

**REPORT DOCUMENTATION PAGE**

Form Approved  
OMB No. 0704-0188

The public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports (0704-0188), 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.  
**PLEASE DO NOT RETURN YOUR FORM TO THE ABOVE ADDRESS.**

<b>1. REPORT DATE (DD-MM-YYYY)</b> 03/21/2017		<b>2. REPORT TYPE</b> Master's Thesis		<b>3. DATES COVERED (From - To)</b> AUG 2016 - JUN 2017	
<b>4. TITLE AND SUBTITLE</b> The Risk of Delay: Why the United States Must Adopt a New AUMF				<b>5a. CONTRACT NUMBER</b> N/A	
				<b>5b. GRANT NUMBER</b> N/A	
				<b>5c. PROGRAM ELEMENT NUMBER</b> N/A	
<b>6. AUTHOR(S)</b> Reznik, Travis W., U.S. Department of State				<b>5d. PROJECT NUMBER</b> N/A	
				<b>5e. TASK NUMBER</b> N/A	
				<b>5f. WORK UNIT NUMBER</b> N/A	
<b>7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES)</b> USMC Command and Staff College Marine Corps University 2076 South Street Quantico, VA 22134-5068				<b>8. PERFORMING ORGANIZATION REPORT NUMBER</b> N/A	
<b>9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)</b>				<b>10. SPONSOR/MONITOR'S ACRONYM(S)</b>	
				<b>11. SPONSOR/MONITOR'S REPORT NUMBER(S)</b> N/A	
<b>12. DISTRIBUTION/AVAILABILITY STATEMENT</b> Approved for public release, distribution unlimited.					
<b>13. SUPPLEMENTARY NOTES</b>					
<b>14. ABSTRACT</b> The United States must adopt a new Authorization for Use of Military Force (AUMF) resolution to re-establish Congress' role when using military force, bolster the United States' credibility on the international stage, help guide a new and inexperienced President, and ensure that the United States can continue to lawfully use military action to respond to today's terrorist threats and keep America safe.					
<b>15. SUBJECT TERMS</b> Authorization for Use of Military Force; AUMF; War Powers; Congressional Statutes; Counterterrorism; Islamic State					
<b>16. SECURITY CLASSIFICATION OF:</b>			<b>17. LIMITATION OF ABSTRACT</b>	<b>18. NUMBER OF PAGES</b>	<b>19a. NAME OF RESPONSIBLE PERSON</b>
<b>a. REPORT</b>	<b>b. ABSTRACT</b>	<b>c. THIS PAGE</b>			USMC Command and Staff College
Unclass	Unclass	Unclass	UU	37	<b>19b. TELEPHONE NUMBER (Include area code)</b> (703) 784-3330 (Admin Office)

United States Marine Corps  
Command and Staff College  
Marine Corps University  
2076 South Street  
Marine Corps Combat Development Command  
Quantico, Virginia 22134-5068

MASTER OF MILITARY STUDIES

---

---

**THE RISK OF DELAY: WHY THE UNITED STATES MUST ADOPT A NEW AUMF**

SUBMITTED IN PARTIAL FULFILLMENT  
OF THE REQUIREMENTS FOR THE DEGREE OF  
MASTER OF MILITARY STUDIES

**TRAVIS W. REZNIK**

AY 16-17

---

---

Mentor and Oral Defense Committee Member: Jill Goldenziel  
Approved: Jill Goldenziel  
Date: 20 March 2017

Oral Defense Committee Member: ERIC Y. SHIBUYA, PHD  
Approved: [Signature]  
Date: 20 MARCH 2017

LT Col Jarrod Stodenborough  
[Signature]

## *Table of Contents*

	Page
DISCLAIMER.....	i
EXECUTIVE SUMMARY .....	ii
Introduction .....	1
The Road to Today: History of the AUMF .....	4
A Divided Congress: Why Previous AUMF Drafts Failed .....	6
Broad Language: Breaking Down the 2001 AUMF.....	7
Reasons for a New AUMF .....	10
The Urgency Button: Why We Need a New AUMF Now .....	14
Counterarguments.....	15
Problems with Previous AUMF Drafts .....	19
Proposed AUMF Language for 2017 .....	21
Conclusion.....	25
ENDNOTES.....	26
BIBLIOGRAPHY .....	30

## DISCLAIMER

THE OPINIONS AND CONCLUSIONS EXPRESSED HEREIN ARE THOSE OF THE INDIVIDUAL STUDENT AUTHOR AND DO NOT NECESSARILY REPRESENT THE VIEWS OF EITHER THE MARINE CORPS COMMAND AND STAFF COLLEGE OR ANY OTHER GOVERNMENTAL AGENCY. REFERENCES TO THIS STUDY SHOULD INCLUDE THE FOREGOING STATEMENT.

QUOTATION FROM, ABSTRACTION FROM, OR REPRODUCTION OF ALL OR ANY PART OF THIS DOCUMENT IS PERMITTED PROVIDED PROPER ACKNOWLEDGEMENT IS MADE.

## Executive Summary

**Title:** The Risk of Delay: Why the United States Must Adopt a New AUMF

**Author:** Travis W. Reznik, USMC Command and Staff College

**Thesis:** The United States must adopt a new Authorization for Use of Military Force (AUMF) resolution to re-establish Congress' role when using military force, bolster the United States' credibility on the international stage, help guide a new and inexperienced President, and ensure that the United States can continue to lawfully use military action to respond to today's terrorist threats and keep America safe.

**Discussion:** In 2001 and 2002, the United States Congress promptly passed two statutes that authorized the President to use military force in response to the 9/11 terrorist attacks as well as the threat posed by Saddam Hussein's regime in Iraq. Known as Authorizations for Use of Military Force (AUMF), these statutes have continued to serve as the primary basis for our nation's counterterrorism efforts abroad for over 15 years. During this time, however, the United States has used military force against a vast array of non-state actors which are not clearly authorized by either the 2001 or 2002 AUMF. Despite recognition that a new AUMF is therefore necessary, congressional attempts to pass a new AUMF have fallen short of gaining bipartisan approval due to disagreements over how the resolution should ultimately read. As a result, the United States continues to face the dangers of the expansion of presidential power regarding the declaration of war; the international ramifications of relying on outdated statutes to use military force abroad; and a new and inexperienced Commander-in-Chief having inherited an unprecedented amount of authority. In addition to these dangers, however, a more pressing reason to adopt a new AUMF has suddenly developed. As President Trump plans to begin bringing IS and other terrorist detainees back to Guantanamo Bay prison, the executive branch's broad application of the AUMFs to counter today's terrorism may soon be subject to judicial review. If the courts determine the existing AUMF statutes do not sufficiently authorize the use of military force against these current threats, it could obligate the military to suspend the necessary counterterrorism efforts required to keep America safe. As terrorist groups continue to operate and proliferate across the globe, this is not a risk the United States nor the world can take. The time for Congress to debate and delay has passed; continued congressional inaction today might very well result in military inaction tomorrow. Congress must update the law to reflect the reality of the evolved war on terrorism. This paper helps this endeavor by analyzing the history and legalities of the AUMF, expounding on why a new AUMF is necessary and why the country can no longer afford for Congress to remain inactive, and presents suggested language that is palatable to both sides of the aisle.

**Conclusion:** Congress must replace the 2001 and 2002 AUMFs with a new statute that strikes a balance between flexibility, limitation, and accurate reflection of today's war on terrorism. A new AUMF will satisfy the requirement for Congress to be more involved when committing American troops to conflict, bolster the United States' credibility on the international stage, and help guide a new and inexperienced President. More importantly, a new AUMF will send a message of American steadfastness and unity in the fight against terrorism and will ensure that the United States can continue to lawfully use military force to keep America safe.

## ***Introduction***

On August 7, 2014, President Barack Obama authorized two United States military missions to counter Islamic State (IS) extremists in Iraq.\* The first mission was to protect American personnel located in Erbil; the second was a humanitarian effort at the request of the Iraqi government to help save thousands of Iraqi Kurds trapped on a mountain without food and water and facing almost certain death from IS fighters below.<sup>1</sup> These first two missions evolved into many, yet IS remained resilient and continued to strengthen. As a result, Obama announced in September 2014 a four-part plan to systematically destroy the group, which included sustained military operations in Iraq, into Syria, and “wherever [the terrorists] are.”<sup>2</sup> While 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.<sup>3</sup> Obama’s justification rested on two congressional resolutions passed into law over a dozen years earlier, resolutions which both his and the George W. Bush administration had relied on to justify the use of military force in the global war on terror. The first resolution was the 2001 Authorization for Use of Military Force (AUMF), which authorized the use of military force to pursue and eliminate those responsible for the September 11, 2001 attacks.<sup>4</sup> The second was the similar 2002 AUMF, which authorized the use of military force to counter the threat posed by Iraq, in particular the threat of weapons of mass destruction (WMD).<sup>5</sup>

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—quickly re-energized a debate among Congress, the White House, and the public

---

\*The Islamic State (IS) has gone by several aliases throughout its evolution, beginning as al-Qaida in Iraq (AQI) in 2004, then the Islamic State of Iraq and the Levant (ISIL), and eventually shortening its name to the Islamic State. This paper will refer to the group as IS, rather than discuss the group with the name it used at each point in history.

regarding the need for a new AUMF statute to more appropriately and legally authorize U.S. military force against the expanding IS threat. The Obama administration assessed the existing AUMFs sufficiently authorized the use of military force against IS based on the group's former ties to al-Qaida as well as their presence in Iraq. Members of Congress assessed the connection between IS and al-Qaida was tenuous at best (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, and limitations of a new AUMF.

Democrats believed a new AUMF would again over-empower the President and serve to extend the seemingly endless war without congressional consent.<sup>6</sup> Republicans feared a new AUMF would not be nearly as flexible as necessary for the President to effectively accomplish the counterterrorism mission.<sup>7</sup> As a result, multiple attempts to pass a new resolution fell short of gaining bipartisan congressional approval, and Obama finished 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 Congress' recognition for needing a new AUMF, as well as 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 AUMFs seemed good enough—until now.

Under the Obama administration, there was no pressing reason for Congress to compromise and draft a new AUMF for IS because there existed no practical context for the courts to interpret the legality of President Obama's extension of the AUMF.<sup>8</sup> However, with a new Commander-in-Chief in President Trump who has vowed to ramp up efforts to wipe out terrorism, but more importantly to "load Guantanamo Bay (GTMO) with some bad dudes," (including IS detainees), the practical context for judicial review now looms on the horizon.<sup>9</sup> If President Trump brings an IS detainee to GTMO, that detainee will almost certainly petition

habeas corpus. The courts could then determine—as many observers already question—that the 2001 and 2002 AUMFs do not accurately nor lawfully authorize today’s broad use of force against IS and other current terrorist threats.<sup>10</sup> 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 for 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. Congress’ unwillingness to compromise on a new AUMF contributed to the 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 the fourth reason and has pushed the urgency button on the issue. America can no longer afford for Congress to continue debating the issue on partisan lines and delay any action. Congress must act with courage and vigor to reach a compromise that addresses today’s realities, before it is too late.

In effort to aid the endeavor, this paper examines the history of the AUMF, why its language afforded the executive branch so much flexibility to use military force for so long, and why recent AUMF draft attempts ultimately failed in Congress. It then elaborates on the four reasons why the United States needs a new AUMF, and debunks several counterarguments as to

why a new AUMF may not be necessary. Finally, the paper ends with proposed AUMF language that offers a compromise regarding the scope, limitations, and duration of military force that is specific to today's threats.

The language in a new AUMF is important; it must strike a measured balance between flexibility and limitation, properly identify and justify lawful enemies, yet stop short of allowing the President to unilaterally authorize permanent war.<sup>11</sup> That said, it is the inherent message behind adopting a new AUMF that is now most important. A new AUMF will not only satisfy the requirement for Congress to be more involved when committing American troops to conflict, bolster the United States' credibility on the international stage, and help limit the new President; it will also send a message of American steadfastness and unity regarding the war on terror and ensure that the United States can lawfully continue using military force to keep America safe.

### ***The Road to Today: History of the AUMF***

To better understand why the AUMF has caused such debate, it is first necessary to examine the fundamental documents on which the principle is based. This section offers a brief chronology and background regarding the documents in question, as well as how the 2001 and 2002 AUMFs came to be.

First and foremost, the AUMF debate is grounded in Articles I and II of the U.S. Constitution. Article I, Section 8, Clause 11, referred to as the War Powers Clause, provides Congress with the power to declare war. Article II, Section 2, establishes the President as the Commander-in-Chief of the military.<sup>12</sup> While Congress has only officially declared war against eleven foreign countries throughout our nation's history (in only five separate wars), the Office of the President has used the authority as Commander-in-Chief to deploy Armed Forces abroad in situations of military conflict hundreds of times.<sup>13</sup> This dichotomy eventually led to the next

significant document, the War Powers Resolution of 1973, also known as the War Powers Act. Congress passed this federal law to check the President's power to commit the United States to an armed conflict without congressional consent, and is precisely where the term Authorization for Use of Military Force originates.<sup>14</sup>

Turning to the AUMFs, President Bush signed Senate Joint Resolution 23 on September 18, 2001. Known as the 2001 AUMF, this resolution authorized the President to use military force against those responsible for the September 11th attacks launched against the United States.<sup>15</sup> With dust still settling in New York, Shanksville, and Washington DC, it only took three days for Congress to agree on the resolution and allow the President to begin seeking justice on al-Qaida and the Taliban.

Just over a year later, Congress passed the 2002 AUMF, this time authorizing President Bush the authority to use all necessary and appropriate force to defend the national security of the United States against the continuing threat posed by Iraq.<sup>16</sup> A similar sense of urgency can be said for the 2002 AUMF, which President Bush signed in October 2002. The thought of Saddam Hussein developing and using WMDs, let alone his regime's harboring of and support to al-Qaida, were strong justifications to use military force in Iraq.<sup>17</sup>

Despite specifically authorizing the use of military force against those responsible for the 9/11 attacks and the terrorist threat posed in Iraq, the 2001 and 2002 AUMFs have remained the primary basis for our nation's counterterrorism efforts abroad for over 15 years. During this time the world has witnessed the collapse of Saddam's regime, the death of Osama bin Laden, the proliferation of terrorist groups across the Middle East, Southeast Asia, Africa, and the international expansion of IS. Facing these new threats along with a 400% increase in the

number of international terrorist incidents per year, the Office of the President and the military continue to rely heavily on these same AUMFs to keep America safe.<sup>18</sup>

### ***A Divided Congress: Why Previous AUMF Drafts Failed***

In response to President Obama's plan to systematically destroy IS in October 2014, Congress recognized the need to update the authority with which the President was authorizing the use of military force. Congress drafted Senate Joint (SJ) Resolution 43, titled Authorization for Use of Force Against the Organization Called the Islamic State, which focused on defending the American people and assisting the Iraqi Government in expelling IS from their territory.<sup>19</sup> The Obama administration was in no hurry to see a new bill, assessing that the 2001 AUMF sufficiently authorized the use of military force in both Iraq and Syria. Congress, on the other hand, was 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.<sup>20</sup>

In February 2015, with 63% of Americans in approval of a military campaign against IS, yet 79% believing that the President should obtain congressional approval before deploying forces abroad, Obama submitted his own AUMF draft to Congress.<sup>21</sup> This draft aimed to authorize the use of military force against IS until 2018 and would have superseded the 2002 AUMF.<sup>22</sup> Again, Congress was divided. Many Democrats and some Republicans felt a new AUMF would lead to wider and more extensive military involvement, including a big build-up in ground troops. But many Republicans, and some Democrats, feared an AUMF would be too limited and would tie the President's hands in the fight against a significant new enemy.<sup>23</sup> Even House Speaker, Republican John Boehner, who had spent months calling on Obama to send Congress his AUMF draft, dismissed it as being too restrictive.<sup>24</sup> As a result, Congress made no effort to pass the legislation, and the bill died within two months.

Congress's lack of action confused even the White House, which was surprised that lawmakers would inject themselves into the United States' nuclear talks with Iran but would not take up Obama's AUMF request. White House press secretary John Earnest noted, "It seems to me [Congress] might have their priorities a little backwards."<sup>25</sup> To that end, Congress turned its attention to other security matters, including funding for the Department of Homeland Security, increased defense spending in the fiscal 2016 budget, and legislation to give lawmakers a greater say in negotiations to curb Iran's nuclear program.<sup>26</sup>

Several subsequent proposals over the next year similarly collapsed in partisan dispute, including Representative Adam Schiff's December 2015 resolution that would have authorized the use of military force against al-Qaida, IS, and the Afghan Taliban and would have superseded both the 2001 and 2002 AUMFs.<sup>27</sup> Democrats continued to push for tighter restrictions, while Republicans were fearful of curbing the President's ability to fight terrorists. Although Congress recognized the 2001 and 2002 AUMFs were not a perfect fit for the campaign against IS, they seemed content to permit the de facto war against IS to continue without a formal declaration.<sup>28</sup>

### ***Broad Language: Breaking Down the 2001 AUMF\****

Despite specifically authorizing the use of military force against those responsible for the 9/11 attacks, the Bush and Obama administrations cited the 2001 AUMF to initiate or continue military or related action (including non-lethal military activities such as detentions and military trials) a combined 37 different occasions, in countries including the Philippines, Georgia, Yemen, Djibouti, Kenya, Ethiopia, Eritrea, and Somalia.<sup>29</sup> Beau Barnes demonstrates how this was possible, by breaking down the 2001 AUMF based on five reference points: object, method,

---

\* To avoid unnecessary duplication, this analysis focuses solely on the 2001 AUMF as it was and continues to be the primary authorization for the use of military force abroad. Many of the same interpretations hold true for the 2002 AUMF, albeit for Iraq vice al-Qaida and the Taliban.

time, place, and purpose.<sup>30</sup> Using Barnes' 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.<sup>31</sup> Yet, because al-Qaida quickly claimed responsibility for the 9/11 attacks, any terrorist group that associates with (as in the case of al-Qaida in the Arabian Peninsula) or subsequently spawned from al-Qaida (as in the case of IS) can be considered within the scope of the AUMF.<sup>32</sup> 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, “al-Shabaab has pledged loyalty to al-Qaida in its public statements; made clear that it considers the United States one of its enemies; and was responsible for numerous attacks, threats, and plots against U.S. persons and interests in East Africa. In short, al-Shabaab has entered the fight alongside al-Qaida and is a cobelligerent with al-Qaida in hostilities against the United States, making it an “associated force” and therefore within the scope of the 2001 AUMF.”<sup>33</sup>

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 ensures the force s/he employs is consistent with what is “necessary and appropriate” to “prevent any future acts of international terrorism against the United States.” Barnes explains, “any force beyond that which is required to prevent future

attacks would be unauthorized,” concluding, “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.”<sup>34</sup>

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 September 11, 2001. 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 nor terminate the authorization.<sup>35</sup> Conversely, however, it is nearly impossible for the AUMF to last forever, as the number of those actually responsible for the 9/11 attacks only continues to diminish.<sup>36</sup> Graham Cronogue best captures this catch-22, stating, “this conflict is not against a specific nation or well-defined organization, making it very difficult to say when the conflict will end or even what that end would look like.”<sup>37</sup>

The fourth aspect in examining the AUMF is its geographic scope. In the immediate aftermath of 9/11 when Congress drafted the AUMF language, there was 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 prescriptions 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 United States assistance, the President is legally authorized to use military force.<sup>38</sup>

The fifth and 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.<sup>39</sup> Others simply claim the “in order to” clause was included to satisfy the international law prohibition against reprisals.<sup>40</sup>

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 same points as above, the 66-page memo titled the *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-Qaida and the Taliban, but also al-Qaida in the Arabian Peninsula, al-Qaida in Libya, al-Qaida in Syria, al-Shabaab, and IS.<sup>41</sup>

### ***Reasons for a New AUMF***

President Obama’s December 2016 memo reinforces the first reason for why a new AUMF is necessary: the dangers regarding the expansion of presidential power to unilaterally wage war. The Constitution states that Congress—and not the President—has the power to declare war. Yet in the Presidents’ defense, there have been hundreds of instances since 1798 whereby the United States put military forces into combat abroad without declaring war.<sup>42</sup> Law professors Jack Goldsmith and Curtis Bradley explain, “[t]he President does not require a congressional declaration of war in order to provide *full authorization* to prosecute a war; an AUMF can be sufficient.<sup>43</sup> There are likewise no restrictions or limitations on the President. “Presidents have exercised their full Commander-in-Chief powers in a number of military

conflicts throughout U.S. history which involved many nontraditional elements. The political branches have clearly indicated, in the AUMF and elsewhere, that the conflict with the terrorists responsible for the September 11 attacks is a war requiring a *full military response* by the President.”<sup>44</sup>

Although the Constitution allows the President as Commander-in-Chief to introduce United States 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 requirement, the same law also states “it is the purpose of this chapter to fulfill the intent of the framers of the Constitution of the United States and insure that the *collective judgment of both the Congress and the President* will apply to the introduction of United States Armed Forces into hostilities.”<sup>45</sup> Making it even clearer, Section 1542 of the law states that the President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities, and after every such introduction shall *consult regularly* with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.<sup>46</sup>

Despite such a clear mandate, the broad language in the current AUMFs does not require the President to seek collective judgment from nor regularly consult with Congress regarding the application of military force. The repercussions have transcended more than mere constitutional or academic debate. In 2011, the American Civil Liberties Union (ACLU) and the Center for Constitutional Rights sued the Obama administration on behalf of Anwar al-Awlaki, an American citizen of whom the United States military killed in Yemen via drone strike. Despite

al-Awlaki being a chief al-Qaida recruiter of whom Obama considered a viable target under the 2001 AUMF, the ACLU countered 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.<sup>47</sup> 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. Smith was deployed to Kuwait as an Army intelligence analyst supporting the campaign against IS, yet contended that the President violated the War Powers Resolution by issuing Smith an illegal order given that Congress never approved a war against IS.<sup>48</sup>

These two anecdotes highlight and summarize the first reason for why a new AUMF is necessary. The war powers the Constitution vests in the President and Congress alike were never meant to operate indefinitely. “Whether or not the conflict against terrorism is a “new” kind of war, the President's authority to conduct traditional, temporary wars should not be accepted as justifying the permanent exercise of the war powers.”<sup>49</sup> Although terrorism will pose a threat to our nation for years to come, Congress requires a more active and more frequent role in reauthorizing the President’s authorization of military force.<sup>50</sup> Congress must therefore put their partisan differences aside, face the issue with courage and vigor, and reach a compromise for the good of the Constitution, the legislative branch, and the country.

The second justification for adopting a new AUMF pertains to the international ramifications and inherent damage to the United States’ credibility as a result of relying on outdated statutes and the seemingly limitless presidential authority to use military force.<sup>51</sup> As previously noted, the 2001 AUMF is expressly linked to the 9/11 attacks and al-Qaida. As it stands, however, portions of al-Qaida have expanded into new groups not even around in 2001, organizations such as IS, al-Qaida in the Arabian Peninsula, Boko Haram, and al-Shabaab.<sup>52</sup>

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."<sup>53</sup>

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.<sup>54</sup> As the leading democracy, the United States cannot afford to act in ways that it is not prepared to see proliferate around the globe. For instance, United States strategy with regard to 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 potentially facilitating similar destabilizing actions by China and countless other nations around the world.<sup>55</sup>

The third reason for needing a new AUMF pertains to the recent transfer of power from President Obama to President Trump. President Obama had been in office for over five years when he made the calculated decision to take military action against IS under the 2001 AUMF. Five years of experience as the Commander-in-Chief; President Trump has little to none. Yet because Congress failed to pass a new AUMF during the final years of the Obama administration, President Trump has now 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.<sup>56</sup>

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 ISIL.”<sup>57</sup> As Democratic Representative Barbara Lee highlights, “For an inexperienced President who tweets and gets angry to have broad war-making power, it’s a dangerous place to be.”<sup>58</sup>

In his first weeks in office, President Trump has already signed 12 executive orders<sup>59</sup>—several of them controversial—and has demonstrated a tendency to lash out against those who oppose him. Examples include his response to critics of his sudden immigration travel ban against seven Muslim countries in January 2017, and his fervent mission to build a wall along the southern U.S. border. This behavior has caused concern among even Republican congressmen, as Republican Jim Hines admitted, “Some of us are really worried about Trump.”<sup>60</sup> President Trump has 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.<sup>61</sup>

### ***The Urgency Button: Why We Need A New AUMF Now***

As of early February 2017, the Trump administration was nearing completion of an order that would direct the Pentagon to bring future IS detainees to GTMO.<sup>62</sup> As 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.<sup>63</sup>

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.”<sup>64</sup> 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 as unlawful.<sup>65</sup> Such a determination would either force the military to suspend counterterrorism efforts against IS—therefore allowing the group to rebuild, refit, and reattack—or force an inexperienced President to rely on the Constitution's self-defense clause to respond to emerging and imminent terrorist threats.<sup>66</sup> Equally as detrimental, such a determination would send a delegitimizing message to not only the world, but a demoralizing message to the millions of servicemen and women, civilians, and contractors who have spent their lives fighting to protect the nation. America cannot afford for these men and women and their families to question the legitimacy of the work they have done in protecting the nation, the sacrifices they have made, and the loved ones they have lost. These men and women have risen to the challenge time and time again; it is time for Congress to finally do the same.

As now-Secretary of Defense James Mattis wrote in March 2015, a new AUMF resolution supported by a majority of both parties in both houses of Congress will send an essential message of American steadfastness to our people and to the global audience.<sup>67</sup> Congress must send a message that the nation is still committed to the fight against terrorism, because the truth of the matter is that the threat still remains. The United States is a peaceful nation, yet in the face of today's threats, the only way to pursue peace is to pursue those who threaten it.<sup>68</sup> Congress must ensure the President and our troops maintain the legal authority to do so, *before* any IS detainee is brought to GTMO.

### ***Counterarguments***

The aforementioned evidence notwithstanding, there are several schools of thought as to why a new AUMF is in fact unnecessary. The first rests on the assessment that the current legal framework under the 2001 and 2002 AUMFs remains both valid and effective in combating the

current state of global counterterrorism threats, including IS. President Obama's General Counsel for the Department of Defense, Stephen Preston, explained this view in April 2015.

The 2001 AUMF authorized the use of force against the group now called IS since at least 2004, when [Osama] bin Laden and [Abu Musab] al-Zarqawi brought their groups together. The recent split between IS and current al-Qaida leadership does not remove IS from coverage under the 2001 AUMF. The name may have changed, but the group we call IS today has been an enemy of the United States within the scope of the 2001 AUMF.<sup>69</sup>

Preston continued by saying the President's authority to fight IS was further reinforced by the 2002 AUMF. Although the primary focus of the 2002 AUMF was the threat posed by Saddam Hussein's regime, Preston argued the statute was always understood to authorize the use of force to establish a stable and democratic Iraq and address any terrorist threats emanating from Iraq.

After Saddam Hussein's regime fell in 2003, the United States continued to take military action in Iraq under the 2002 AUMF to further these purposes, including action against al-Qaida in Iraq, which then, as now, posed a terrorist threat to the United States and its partners and undermined stability and democracy in Iraq. Accordingly, the 2002 AUMF authorizes military operations against IS in Iraq and, to the extent necessary to achieve these purposes, in Syria.<sup>70</sup>

This argument only addresses the current threat of IS and not any other terrorist group that may warrant AUMF attention in the future. This is especially alarming considering the potential downfall of IS and the likelihood that IS could soon morph into a new group under a different name in a different part of the world. As of June 2016, the coalition Operation Inherent Resolve had conducted 13,470 airstrikes and had destroyed 26,374 IS targets.<sup>71</sup> United States officials argue that the state of IS is in decline; having lost approximately 50 percent of the populated territory it once held in Iraq and approximately 20 percent of the populated territory it once held in Syria. Officials estimate that thousands of IS fighters have died in battle, their

numbers continuing to shrink along with morale as the group's finances, recruitment streams, and leadership have been substantially disrupted.<sup>72</sup>

Max Abrahms of the Council of Foreign Relations concurs, "ISIL is very quickly decentralizing all over the world. The administration should not be locked into having a focus only on pure IS targets, but should intentionally include associated groups. If these groups say they are IS associates, then that certainly makes them fair game."<sup>73</sup> As Preston himself admitted,

The 2001 and 2002 AUMFs authorize the current military operations against IS, but they were enacted more than a decade ago. The last 14 years have taught us that the threats we face tomorrow will not be the same as the threats we faced yesterday or face today. This confrontation with terrorism will not be over quickly, and now is an appropriate time for the President, Congress, and the American people to define the scope of the conflict and make sure we have the appropriate authorities in place for the future.<sup>74</sup>

A second argument against a new AUMF is the belief that such statutes are too broad in nature and simply provide too much power to the President. In this vein, Congress should rescind the 2001 and 2002 AUMFs and force the President to authorize the use of future military force under the premise of self-defense of the homeland. There are many situations where the President's position as Commander-in-Chief provides such uncontroversial authority for military actions against terrorists, such as former President Ronald Reagan's air strikes against Libyan targets after the bombing of a Berlin night club in 1986, and former President Bill Clinton's cruise missile strikes against al-Qaida-related targets in Afghanistan and Sudan in response to the embassy bombings in Kenya and Tanzania in 1998.<sup>75</sup> Few would disagree that the President needs no authorization to act in self-defense on behalf of the country.

However, international law states that a nation cannot use force in self-defense unless it is in response to an armed attack or an imminent threat. The executive branch would no longer be able to target a senior member of al-Qaida in Yemen based on that information alone. It would

have to plausibly make the case that the senior member of al-Qaida posed an *imminent* and grave threat to the United States. While the debate regarding the actual meaning of the word “imminent” lies beyond the scope of this paper, suffice it to say that relying on this clause would certainly limit the military’s ability to act preemptively when conducting counterterrorism operations.<sup>76</sup>

Further, relying on the rationale of self-defense would do nothing to re-establish Congress' role in regulating United States foreign and national security policy. The practice of using self-defense as the justification to target and detain terrorists worldwide is a dangerous slippery slope. Once the President authorizes military force against someone who does not pose a legitimate imminent threat, there would be very few targets that would then be off-limits to the executive branch, leaving Congress little room for recourse.<sup>77</sup>

A third counterargument against a new AUMF is that the United States should defeat IS and other terrorist groups by relying on the covert counterterrorism operations as approved by Title 50, U.S. Code. There are three problems with this solution. The first, Title 50 operations are mostly carried out by the Central Intelligence Agency, which is simply not manned nor equipped for large-scale paramilitary efforts, if required. Second, covert operations are by definition kept out of public view, making it difficult to subject them to proper review. Barnes correctly notes, “In light of the democratic deficit that already plagues the nation in the legal war on terror, further distancing counterterrorism operations from democratic oversight would exacerbate this problem.”<sup>78</sup> Finally, any Title 50 activity inherently requires a sufficient domestic law foundation in terms of either an AUMF or a legitimate claim of constitutional authority for the use of force, meaning there would need to be an underlying AUMF to begin with anyway.<sup>79</sup>

### *Problems With Previous AUMF Drafts*

Despite recognizing the need for a new AUMF, Congress has been unable and unwilling to compromise on how the text should read. This section examines three of the most recent AUMF draft attempts and their respective pitfalls that caused Congress to balk. The first attempt, Senate Joint Resolution 43, of which the 113<sup>th</sup> Congress drafted in September 2014, is arguably the weakest of the three. As previously noted, this draft specifically focused on defending the American people and assisting the Iraqi Government in expelling IS from Iraqi territory. The first problem with this draft is 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. Further, 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-Qaida and its associates. Finally, while the draft called for the President to report to Congress his comprehensive strategy on the use of military force to congress every 90 days, it did not contain any temporal limitation or “sunset clause”.<sup>80</sup> This meant neither Congress nor the President were pre-committed to revisit the nature and scope of the war against Islamic terrorists on a regular basis.<sup>81</sup>

The second attempt was President Obama’s February 2015 draft. This draft included no mandate for the President to routinely report to Congress where and when he had authorized the use of military force. It also precluded the use of United States Armed Forces in enduring offensive ground combat operations.<sup>82</sup> Republicans balked at this limitation, as law professor Robert Chesney explained. “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.”<sup>83</sup> The importance of maintaining flexibility for the possible use of additional military capabilities against IS was further underscored by former Defense Secretary Robert Gates, who warned, “there will be boots on the ground if there is to be any hope of success in the strategy.”<sup>84</sup>

The last problem with President Obama’s draft was that it only superseded the 2002 Iraq AUMF and did not affect the 2001 AUMF.<sup>85</sup> One of President Obama’s primary goals with his draft was to preclude another ground war like Afghanistan or Iraq (without explicit congressional approval), unlike the 2002 AUMF which authorized the 2003 invasion of Iraq.<sup>86</sup> Yet as previously discussed, the connection between both the Iraqi invasion *and* 9/11 with today’s use of military force against terrorists is already stretched, meaning both of these statutes need replacement.

Finally, we turn to the joint resolution proposed by Representative Adam Schiff in 2015, which is both the most recent and most comprehensive bill proposed to date. Goldsmith argues the bill is a great attempt as it remains “substantively neutral (it gives the President the same authorities he currently claims to possess) yet procedurally constraining (it forces the President to communicate more with Congress about the conflict and forces Congress to be more involved).”<sup>87</sup> The Schiff draft authorizes force against al-Qaida, the Taliban, IS, and associated forces; is authorized for only three years; and allows the President to deploy combat ground troops. It also mandates that the President must submit to the appropriate congressional committees and publish in the Federal Register a list of entities against which such authority has been exercised and the geographic location where such authority has been exercised at least once every 90 days.<sup>88</sup> This 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.<sup>89</sup> Most important, it also supersedes both the 2001 and 2002 AUMFs.<sup>90</sup>

The Schiff bill is close to hitting the mark, yet still falls short in a few key areas. One, it sets an unnecessary limitation on coverage to only the “Afghan” Taliban.<sup>91</sup> Second, it mentions nothing of geography. As Goldsmith proposed in 2014, the authorization of force should extend “only to operations in places where force can be used consistent with applicable international law concerning sovereignty and the use of force.” Such a limitation would allow use of force (by the principle of consent from the host government) in Iraq, Afghanistan, Yemen, Nigeria, and Somalia. It would not, however, give the President a blank check to use military force in the territories of non-consenting countries, unless overridden by a United Nations Security Council Resolution or in accordance with self-defense principles.<sup>92</sup>

### ***Proposed AUMF Language for 2017***

Having demonstrated the need for a new AUMF and examined the flaws of the existing drafts, the question now rests on what it means to get a new AUMF “right.” Drawing from President Obama’s 2013 speech at National Defense University, 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.”<sup>93</sup> As such, this final section identifies the components that are necessary 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 only

becoming more tenuous. Further to that end, the new draft should not include a specific reference to any previous attacks (as the 2001 AUMF referenced 9/11), but should rather orient 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-Qaida, as well as their affiliates and associates such as Boko Haram in Nigeria and al-Shabaab in east Africa. Regarding the terms “affiliates, associates, and branches,” courts have previously noted with the 2001 AUMF that “associated forces do not include terrorist organizations who merely share an abstract philosophy or even a common purpose with al-Qaida,” and that “there must be an actual association in the current conflict with al-Qaida or the Taliban.”<sup>94</sup> The AUMF should therefore 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 the National Security Council, should be final arbiter in deciding if this threshold is met. Further, as long as the underlying factors of a group remain unchanged—such as the personalities, activities, affiliation, and goals—then any terrorist group simply changing its name can likewise be targeted under the AUMF. This will eliminate the possibility of the enemy using the rules and regulations of the AUMF to their 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 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.<sup>95</sup> 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 United States military force can be used consistent with applicable international law concerning sovereignty and the use of force.<sup>96</sup> 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, then Congress should specifically authorize that military action independently from the AUMF statute.<sup>97</sup>

Moving on to the temporal limits of a new AUMF, the statute must include a sunset clause. Such a provision will satisfy the War Powers Act by ensuring that Congress, and not just the executive branch, would have a say regarding when and where the United States military engages in conflict. A sunset clause of three years would keep military options flexible in response to threats, yet 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.”<sup>98</sup>

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 s/he has authorized and exercised military force. Finally, given that the enemy is

constantly adapting, a principal challenge the new AUMF must overcome is ensuring it does not become obsolete.<sup>99</sup> 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. The following verbiage is a suggestion that an AUMF should contain in addition to the “all necessary and appropriate force” clause, much of which resides in President Obama’s 2013 Presidential Policy Guidance.

The authorization for use of military force, including lethal action against authorized terrorist targets, shall be as discriminating and precise as reasonably possible. The capture of terrorist suspects is the preferred option over lethal action, and will therefore require a feasibility assessment of capture options as a component of any proposal for lethal action. Lethal action should be taken in an effort to prevent terrorist attacks against U.S. persons only when capture of an individual is not feasible and no other reasonable alternatives exist to effectively address the threat. Absent extraordinary circumstances, direct action will be taken only if there is near certainty that the action can be taken without injuring or killing non-combatants. Lethal action should not be proposed or pursued as a punitive step or as a substitute for prosecuting a terrorist suspect in a civilian court or a military commission.<sup>100</sup>

Finally, the new statute should state that any authorization for use of U.S. military force will be a partnered effort with the host nation’s counterterrorism strategy.

## ***Conclusion***

Over the past several years, the task of adopting a new AUMF has proven 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. But the time for partisan debate and delay has passed. Terrorist groups continue to operate and proliferate across the globe and continue to threaten our freedoms, and the use of military force to counter these threats is often the only option to keep America safe. Congress must reach a compromise to update the law and accurately reflect this reality. 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 the United States' credibility on the international stage, and help guide a new and inexperienced President. More importantly, a new AUMF will send a message of American steadfastness and unity in the fight against terrorism, and will 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.

---

<sup>1</sup> Barack Obama, "Statement by the President," (speech, Washington, DC, August 7, 2014), The White House Office of the Press Secretary,

<https://obamawhitehouse.archives.gov/the-press-office/2014/08/07/statement-president>.

<sup>2</sup> Barack Obama, "Statement by the President on ISIL," (speech, Washington, DC, September 10, 2014), The White House Office of the Press Secretary,

<https://obamawhitehouse.archives.gov/the-press-office/2014/09/10/statement-president-isil-1>.

---

<sup>3</sup> *Ibid.*

<sup>4</sup> Josh Earnest, "Press Briefing by Press Secretary Josh Earnest, 9/11/2014," (speech, Washington, DC, September 11, 2014), The White House Office of the Press Secretary, <https://obamawhitehouse.archives.gov/the-press-office/2014/09/11/press-briefing-press-secretary-josh-earnest-9112014>.

<sup>5</sup> Jack Goldsmith, "Obama Administration Claims that 2002 Iraq Resolution is a Legal Basis for Air Strikes Against the Islamic State [UPDATED]," *Lawfare*, September 13, 2014, <https://www.lawfareblog.com/obama-administration-claims-2002-iraq-resolution-legal-basis-air-strikes-against-islamic-state>.

<sup>6</sup> Stephen W. Preston, "The Legal Framework for the United States' Use of Military Force Since 9/11" (speech, Annual Meeting of the American Society of International Law, Washington, DC, April 10, 2015), <https://www.defense.gov/News/Speeches/Speech-View/Article/606662>.

<sup>7</sup> Stephen I. Vladeck, "Ludecke's Lengthening Shadow: The Disturbing Prospect of War Without End," *Journal of National Security Law & Policy* 2, no. 1 (2006): 3, <https://search.westlaw.com>.

<sup>8</sup> Jack Goldsmith, "The Practical Legal Need for an ISIL AUMF," *Lawfare*, February 8, 2017, <https://www.lawfareblog.com/practical-legal-need-isil-aumf>.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> Beau D. Barnes, "Reauthorizing the 'War on Terror': The Legal and Policy Implications of the AUMF's Coming Obsolescence," *Military Law Review* 211, rev. 57 (Spring 2002): 2, <https://search.westlaw.com>.

<sup>12</sup> US Const. art. I, § 8, cl. 11 and art. II, § 2.

<sup>13</sup> Barbara S. Torreon, *Instances of Use of United States Armed Forces Abroad, 1798-2016*, CRS Report for Congress R42738 (Washington DC: Congressional Research Service, October 7, 2016), Summary page, <https://www.fas.org/spp/crs/natsec/R42738.pdf>.

<sup>14</sup> War Powers Resolution, 50 U.S.C § 1541-1548 (1973).

<sup>15</sup> *Authorization for Use of Military Force*, SJR 23, 107<sup>th</sup> Cong., Congressional Record 147, daily ed. (September 18, 2001): Public Law 107-40.

<sup>16</sup> *Authorization for Use of Military Force Against Iraq Resolution of 2002*, HJR 114, 107<sup>th</sup> Cong., Congressional Record 148, daily ed. (October 16, 2002): Public Law 107-243.

<sup>17</sup> Department of State, *Winning the War on Terror* (Washington DC: Department of State, Bureau of Public Affairs, 2003), <https://2001-2009.state.gov/documents/organization/24172.pdf>.

<sup>18</sup> *National Consortium for the Study of Terrorism and Responses to Terrorism (START)*, Global Terrorism Database [Data file], 2016, <https://www.start.umd.edu/gtd>.

<sup>19</sup> *Authorization for Use of Military Force Against the Organization Called the Islamic State*, SJR 43, 113<sup>th</sup> Cong., (September 8, 2014).

<sup>20</sup> James Arkin and Alexis Simendinger, "Approval of War Authorization Against ISIL Uncertain in Congress," *Real Clear Politics*, February 12, 2015, <http://www.realclearpolitics.com/>.

<sup>21</sup> Lauren Leatherby, "Whatever Happened to the Debate Over Use of Force Against ISIS?," National Public Radio, June 17, 2015, <http://www.npr.org/2015/06/17/415203016/whatever-happened-to-the-debate-over-use-of-force-against-isis>.

<sup>22</sup> The White House, *Authorization for Use of Military Force Against the Islamic State of Iraq and the Levant* (Washington, DC, 2015), [https://www.whitehouse.gov/sites/default/files/docs/aumf\\_02112015.pdf](https://www.whitehouse.gov/sites/default/files/docs/aumf_02112015.pdf).

<sup>23</sup> Leatherby, *Whatever Happened to the Debate Over the Use of Force Against ISIS?*, 2015.

<sup>24</sup> Scott Wong, "GOP: Obama War Request Is Dead," *The Hill*, April 13, 2015, <http://thehill.com/policy/defense/238619-gop-obama-war-request-is-dead>.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> Adam Schiff, "Consolidated Authorization for Use of Military Force Resolution of 2015," (draft, United States Congress, December 2015), available online at: [https://www.justsecurity.org/wp-content/uploads/2015/12/SCHIFF\\_023\\_xml.pdf](https://www.justsecurity.org/wp-content/uploads/2015/12/SCHIFF_023_xml.pdf).

<sup>28</sup> Austin Wright, "Congress Leaves Trump With Unlimited War Powers," *Politico*, December 29, 2016, <http://www.politico.com/story/2016/12/congress-trump-military-force-232815>.

- 
- <sup>29</sup> Matthew C. Weed, *Presidential References to the 2001 Authorization for Use of Military Force in Publicly Available Executive Actions and Reports to Congress*, CRS Memorandum (Washington DC: Congressional Research Service, May 11, 2016), 2, <https://www.hsdl.org/?abstract&did=792875>.
- <sup>30</sup> Barnes, *Reauthorizing the War on Terror*, 4-6.
- <sup>31</sup> *Ibid.*, 4.
- <sup>32</sup> The White House, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* (Washington, DC, December 2016), 5, available online at: [https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report\\_Final.pdf](https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf).
- <sup>33</sup> *Ibid.*
- <sup>34</sup> Barnes, *Reauthorizing the War on Terror*, 5.
- <sup>35</sup> *Ibid.*
- <sup>36</sup> *Ibid.*, 9.
- <sup>37</sup> Graham Cronogue, "A New AUMF: Defining Combatants in the War on Terror," *Duke Journal of Comparative & International Law* 22, no. 3 (Spring 2012): 5, <https://search.westlaw.com>.
- <sup>38</sup> *Ibid.*, 7.
- <sup>39</sup> *Ibid.*, 6-7.
- <sup>40</sup> *Ibid.*, 7.
- <sup>41</sup> The White House, *Report on the Legal and Policy Frameworks*, 5.
- <sup>42</sup> 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): 4, <https://search.westlaw.com>.
- <sup>43</sup> Jack L. Goldsmith and Curtis A. Bradley, "Congressional Authorization and the War on Terrorism," *Harvard Law Review* 118, no. 7 (May 2005): 5, <https://search.westlaw.com>.
- <sup>44</sup> *Ibid.*
- <sup>45</sup> War Powers Resolution, 50 U.S.C § 1541 (1973).
- <sup>46</sup> War Powers Resolution, 50 U.S.C § 1542 (1973).
- <sup>47</sup> Cronogue, *A New AUMF: Defining Combatants in the War on Terror*, 2012, 10.
- <sup>48</sup> Mary Louise Kelly, "When the U.S. Military Strikes, White House Points to a 2001 Measure," radio address by National Public Radio, *All Things Considered*, September 6, 2016, <http://www.npr.org/sections/parallels/2016/09/06/492857888/when-the-u-s-military-strikes-white-house-points-to-a-2001-measure>.
- <sup>49</sup> Vladeck, *Ludecke's Lengthening Shadow*, 2.
- <sup>50</sup> *Ibid.*
- <sup>51</sup> Barnes, *Reauthorizing the War on Terror*, 11.
- <sup>52</sup> Cronogue, *A New AUMF: Defining Combatants in the War on Terror*, 2012, 14.
- <sup>53</sup> John Kerry, "Support for Authorization for Use of Military Force," (speech, Washington DC, February 11, 2015), US Department of State, <https://www.state.gov/secretary/remarks/2015/02/237384.htm>.
- <sup>54</sup> Barnes, *Reauthorizing the War on Terror*, 13.
- <sup>55</sup> *Ibid.*
- <sup>56</sup> Ana Radelat, "Himes Seeks to Curb Trump's Warpowers," *The CT Mirror*, December 9, 2016, <http://ctmirror.org/2016/12/09/himes-seeks-to-curb-trumps-war-powers/>.
- <sup>57</sup> *Ibid.*
- <sup>58</sup> Wright, *Congress Leaves Trump With Unlimited War Powers*, 2016.
- <sup>59</sup> The White House, *President Trump's Executive Orders*, Washington DC, retrieved February 14, 2016, <https://www.whitehouse.gov/briefing-room/presidential-actions/executive-orders>.
- <sup>60</sup> Radelate, *Himes Seeks to Curb Trump's Warpowers*, 2016.
- <sup>61</sup> Wright, *Congress Leaves Trump With Unlimited War Powers*, 2016.
- <sup>62</sup> Executive Order, *Protecting America Through Lawful Detention of Terrorists and Other Designated Enemy Elements*, (draft, February 2017), retrieved online at: <https://assets.documentcloud.org/documents/3455640/Revised-draft-Trump-EO-on-detainees-and-Gitmo.pdf>
- <sup>63</sup> Goldsmith, *The Practical Legal Need for an ISIL AUMF*, 2017.
- <sup>64</sup> *Ibid.*

- 
- <sup>65</sup> *Ibid.*
- <sup>66</sup> Stephen I. Vladeck, "Detention After the AUMF," *Fordham Law Review* 82, iss. 5 (2014): 5, <https://search.westlaw.com>.
- <sup>67</sup> James Mattis, "Using Military Force Against ISIS," *The Hoover Institution*, March 4, 2015, <http://www.hoover.org/research/using-military-force-against-isis>.
- <sup>68</sup> George W. Bush, "Presidential Address to the Nation," (speech, Washington, DC, October 7, 2001), The White House Office of the Press Secretary, <https://georgewbush-whitehouse.archives.gov/news/releases/2001/10/20011007-8.html>.
- <sup>69</sup> Preston, *The Legal Framework for the United States' Use of Military Force Since 9/11*, 2015.
- <sup>70</sup> *Ibid.*
- <sup>71</sup> Kathleen J. McInnis, *Coalition Contributions to Countering the Islamic State*, CRS Report for Congress R44135 (Washington DC: Congressional Research Service, August 24, 2016), 2, <https://www.fas.org/sgp/crs/natsec/R44135.pdf>.
- <sup>72</sup> Christopher M. Blanchard and Carla E. Humud, *The Islamic State and U.S. Policy*, CRS Report for Congress R43612 (Washington DC: Congressional Research Service, June 27, 2016), 1, <https://fas.org/sgp/crs/mideast/R43612.pdf>.
- <sup>73</sup> Jack Moore, "U.S. War on ISIS Could Expand to Affiliates in Libya and Nigeria," *Newsweek*, March 2015, <http://www.newsweek.com/>.
- <sup>74</sup> Preston, *The Legal Framework for the United States' Use of Military Force Since 9/11*, 2015.
- <sup>75</sup> Barnes, *Reauthorizing the War on Terror*, 10-11.
- <sup>76</sup> Rosa Brooks and Benjamin Wittes, "AUMF Panel Transcript," *Pepperdine Law Review* 42, iss. 3 (March 2014): 8-10, <https://search.westlaw.com>.
- <sup>77</sup> *Ibid.*, 12.
- <sup>78</sup> Barnes, *Reauthorizing the War on Terror*, 11.
- <sup>79</sup> *Ibid.*
- <sup>80</sup> *Authorization for Use of Military Force Against the Organization Called the Islamic State*, SJR 43, 2014.
- <sup>81</sup> <https://www.lawfareblog.com/why-sunset-clause-important-any-new-aumf>
- <sup>82</sup> The White House, *Authorization for Use of Military Force Against the Islamic State of Iraq and the Levant*, 2015.
- <sup>83</sup> Robert Chesney, "HASC Testimony: Towards A Better AUMF," *Lawfare*, February 26, 2015, <https://www.lawfareblog.com/hasc-testimony-towards-better-aumf>.
- <sup>84</sup> Castle, *The Argument for a New and Flexible Authorization for the Use of Military Force*, 2015, 1.
- <sup>85</sup> The White House, *Authorization for Use of Military Force Against the Islamic State of Iraq and the Levant*, 2015.
- <sup>86</sup> Tanya Somanader, "The Authorization of Military Force Against ISIL Terrorists: What You Need to Know," *The White House* (blog), February 11, 2015, <https://www.whitehouse.gov/blog/2015/02/11/authorization-military-force-against-isil-terrorists-what-you-need-know>.
- <sup>87</sup> Jack Goldsmith, "Representative Schiff's Good New Draft AUMF," *Lawfare*, December 10, 2015, <https://www.lawfareblog.com/representative-schiffs-good-new-draft-aumf>.
- <sup>88</sup> Schiff, *Consolidated Authorization for Use of Military Force Resolution of 2015*, 2015.
- <sup>89</sup> Chesney, Goldsmith, Waxman, and Wittes, *A Draft AUMF to Get the Discussion Going*, 2014.
- <sup>90</sup> Schiff, *Consolidated Authorization for Use of Military Force Resolution of 2015*, 2015.
- <sup>91</sup> Goldsmith, *Representative Schiff's Good New Draft AUMF*, 2015.
- <sup>92</sup> Robert Chesney, Jack Goldsmith, Matthew Waxman, and Benjamin Wittes, "A Draft AUMF to Get the Discussion Going," *Lawfare*, November 10, 2014, <https://www.lawfareblog.com/draft-aumf-get-discussion-going>.
- <sup>93</sup> Barack Obama, "Remarks by the President at the National Defense University," (speech, Washington, DC, May 23, 2013), The White House Office of the Press Secretary, <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.
- <sup>94</sup> Barnes, *Reauthorizing the War on Terror*, 8.
- <sup>95</sup> *Ibid.*, 17.
- <sup>96</sup> Goldsmith, Chesney, Waxman, and Wittes, *A Draft AUMF to Get the Discussion Going*, 2014.
- <sup>97</sup> Barnes, *Reauthorizing the War on Terror*, 17.

---

<sup>98</sup> Jack Goldsmith, "Why A Sunset Clause is Important in any New AUMF," *Lawfare*, February 5, 2015, <https://www.lawfareblog.com/why-sunset-clause-important-any-new-aumf>.

<sup>99</sup> Barnes, *Reauthorizing the War on Terror*, 13.

<sup>100</sup> The White House, *Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities* (Washington, DC, 2013), <https://fas.org/irp/offdocs/ppd/ppg-procedures.pdf>.

## Bibliography

- Arkin, James and Alexis Simendinger. "Approval of War Authorization Against ISIL Uncertain in Congress." *Real Clear Politics*, February 12, 2015. <http://www.realclearpolitics.com/>.
- Barnes, Beau D. "Reauthorizing the "War on Terror": The Legal and Policy Implications of the AUMF's Coming Obsolescence." *Military Law Review* 211, rev. 57 (Spring 2002). <https://search.westlaw.com>.
- Blanchard, Christopher M. and Carla E. Humud. *The Islamic State and U.S. Policy*. CRS Report for Congress R43612. Washington DC: Congressional Research Service, June 27, 2016. <https://fas.org/sgp/crs/mideast/R43612.pdf>.
- Brooks, Rosa and Benjamin Wittes. "AUMF Panel Transcript." *Pepperdine Law Review* 42, iss. 3 (March 2014): <https://search.westlaw.com>.
- Bush, George W. "Presidential Address to the Nation." Speech. Washington, DC, October 7, 2001. The White House Office of the Press Secretary, <https://georgewbush-whitehouse.archives.gov/news/releases/2001/10/20011007-8.html>.
- Castle, William S. "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): <https://search.westlaw.com>.
- Chesney, Robert, Jack Goldsmith, Matthew Waxman, and Benjamin Wittes. "A Draft AUMF to Get the Discussion Going." *Lawfare*, November 10, 2014. <https://www.lawfareblog.com/draft-aumf-get-discussion-going>.
- Chesney, Robert. "HASC Testimony: Towards A Better AUMF." *Lawfare*, February 26, 2015. <https://www.lawfareblog.com/hasc-testimony-towards-better-aumf>.
- Cronogue, Graham. "A New AUMF: Defining Combatants in the War on Terror." *Duke Journal of Comparative & International Law* 22, no. 3 (Spring 2012): <https://search.westlaw.com>.
- Daugirdas, Kristina and Julian Davis Mortenson. "President Obama Seeks Statutory Authorization for the Use of Military Force Against ISIL." *American Journal of International Law* 109, no. 2 (April 2015): <https://search.westlaw.com>.
- Earnest, Josh. "Press Briefing by Press Secretary Josh Earnest, 9/11/2014." Speech. Washington, DC, September 11, 2014. The White House Office of the Press Secretary, <https://obamawhitehouse.archives.gov/the-press-office/2014/09/11/press-briefing-press-secretary-josh-earnest-9112014>.
- Executive Order. *Protecting America Through Lawful Detention of Terrorists and Other Designated Enemy Elements*. Draft, February 2017. Retrieved online at:

<https://assets.documentcloud.org/documents/3455640/Revised-draft-Trump-EO-on-detainees-and-Gitmo.pdf>

Goldsmith, Jack. "Obama Administration Claims that 2002 Iraq Resolution is a Legal Basis for Air Strikes Against the Islamic State [UPDATED]." *Lawfare*, September 13, 2014. <https://www.lawfareblog.com/obama-administration-claims-2002-iraq-resolution-legal-basis-air-strikes-against-islamic-state>.

Goldsmith, Jack. "Representative Schiff's Good New Draft AUMF." *Lawfare*, December 10, 2015. <https://www.lawfareblog.com/representative-schiffs-good-new-draft-aumf>.

Goldsmith, Jack. "The Practical Legal Need for an ISIL AUMF." *Lawfare*, February 8, 2017, <https://www.lawfareblog.com/practical-legal-need-isil-aumf>.

Goldsmith, Jack L. and Curtis A. Bradley, "Congressional Authorization and the War on Terrorism." *Harvard Law Review* 118, no. 7 (May 2005): <https://search.westlaw.com>.

Goldsmith, Jack. "Why A Sunset Clause is Important in any New AUMF." *Lawfare*, February 5, 2015, <https://www.lawfareblog.com/why-sunset-clause-important-any-new-aumf>.

Kelly, Mary Louise. "When the U.S. Military Strikes, White House Points to a 2001 Measure." By National Public Radio. *All Things Considered*, September 6, 2016. <http://www.npr.org/sections/parallels/2016/09/06/492857888/when-the-u-s-military-strikes-white-house-points-to-a-2001-measure>.

Kerry, John. "Support for Authorization for Use of Military Force." Speech. United States Department of State, Washington DC, February 11, 2015. <https://www.state.gov/secretary/remarks/2015/02/237384.htm>.

Leatherby, Lauren. "Whatever Happened to the Debate Over Use of Force Against ISIS?" National Public Radio. June 17, 2016. <http://www.npr.org/2015/06/17/415203016/whatever-happened-to-the-debate-over-use-of-force-against-isis>.

Mattis, James. "Using Military Force Against ISIS." *The Hoover Institution*, March 4, 2015. <http://www.hoover.org/research/using-military-force-against-isis>.

McInnis, Kathleen J. *Coalition Contributions to Countering the Islamic State*. CRS Report for Congress R44135. Washington DC: Congressional Research Service, August 24, 2016. <https://www.fas.org/sgp/crs/natsec/R44135.pdf>.

Moore, Jack. "U.S. War on ISIS Could Expand to Affiliates in Libya and Nigeria." *Newsweek*, March 2015. <http://www.newsweek.com/>.

National Consortium for the Study of Terrorism and Responses to Terrorism (START). Global Terrorism Database [Data file], 2016, <https://www.start.umd.edu/gtd>.

- Obama, Barack. "Remarks by the President at the National Defense University." Speech. Washington, DC, May 23, 2013. The White House Office of the Press Secretary, <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.
- Obama, Barack. "Statement by the President." Speech. Washington, DC, August 7, 2014. The White House Office of the Press Secretary, <https://obamawhitehouse.archives.gov/the-press-office/2014/08/07/statement-president>.
- Obama, Barack. "Statement by the President on ISIL." Speech. Washington, DC, September 10, 2014. The White House Office of the Press Secretary, <https://obamawhitehouse.archives.gov/the-press-office/2014/09/10/statement-president-isil-1>.
- Preston, Stephen W. "The Legal Framework for the United States' Use of Military Force Since 9/11." Speech. Annual Meeting of the American Society of International Law, Washington, DC, April 10, 2015. <https://www.defense.gov/News/Speeches/Speech-View/Article/606662>.
- Radelat, Ana. "Himes Seeks to Curb Trump's Warpowers." *The CT Mirror*, December 9, 2016. <http://ctmirror.org/2016/12/09/himes-seeks-to-curb-trumps-war-powers/>.
- Schiff, Adam. "Consolidated Authorization for Use of Military Force Resolution of 2015." Draft. United States Congress, December 8, 2015. Available online at: [https://www.justsecurity.org/wp-content/uploads/2015/12/SCHIFF\\_023\\_xml.pdf](https://www.justsecurity.org/wp-content/uploads/2015/12/SCHIFF_023_xml.pdf).
- The White House. *Authorization for Use of Military Force Against the Islamic State of Iraq and the Levant*. Washington, DC, 2015. [https://www.whitehouse.gov/sites/default/files/docs/aumf\\_02112015.pdf](https://www.whitehouse.gov/sites/default/files/docs/aumf_02112015.pdf).
- The White House. *President Trump's Executive Orders*. Washington, DC, retrieved February 14, 2016. <https://www.whitehouse.gov/briefing-room/presidential-actions/executive-orders>.
- The White House. *Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities*. Washington, DC, 2013. <https://fas.org/irp/offdocs/ppd/ppg-procedures.pdf>.
- The White House. *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations*. Washington, DC, December 2016. Available online at: [https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report\\_Final.pdf](https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf).
- Torreon, Barbara S. *Instances of Use of United States Armed Forces Abroad, 1798-2016*. CRS Report for Congress R42738. Washington, DC: Congressional Research Service, October 7, 2016. <https://fas.org/sgp/crs/natsec/R42738.pdf>.
- US Congress. House. *Authorization for Use of Military Force Against Iraq Resolution of 2002*. HJ Res 114. 107<sup>th</sup> Cong., Congressional Record 148, daily ed. (October 16, 2002): Public Law 107-243.

- US Congress. Senate. *Authorization for Use of Military Force*. SJ Res 23. 107<sup>th</sup> Cong., Congressional Record 147, daily ed. (September 18, 2001): Public Law 107-40.
- US Congress, Senate. *Authorization for Use of Military Force Against the Organization Called the Islamic State*. SJ Res 43, 113<sup>th</sup> Cong., (September 8, 2014).
- US Department of State. *Winning the War on Terror*. Washington DC: US Department of State, Bureau of Public Affairs, 2003. <https://2001-2009.state.gov/documents/organization/24172.pdf>.
- Vladeck, Stephen I. "Ludecke's Lengthening Shadow: The Disturbing Prospect of War Without End." *Journal of National Security Law & Policy* 2, no. 1 (2006). <https://search.westlaw.com>.
- Vladeck, Stephen I. "Detention After the AUMF." *Fordham Law Review* 82, iss. 5 (2014). <https://search.westlaw.com>.
- War Powers Resolution, 50 U.S.C § 1541 and 50 U.S.C. § 1542 (1973).
- Weed, Matthew C. *Presidential References to the 2001 Authorization for Use of Military Force in Publicly Available Executive Actions and Reports to Congress*. CRS Memorandum. Washington DC: Congressional Research Service, May 11, 2016. <https://www.hsdl.org/?abstract&did=792875>.
- Wong, Scott. "GOP: Obama War Request Is Dead." *The Hill*, April 13, 2015. <http://thehill.com/policy/defense/238619-gop-obama-war-request-is-dead>.
- Wright, Austin. "Congress Leaves Trump With Unlimited War Powers." *Politico*, December 29, 2016. <http://www.politico.com/story/2016/12/congress-trump-military-force-232815>.