq AUMF is no longer needed and should be repealed. And any new authorization for ISIS should repeal and replace the 2001 AUMF, or supersede the authorities in the 2001 AUMF as pertains to ISIS if the 2001 AUMF remains in place.

### Addressing Detention Authority

By authorizing “all necessary and appropriate force” against the perpetrators of the 9/11 attacks, the 2001 AUMF provides the authority for the military to detain members of al Qaeda and the Taliban engaged in armed conflict against the United States.<sup>21</sup> But because the application of the 2001 AUMF to ISIS remains controversial, the authority to detain members of ISIS is on less solid legal ground. If the administration were to bring ISIS fighters to Guantanamo, where detainees are entitled to bring habeas petitions, courts may determine that their detention is not lawful under the 2001 AUMF.<sup>22</sup>

A new AUMF that authorizes necessary and appropriate force against ISIS would provide the authority to detain ISIS fighters consistent with the laws of war. This would allow for in theatre military detention and lawful, humane interrogation approaches to gather intelligence to support the mission.

### **Conclusion**

The terrorist threat confronting the nation is complex, serious, and evolving. Congress should update the 2001 AUMF—which is increasingly outdated given the threats the country is facing today—to explicitly provide a mandate for the use of military force and the authority that is warranted. In doing so, Congress should provide the executive branch with the operational flexibility to prosecute those wars effectively.

At the same time, it should tailor those authorities to prevent them from being used for future wars against unnamed enemies that Congress, and the American people, did not intend to authorize. Passing a properly tailored AUMF with meaningful oversight and transparency is Congress’ democratic responsibility.

Fulfilling this responsibility will show our troops that Congress is behind them, bolster American leadership, assure our allies and partners that the United States respects human rights and the rule of law, and demonstrate to our enemies that we are committed to their defeat.

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<sup>21</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

<sup>22</sup> See e.g. Jack Goldsmith, The Practical Need for an ISIL AUMF, Lawfare Blog, Feb. 8, 2017, available at <https://www.lawfareblog.com/practical-legal-need-isil-aumf>; Charles Stimson & Hugh Danilak, The Case Law Concerning the 2001 Authorization for Use of Military Force and Its Application to ISIS, The Heritage Foundation, available at <http://www.heritage.org/defense/report/the-case-law-concerning-the-2001-authorization-use-military-force-and-its>.