



The Risk of Delay

The Need for a New Authorization for Use of Military Force

By Travis W. Reznik

In September 2014, President Barack Obama announced a four-part plan to systematically destroy the so-called Islamic State (IS), a plan that included sustained military operations in Iraq,

into Syria, and “wherever [the terrorists] are.”¹ While President Obama welcomed congressional support for the effort in order to show the world that America was united in confronting this new danger, he claimed the executive branch had the authority to unilaterally approve such use of military force against IS.² The President’s justification rested on two congressional resolutions passed into law over a

dozen years earlier: the 2001 and 2002 Authorizations for Use of Military Force (AUMFs). Despite specifically authorizing the use of military force against those responsible for the 9/11 attacks and the terrorist threat posed in Iraq, respectively, the 2001 and 2002 AUMFs have remained the primary basis for our nation’s counterterrorism efforts abroad for over 15 years.³ Yet during this period, the world has witnessed the collapse of Saddam Hussein’s regime, death of Osama bin Laden, proliferation of new terrorist groups across the Middle East, Southeast Asia, and Africa, and the international expansion of IS.

President Obama’s decision to engage IS under the purview of these AUMFs—which came on the heels of Abu Bakr al-Baghdadi’s June 2014 announcement of the so-called Islamic caliphate—re-energized the debate among Congress, White House, and public regarding the need for a new AUMF to more appropriately and legally authorize U.S. military

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force against the expanding IS threat. The Obama administration assessed that the existing AUMFs sufficiently authorized the use of military force against IS based on the group's former ties to al Qaeda as well as its presence in Iraq. Members of Congress assessed the connection between IS and al Qaeda was tenuous at best (since IS had not spawned until 2004) and began calling for a new AUMF to specifically authorize the use of force against IS. However, neither side of the aisle could agree on the proper scope, authorities, or limitations of a new AUMF, leaving Obama to finish out his Presidential term by continuing to justify the use of military force against IS and other terrorist organizations under the 2001 and 2002 AUMFs. Despite congressional recognition of the need for a new AUMF, given the questionable link between the existing AUMFs and the use of military force against IS, the status quo of relying on the 2001 and 2002 authorizations seemed good enough—until now.

Under the Obama administration, there was no pressing reason for Congress to compromise and draft a new AUMF because there existed no practical context for the courts to interpret the legality of President Obama's extension of the AUMF.⁴ However, with a new commander in chief who has vowed to ramp up efforts to wipe out terrorism and to "load Guantanamo Bay [GTMO] with some bad dudes" (including IS detainees), the practical context of judicial review now looms on the horizon.⁵ If President Donald Trump sends an IS detainee to GTMO, that detainee will almost certainly petition for habeas corpus. The courts could then determine that the 2001 and 2002 AUMFs neither accurately nor lawfully authorize today's broad use of force against IS and other current terrorist threats.⁶ Given that the use of military force remains an essential option to counter these threats to keep America safe, the country cannot risk an adverse judicial determination based solely on insufficient and outdated statutes that could force a suspension in counterterrorism efforts. Such an outcome would allow IS and other terrorist groups to regroup and refit, unnecessarily

placing Americans in danger and the country at great risk of attack.

President Obama's unilateral authorization to use military force against IS in 2014 highlighted the first two reasons why a new AUMF is necessary: the dangers of the expansion of Presidential power regarding the declaration of war, and the international ramifications of relying on outdated statutes to use military force abroad. The unwillingness of Congress to compromise on a new AUMF contributed to a third reason: leaving a new and inexperienced commander in chief who has an unpredictable agenda with an unprecedented amount of pre-existing authority. President Trump's vow to bring IS detainees to GTMO produced a fourth urgent reason for Congress to act.

After examining how the broad language of the 2001 and 2002 AUMFs afforded the executive branch the flexibility to use military force for so long, this article expounds on the above four reasons why a new AUMF is necessary. It then examines why previous AUMF draft attempts have failed at gaining bipartisan congressional approval and concludes with suggested language that is palatable to both sides of the aisle for a new AUMF in 2017.

While the language in a new AUMF must strike a measured balance between flexibility and limitation, it is the inherent message behind passing a new authorization that is now most important. As James Mattis wrote in March 2015, a new AUMF resolution supported by a majority of both parties in both houses of Congress would send an essential message of American steadfastness to our people and to the global audience.⁷ Congress must act with courage and vigor to reach a compromise and send the message that the Nation is still committed to the fight against terrorism. The time for partisan debate and delay has passed. A new AUMF will not only satisfy the requirement for Congress to be more involved when committing American troops to conflict, bolster U.S. credibility on the international stage, and help limit the new President, but also send a message of American resolve and unity regarding the

war on terror and ensure that Washington can lawfully continue using military force to keep the Nation safe.

Broad Language: Breaking Down the 2001 AUMF

Despite specifically authorizing the use of military force against those responsible for the 9/11 attacks, the George W. Bush and Obama administrations cited the 2001 AUMF⁸ to initiate or continue military or related action a combined 37 different occasions, in countries including the Philippines, Georgia, Yemen, Djibouti, Kenya, Ethiopia, Eritrea, and Somalia.⁹ Beau Barnes demonstrated how this was possible by breaking down the 2001 AUMF based on five reference points: object, method, time, place, and purpose.¹⁰ Using Barnes's approach in a more straightforward manner—that is, in terms of who, what, when, where, and why the statute authorizes military force—it becomes clear how Presidents Bush and Obama were able to apply it so broadly.

Regarding the "who," the 2001 AUMF authorizes the use of force against those nations, organizations, or persons who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001. The resolution text itself is clear that Congress did not authorize the President to use military action against terrorists generally.¹¹ Yet because al Qaeda quickly claimed responsibility for the 9/11 attacks, any terrorist group that associates with it (as in the case of al Qaeda in the Arabian Peninsula) or was subsequently spawned from it (as in the case of IS) can be considered within the scope of the AUMF.¹² For example, in November 2016, the Obama administration made this determination for al Shabaab in Somalia, even though the group had not formed until 2006. President Obama stated because al Shabaab had publicly pledged loyalty to al Qaeda, made clear that it considers the United States an enemy, and was responsible for numerous plots, threats, and attacks against U.S. persons and interests in East Africa, the group was an "associated force" of al Qaeda and therefore within the scope of the 2001 AUMF.¹³

Moving on to the “what,” the AUMF authorizes the President to use all necessary and appropriate force, clearly meaning military force, and thus encompassing the use of lethal force. In compliance with international law, however, the modifiers *necessary* and *appropriate* do limit the President’s authority and ensure the force employed is consistent with what is “necessary and appropriate” to “prevent any future acts of international terrorism against the United States.” As Barnes explains, “Any force beyond that which is required to prevent future attacks would be unauthorized,” concluding that “if the United States had responded to the 9/11 attacks by reverting to the World War II–era practice of indiscriminate carpet bombing, that action would have been beyond that which was ‘necessary and appropriate’ to prevent future terrorist attacks.”¹⁴

In terms of the “when,” the AUMF contains no explicit reference to duration. The only temporal limitation is the nexus to the terrorist attacks that occurred on 9/11. As a result, the 2001 AUMF has seemingly authorized an indefinite use of force, as the mere passage of time (without any other factors) does not violate or terminate the authorization.¹⁵ Conversely, however, it is nearly impossible for the AUMF to last forever, as the number of actors actually responsible for the 9/11 attacks continues to diminish.¹⁶ Graham Cronogue best captures this catch-22, noting that because the conflict is not against a specific nation or well-defined organization, it is difficult to say when the conflict will end or what that end will even look like.¹⁷

The fourth aspect in examining the AUMF is its geographic scope. When Congress drafted the AUMF immediately after 9/11, it had an understandable lack of precise knowledge regarding the whereabouts for those responsible for the attacks. It therefore would have been difficult for Congress to have authorized military action in certain areas or specific countries. Consequently, the 2001 AUMF contains no geographic proscriptions or limitations. Therefore, if an organization that satisfies the 9/11 nexus is located in any foreign country, and that

foreign country is amenable to U.S. assistance, the President is legally authorized to use military force.¹⁸

The final aspect is the purpose. The 2001 AUMF authorizes the President to use force “in order to prevent any future acts of international terrorism against the United States.” While some observers view the “in order to” clause as a limiting function—in that the President can *only* use military force to prevent future terrorist attacks—others argue the clause bolsters a rhetorical and policy goal and opens the umbrella for a much broader use of military force.¹⁹ Others simply claim the “in order to” clause was included to satisfy the international law prohibition against reprisals.²⁰

After breaking down the 2001 AUMF, it becomes clearer how the statute’s language allowed the executive branch much room for broad interpretation. In December 2016, just weeks before leaving the White House, President Obama summarized his administration’s rationale in this regard. Arguing many of the points above, the 66-page memo titled *Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations* outlined why the 2001 AUMF sufficiently authorized military action against not only al Qaeda and the Taliban but also al Qaeda in the Arabian Peninsula, al Qaeda in Libya, al Qaeda in Syria, al Shabaab, and IS.²¹

Reasons for a New AUMF

President Obama’s December 2016 memo reinforces the first reason a new AUMF is necessary: the dangers regarding the expansion of Presidential power to unilaterally wage war. Although the Constitution allows the President as commander in chief to introduce U.S. Armed Forces into hostilities, the War Powers Act of 1979 *mandates* that the President *may only exercise these powers* pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its Armed Forces. While an AUMF satisfies this second require-

ment, the same act also states that “the *collective judgment of both the Congress and the President* will apply to the introduction of United States Armed Forces into hostilities.”²² Section 1542 of the law clarifies further, stating that the President in every possible instance shall consult with Congress before introducing the Armed Forces into hostilities, and after every such introduction shall *consult regularly* with the Congress until they are no longer engaged in hostilities or have been removed from such situations.²³

Despite such a clear mandate, the broad language in the current AUMFs does not require the President to seek collective judgment from, or regularly consult with, Congress regarding the application of military force. The repercussions have transcended more than mere constitutional or academic debate. In 2011, for instance, the American Civil Liberties Union sued the Obama administration for conducting a missile strike to kill Anwar al-Awlaki in Yemen, claiming that the United States was not at war with Yemen, that Yemen did not fall under the 2001 AUMF list of targets, and that the President did not have a “blank check” to kill terrorists all over the world.²⁴ Similarly, in July 2016, U.S. Army Captain Nathan Smith filed a lawsuit against the Obama administration for the illegal use of force and targeting against IS, contending that the President violated the War Powers Resolution by issuing Smith an illegal order given that Congress never approved a war against IS.²⁵ These two anecdotes highlight and summarize the first reason for why a new AUMF is necessary: Congress requires a more active and frequent role in reauthorizing the President’s authorization of military force.²⁶

The second justification for adopting a new AUMF pertains to the international ramifications and inherent damage to U.S. credibility as a result of relying on outdated statutes and the seemingly limitless Presidential authority to use military force.²⁷ As previously noted, the 2001 AUMF is expressly linked to the 9/11 attacks and al Qaeda. As it stands, however, portions of al Qaeda



Marines move through poppy field on their way to Patrol Base Mohmon in Lui Tal District, Helmand Province, Afghanistan, April 17, 2012 (U.S. Marine Corps/Ismael Ortega)

have expanded into new groups not even around in 2001, organizations such as IS, al Qaeda in the Arabian Peninsula, Boko Haram, and al Shabaab.²⁸ Valid connections between these terrorist threats and those responsible for the 9/11 attacks are already logically stretched. This dilemma is certainly not lost on our allies, who look to the United States as a legitimate leader on the global stage. Secretary of State John Kerry reiterated this message while advocating for the passage of President Obama's 2015 draft AUMF against IS, stressing, "I know from talking with many Foreign Ministers all over the world that they study our debates, and these public signals matter to them. The coalition itself will be stronger with passage of this AUMF."²⁹

Along these same lines, the United States is an international standard bearer that sets norms that are mimicked by other nations. If other states were to claim the broad-based authority that the United States currently does—to

target people anywhere, anytime—the result would be chaos.³⁰ As a leading democracy, the United States cannot afford to act in ways that it is not prepared to see proliferate around the globe. For instance, U.S. strategy regarding China focuses on binding China to international norms as it gains power in East Asia. By continuing with the status quo, the United States is not only discrediting its own legitimacy but also potentially facilitating similar destabilizing actions by China and countless other nations around the world.³¹

The third reason for needing a new AUMF pertains to the recent transfer of power from President Obama to Trump. President Obama had been in office for more than 5 years when he made the calculated decision to take military action against IS under the 2001 AUMF. This meant he had 5 years of experience as the commander in chief; Trump has little to none. Yet because Congress failed to pass a new AUMF during the final years of the

Obama administration, Trump entered office with the same latitude to wage war around the world and can point to the precedent set by the Obama administration to do so.³² Although Trump has pledged to avoid nation-building and regime change, he has simultaneously vowed to ramp up efforts to wipe out terrorism and "knock the hell out of [IS]."³³ As Representative Barbara Lee (D-CA) highlights, "For an inexperienced President who tweets and gets angry to have broad war-making power, it's a dangerous place to be."³⁴

In his few months in office, Trump signed 25 executive orders—several of them controversial—and has demonstrated a tendency to lash out against those who oppose him.³⁵ This behavior has caused concern among even Republican Congressmen. As Representative Jim Hines (R-CT) admitted, "Some of us are really worried about Trump."³⁶ Trump stepped into the White House with an unprecedented amount

of pre-existing authority, an unpredictable agenda, and limited experience as commander in chief. In the war against terrorism, Congress must pass a new AUMF to help define and codify his limits.³⁷

Finally, the most pressing reason lies in the Trump administration's drafting of an executive order that would direct the Pentagon to bring future IS detainees to GTMO.³⁸ As Jack Goldsmith explains:

President Obama extended the 2001 AUMF to apply to IS over two years ago, yet there was no practical context in which a court could consider the legality of the President's interpretation. But if President Trump follows through on his order to bring IS detainees to GTMO, then suddenly President Obama's extension of the AUMF to IS will be subject to judicial review. The moment the Trump administration brings an IS detainee to GTMO, that detainee will almost certainly seek habeas review in court.³⁹

Goldsmith continues, "It is easy to imagine a habeas court ruling that the President does not have the authority to detain a member of IS because the 2001 AUMF does not extend to IS."⁴⁰ The United States would then run the risk of the courts declaring all of the President's military efforts against IS under the 2001 AUMF to be unlawful.⁴¹ Such a determination could force the military to suspend all counterterrorism efforts against IS—therefore allowing the group to rebuild, refit, and re-attack.⁴² Since IS remains a threat to the United States, Congress must ensure the President and our troops maintain the legal authority to degrade and destroy the group—and must act *before* Trump brings any IS detainee to GTMO.

A Divided Congress: Why Previous AUMF Drafts Failed

For nearly 3 years now, Congress has recognized the need to update the AUMFs, yet remains unable and unwilling to compromise on how the resolution should ultimately read. This section examines three of the recent AUMF draft attempts and highlights what

caused Congress to balk at passing any of them into law.

The first attempt, the Authorization for Use of Force Against the Organization Called the Islamic State, arose immediately after Obama's September 2014 announcement regarding his planned use of force against IS.⁴³ The first problem with this draft is that it set a geographic boundary to that of Iraq, which was quite limiting considering the spread of IS to Syria, east and central Africa, and beyond. Furthermore, because it was only specific to IS, it mentioned no such repeal of the previous AUMFs and in fact required that the 2001 and 2002 AUMFs remain intact in order to continue authorizing military force against al Qaeda and its associates. Finally, the draft did not contain any temporal limitation or "sunset clause."⁴⁴ This meant neither Congress nor the President would be committed to revisit the nature and scope of the war against Islamic terrorists on a regular basis.⁴⁵ Given these shortfalls, Congress remained divided on how the bill should read and remained hesitant to make such a serious vote in the lead-up to the midterm elections and therefore made no effort to pass the bill.⁴⁶

In February 2015, with 79 percent of Americans believing that the President should obtain congressional approval before deploying forces against IS, Obama submitted his own AUMF draft to Congress.⁴⁷ This draft aimed to authorize the use of military force against IS until 2018 and would have superseded the 2002 AUMF, yet it included no mandate for the President to routinely report to Congress where and when he had authorized the use of military force.⁴⁸ It also precluded the use of the Armed Forces in enduring offensive ground combat operations.⁴⁹ Republicans cringed at this limitation; as law professor Robert Chesney explains, "Whether it is constitutional or not, any limitation on the role of ground forces in the AUMF must not create unnecessary legal uncertainty for commanders. [President Obama's] vague prohibition on enduring offensive ground combat operations violates this principle."⁵⁰ The importance of maintaining flexibility for the possible use of

additional military capabilities was further underscored by Defense Secretary Robert Gates, who warned that there must be "boots on the ground" if there is to be any chance of success in the strategy against IS.⁵¹

As with the 2014 draft, Congress was again divided. Many Democrats believed a new AUMF would lead to wider and more extensive military involvement, while many Republicans feared an AUMF would be too limited and would tie the President's hands in the fight against a significant new enemy.⁵² Even House Speaker John Boehner (R-OH), who had spent months calling on Obama to send Congress his AUMF draft, dismissed it as being too restrictive.⁵³ As a result, Congress made no effort to pass the legislation, and the bill died within 2 months.

Several subsequent proposals over the next year similarly collapsed in partisan dispute, including Representative Adam Schiff's (D-CA) December 2015 resolution.⁵⁴ Goldsmith argues the Schiff bill was a great attempt as it remained "substantively neutral (it gave the President the same authorities he currently claimed to possess) yet procedurally constraining (it forced the President to communicate more with Congress about the conflict and forced Congress to be more involved)."⁵⁵ Schiff's draft authorized the use of military force against al Qaeda, the Taliban, IS, and associated forces; was authorized for only 3 years; and allowed the President to deploy combat ground troops. It also mandated that the President submit to the appropriate congressional committees and publish in the Federal Register a list of entities against which such authority had been exercised and the geographic location where such authority had been exercised at least once every 90 days.⁵⁶ This latter requirement promotes Presidential accountability to ensure that Members of Congress and the public know precisely against whom, and where, the United States is at war.⁵⁷ Most importantly, it superseded both the 2001 and 2002 AUMFs.⁵⁸

Despite the progress of the Schiff bill, Congress yet again could not compromise. Democrats continued to push for



Suspected al-Shabab militants wait to be taken away for interrogation during joint night operation between Somali security services and African Union Mission in Somalia forces in Mogadishu, Somalia, May 4, 2014 (Courtesy UN Photo/Tobin Jones)

tighter restrictions, while Republicans were fearful of curbing the President's ability to fight terrorists. Despite recognizing the 2001 and 2002 AUMFs were not a perfect fit for the campaign against IS, Congress seemed content to permit the de facto war against IS to continue without a formal declaration.⁵⁹

Proposed AUMF Language for 2017

Having examined the flaws of the existing drafts, while also demonstrating the dire need for a new AUMF, the question now becomes what does it mean to get a new AUMF right. The answer is not legislation that would grant the executive branch unbounded powers more suited for traditional armed conflicts between nations, but rather a framework that will support "a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America."⁶⁰ As such, this final section identifies the components that are neces-

sary in a new AUMF—a compromise from earlier draft attempts that is palatable to both sides of the aisle.

First and foremost, a new AUMF must supersede the 2001 and 2002 AUMFs. Since the inception of those bills, the war on terror has expanded to new groups and regions. The link between 9/11 and the Iraqi invasion to the legal justification for using military force today is becoming only more tenuous. The new draft should not include a specific reference to any previous attacks (as the 2001 AUMF referenced 9/11) but instead should be oriented toward preventing future attacks.

The draft should authorize the use of military force against all foreign terrorist organizations that have demonstrated the intent and capability to target the United States. At present, this includes IS and its branches, the Taliban, al Qaeda, as well as their affiliates and associates such as Boko Haram in Nigeria and al Shabaab in east Africa. The AUMF

should clearly delineate that if the military or Intelligence Community reasonably proves that a group has the capability, motive, and intent to attack the United States, then the use of military force should be authorized. The President—as commander in chief of the military—along with the Joint Chiefs of Staff and National Security Council should be the final arbiters in deciding if this threshold is met. Furthermore, as long as the underlying factors of a group remain unchanged—such as the personalities, activities, affiliation, and goals—any terrorist group simply changing its name can likewise be targeted under the AUMF. This would eliminate the possibility of the enemy using the rules and regulations of the AUMF to its advantage, which in this case would be simply changing names in order to escape deliberate targeting.

The new AUMF should clarify that the geographic reach of authorized military force against terrorists is global—it would reach every country but the



Airman assigned to 340th Expeditionary Air Refueling Squadron communicates with KC-135 Stratotanker pilots above Southwest Asia, July 20, 2017, in support of Operation *Inherent Resolve* (U.S. Air Force/Trevor T. McBride)

United States itself. A restriction to certain countries is unnecessary and fraught with diplomatic landmines. While the United States would not likely use military force in friendly states permitting effective cooperation with authorities, explicitly excluding allies from the authorization of military force would beg the question of why other countries were not similarly included. This would force the United States to publicly draw lines, needlessly alienate certain allies, and run the risk of creating safe harbors in certain areas for terrorists.⁶¹ As a limiting clause to this seemingly blank check, the AUMF should include language that the authorization of force would be limited only to places where U.S. military force could be used consistent with applicable international law concerning sovereignty and the use of force.⁶² Finally, the new AUMF should not include any reference to specific nations; an armed conflict with a country poses far too many risks for the executive branch to authorize alone. If an attack against the United States or its allies calls for a response similar to that of Afghanistan in 2001, Congress should specifically authorize that military action independently from the AUMF statute.⁶³

Moving on to the temporal limits of a new AUMF, the statute must include a sunset clause. Such a provision would satisfy the War Powers Act by ensuring that Congress, and not just the executive branch, would have a say regarding when and where the military engages in conflict. A sunset clause of 3 years would keep military options flexible in response to threats but would “pressure the [Office of the President] on a regular basis to explain the nature of the conflict and the reasons why it must continue, as well as pressure Congress to exercise its constitutional and democratic responsibilities to deliberate about and vote on (or at least face) the issue.”⁶⁴

To ensure sufficient oversight, a new AUMF must mandate that the President submit to the appropriate congressional committees within 60 days a list of entities and locations against which he has authorized and exercised military force. Finally, given that the enemy is constantly adapting, a principal challenge that the new AUMF must overcome is ensuring it does not become obsolete.⁶⁵ The AUMF must therefore include a provision that allows amendments to be added to sufficiently address new and unforeseen threats (subject to notification

to Congress), insofar as the new threats satisfy the aforementioned criteria of both intent and capability to target the United States.

Finally, in terms of what force the President is authorized to use, a new AUMF should communicate that while the President has the authority to use all necessary and appropriate force, the United States will only use lethal force as a last resort. Such lethal force would be as discriminating and precise as reasonably possible and would be a partnered effort with the host nation’s counterterrorism strategy.⁶⁶

Conclusion

Over the past several years, the task of adopting a new AUMF has proved easier said than done. With multiple viewpoints and competing arguments on the proper scope of a new AUMF, there may never be a perfect solution. Yet as terrorist groups continue to operate and proliferate across the globe and continue to threaten our freedoms, the use of military force is often the only option to counter these threats. Congress must reach a compromise to update the law and accurately reflect this reality; the time for partisan debate and delay has passed. Both sides of the aisle may not agree on every word or clause of a new AUMF, but they must acknowledge that a new AUMF will send the message that America remains united and committed to the fight against terrorism.

Congress must replace the 2001 and 2002 AUMFs with a new statute that strikes a balance between flexibility and limitation. Doing so will satisfy the requirement for Congress to be more involved when committing American troops to conflict, bolster U.S. credibility on the international stage, and help guide a new and inexperienced President. More important, a new AUMF will send a message of American steadfastness and unity in the fight against terrorism, and ensure that the United States can continue to lawfully use military force to keep America safe. A new AUMF may not make the war on terror any different, but the absence of one most certainly will. JFQ

Notes

¹ Barack Obama, “Statement by the President on ISIL,” Washington, DC, September 10, 2014, available at <<https://obamawhitehouse.archives.gov/the-press-office/2014/09/10/statement-president-isil-1>>.

² *Ibid.*

³ “Authorization for Use of Military Force,” SJR 23, 107th Cong., Congressional Record 147, daily ed. (September 18, 2001): Public Law 107-40; “Authorization for Use of Military Force Against Iraq Resolution of 2002,” HJR 114, 107th Cong., Congressional Record 148, daily ed. (October 16, 2002): Public Law 107-243.

⁴ Jack Goldsmith, “The Practical Legal Need for an ISIL AUMF,” *Lawfare*, February 8, 2017, available at <www.lawfareblog.com/practical-legal-need-isil-aumf>.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ James Mattis, “Using Military Force Against ISIS,” The Hoover Institution, March 4, 2015, available at <www.hoover.org/research/using-military-force-against-isis>.

⁸ To avoid unnecessary duplication, this analysis focuses solely on the 2001 Authorization for Use of Military Force (AUMF) as it has been the primary authorization for the use of military force abroad. Many of the same interpretations hold true for the 2002 AUMF, albeit for Iraq versus al Qaeda and the Taliban.

⁹ Matthew C. Weed, *Presidential References to the 2001 Authorization for Use of Military Force in Publicly Available Executive Actions and Reports to Congress*, Congressional Research Service (CRS) Memorandum (Washington, DC: CRS, May 11, 2016), 2, available at <www.hsdl.org/?abstract&did=792875>.

¹⁰ Beau D. Barnes, “Reauthorizing the ‘War on Terror’: The Legal and Policy Implications of the AUMF’s Coming Obsolescence,” *Military Law Review* 211, no. 57 (Spring 2002), 4–6.

¹¹ *Ibid.*, 4.

¹² *Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations* (Washington, DC: The White House, December 2016), 5, available at <www.justsecurity.org/wp-content/uploads/2016/12/framework-Report_Final.pdf>.

¹³ *Ibid.*

¹⁴ Barnes, 5.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, 9.

¹⁷ Graham Cronogue, “A New AUMF: Defining Combatants in the War on Terror,” *Duke Journal of Comparative & International Law* 22, no. 3 (Spring 2012), 5.

¹⁸ *Ibid.*, 7.

¹⁹ *Ibid.*, 6–7.

²⁰ *Ibid.*, 7.

²¹ *Report on the Legal and Policy Frameworks*, 5.

²² War Powers Resolution, 50 U.S.C. § 1541 (1973). Emphasis added.

²³ War Powers Resolution, 50 U.S.C. § 1542 (1973). Emphasis added.

²⁴ Cronogue, 10.

²⁵ Mary Louise Kelly, “When the U.S. Military Strikes, White House Points to a 2001 Measure,” National Public Radio, September 6, 2016, available at <www.npr.org/sections/parallels/2016/09/06/492857888/when-the-u-s-military-strikes-white-house-points-to-a-2001-measure>.

²⁶ Stephen I. Vladeck, “Ludecke’s Lengthening Shadow: The Disturbing Prospect of War Without End,” *Journal of National Security Law & Policy* 2, no. 1 (2006), 2.

²⁷ Barnes, 11.

²⁸ Cronogue, 14.

²⁹ John Kerry, “Support for Authorization for Use of Military Force,” Washington DC, February 11, 2015, available at <www.state.gov/secretary/remarks/2015/02/237384.htm>.

³⁰ Barnes, 13.

³¹ *Ibid.*

³² Ana Radelat, “Himes Seeks to Curb Trump’s War Powers,” *The CT Mirror*, December 9, 2016, available at <<http://ctmirror.org/2016/12/09/himes-seeks-to-curb-trumps-war-powers/>>.

³³ *Ibid.*

³⁴ Austin Wright, “Congress Leaves Trump with Unlimited War Powers,” *Politico.com*, December 29, 2016, available at <www.politico.com/story/2016/12/congress-trump-military-force-232815>.

³⁵ “President Trump’s Executive Orders,” The White House, available at <www.whitehouse.gov/briefing-room/presidential-actions/executive-orders>.

³⁶ Radelat.

³⁷ Wright.

³⁸ “Protecting America Through Lawful Detention of Terrorists and Other Designated Enemy Elements,” draft executive order, February 2017, available at <<https://assets.documentcloud.org/documents/3455640/Revised-draft-Trump-EO-on-detainees-and-Gitmo.pdf>>.

³⁹ Goldsmith, “The Practical Legal Need for an ISIL AUMF.”

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Stephen I. Vladeck, “Detention After the AUMF,” *Fordham Law Review* 82, no. 5 (2014), 5.

⁴³ “Authorization for Use of Military Force Against the Organization Called the Islamic State,” SJR 43, 113th Cong., September 8, 2014.

⁴⁴ *Ibid.*

⁴⁵ Jack Goldsmith, “Why a Sunset Clause is Important in Any New AUMF,” *Lawfare*, February 5, 2015, available at <www.lawfareblog.com/why-sunset-clause-important-any-new-aumf>.

⁴⁶ James Arkin and Alexis Simendinger, “Approval of War Authorization Against ISIL Uncertain in Congress,” *Real Clear Politics*, February 12, 2015.

⁴⁷ Lauren Leatherby, “Whatever Happened to the Debate Over Use of Force Against ISIS?” National Public Radio, June 17, 2015, available at <www.npr.org/2015/06/17/415203016/whatever-happened-to-the-debate-over-use-of-force-against-isis>.

⁴⁸ “Authorization for Use of Military Force Against the Islamic State of Iraq and the Levant,” The White House, 2015, available at <www.whitehouse.gov/sites/default/files/docs/aumf_02112015.pdf>.

⁴⁹ *Ibid.*

⁵⁰ Robert Chesney, “HASC Testimony: Towards a Better AUMF,” *Lawfare*, February 26, 2015, available at <www.lawfareblog.com/hasc-testimony-towards-better-aumf>.

⁵¹ William S. Castle, “The Argument for a New and Flexible Authorization for the Use of Military Force,” *Harvard Journal of Law & Public Policy* 38, no. 2 (Spring 2015).

⁵² Leatherby.

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