



## Senator Merkley's Smart New Alternative AUMF Proposal

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Yesterday, Senator Jeff Merkley (D-Ore.) released a new proposal for an authorization to use military force, or “AUMF.”

As Merkley explained in last week's AUMF hearing before the Senate Foreign Relations Committee, the proposal is intended as a constructive response to his and others' sharp critiques of the proposal recently released by Senators Bob Corker (R-TN) and Tim Kaine (D-VA). Despite attempts by Senator Corker during last week's hearing to paint opposition to their proposal as being from only “liberals,” there has actually been widespread opposition and concern from conservative corners as well. The Corker-Kaine proposal has been criticized by the foreign policy manager at the Charles Koch Institute, The American Conservative, Defense Priorities, FreedomWorks, Concerned Veterans for America, experts at the Cato Institute, and many more (see for example, here, here, here, and here).

Moreover, recent polls show that Americans overwhelmingly want Congress to reassert its control over the decision to go to war and oppose Congress surrendering this power to the president (see here, here, and here).

Senator Merkley's proposal reflects his Statement of Principles for a new AUMF, which he released last week. It is an effective approach that would provide sufficient authority to the president to use force, while balancing this expanded authority with crucial safeguards to prevent the delegation of congressional war powers to the executive branch, ensure continued congressional oversight and public transparency, and prevent perpetual armed conflict.

Here is a breakdown of what it would do:

**Who is force authorized against?**

Section 2 of the proposal provides an initial authorization to use force against the Taliban, al Qaeda, and ISIS. The proposal would then leave in place the 2001 AUMF for six months, which would permit the president to continue using force against any groups the executive branch considers to be covered by those authorizations for six months and give him time to come to Congress to add new groups to the new authorization. Congress could authorize force against any additional groups via expedited procedures set out in section 8 of the AUMF. Under section 4, to be eligible for expedited consideration, any new group must be “an organized armed group that has engaged, and continues to be engaged, in active hostilities against the United States as a party to an ongoing armed conflict involving” the Taliban, al Qaeda, or ISIS and must “demonstrate a credible ability to conduct a substantial attack against compelling United States interests.” The expedited procedures cannot be used to authorize force against a foreign state.

### **Where is force authorized?**

Under section 2, force is authorized initially only in Afghanistan and Iraq. As with groups that aren't named in the proposal, because the 2001 AUMF would remain in place for six months, current operations in other countries could continue during that time and Congress could use expedited procedures to authorize force in any other countries beyond that date. As readers will likely note, the proposal does not authorize force in Syria. As such, Congress would need to make a separate determination as to whether, at the end of the six-month period following the enactment of the AUMF, military force should be authorized in Syria. Given the reports of ISIS' “near defeat” in Syria, this is an important inquiry that Congress should undertake as an exercise of its constitutional war powers.

Further, it is important to note that while the geographic locations where force can be used pursuant to this AUMF are limited, this would not impact the president's ability to use forcible means to address threats from individuals suspected of terrorism offenses in other countries under other authorities. The president retains ample authority under Article II of the Constitution, Title 50 of the U.S. Code and other counterterrorism and law enforcement authorities to conduct arrests and even, when necessary, use lethal force against high-value targets. For example, Senator Merkley's proposal would not have prohibited the president from pursuing Osama bin Laden in Pakistan, as this was carried out under Title 50 authorities, which are explicitly not affected or limited by this authorization.

### **What is the purpose or objective for using force?**

Unlike the Corker-Kaine AUMF proposal, which does not specify a purpose for which force is authorized or the objective that would be achieved by authorizing force, the Merkley proposal's purpose for authorizing force is specified in section 2 as “to protect the United States and its compelling interests from attack by the Taliban, al Qaeda, and the Islamic State in Iraq and the Levant.” “Compelling United States interests” are defined in section 11 as “United States territory, The United Armed Forces, and United States citizens.”

### **What does it say about ground troops?**

While the AUMF does not restrict the use of ground troops to fight the Taliban, al Qaeda, and ISIS in Afghanistan and Iraq, under section 4, any new authorization to use force in a new country that is obtained via the proposal's expedited procedures cannot also authorize the use of "ground forces in a combat role" without an additional vote from Congress. The president can subsequently obtain authorization to use ground troops in that country via the expedited procedures. This just can't be done at the same time that Congress authorizes the president to use force in the new country (unless, of course, Congress chose to forgo the expedited procedures and passed an authorization through regular order).

### **Does it include a sunset?**

Yes. Under section 6, the authorization would expire after three years. Congress can reauthorize it with or without modifications via the proposal's expedited procedures.

The proposal also includes a novel provision in section 5 whereby the authority to use force against groups covered by the AUMF would sunset once a group is no longer "an organized armed group that has engaged, and continues to be engaged, in active hostilities against the United States as a party to an ongoing armed conflict involving" the Taliban, al Qaeda, or ISIS and does not have a "credible ability to conduct a substantial attack against compelling United States interests." Under section 5(a) the president, in consultation with the Secretary of Defense, the Secretary of State, and the Director of National Intelligence must submit a report every six months, certifying whether each group covered by the AUMF meets these conditions. If the president does not certify that a group does meet these conditions, the authority to use force against that group would cease 60 days after the report is due.

### **What does it do to the 2001 and 2002 AUMFs?**

As noted above, the proposal would sunset the 2001 AUMF after six months (in section 9). Under section 10, the 2002 Iraq AUMF is repealed immediately.

### **What information must be reported?**

The Merkley AUMF includes comprehensive reporting requirements to both Congress and the public. Under section 7, the president must submit to appropriate congressional committees and publish in the Federal Register reports every six months which provide the following information on the prior six-month period:

- The groups the United States is using force against under the authorization, along with information on the extent to which each group has targeted compelling U.S. interests and poses a threat to such interests;
- The countries where the United States has used force under the authorization, including the location within each country where force was used;
- The numbers of combatant and civilian casualties determined by both U.S. and credible nongovernmental sources, along with an explanation of any discrepancies between these numbers;

- Descriptions of the mechanisms used to prevent and limit civilian casualties and the processes used to investigate allegations of civilian harm;
- A description of the national security, diplomatic, development, and humanitarian goals of the United States for each country in which the use of force is authorized, along with the strategy and timeline for achieving these goals;
- An assessment of the bilateral and multilateral impact of U.S. force in each country and the level of engagement of the government of each country with such force; and
- A description of the financial costs of operations conducted pursuant to the authorization both in aggregate and for the prior 6-month period.

The reports must be unclassified, although portions may be classified “if strictly required to protect the national security interests of the United States.” However, the names of the groups and locations where force is used cannot be classified, ensuring that the American people know where they are at war and who they are at war with.

### **What does it say about international law compliance?**

In Senator Merkley’s Statement of Principles for a new AUMF, he states that any new AUMF must “[r]equire that the United States adhere to international law.” Merkley’s proposal achieves this by authorizing the use of “necessary and appropriate force” (as does the Corker-Kaine proposal), which the Supreme Court has held requires all actions taken under the authorization to comply with U.S. obligations under the law of armed conflict. The *Charming Betsy* doctrine (*Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804)) also holds that U.S. statutes should not be interpreted in a manner that conflicts with international law if any other possible construction is available. Senator Merkley’s proposal goes one step further, including an explicit statement in section 3(c) that the authority provided in the AUMF “may be used only in a manner consistent with the obligations of the United States under international law.” Including such a statement in any new force authorization would signal to the world the importance the United States places in adhering to such obligations, and would bolster confidence, both internally and globally, in the United States as a nation that complies with the rule of law.

Yesterday, Senator Merkley said he “tremendously appreciate[d]” the leadership that Senators Corker and Kaine had taken in seeking to advance this difficult issue. Indeed, these Senators should be applauded for their efforts to address such a fraught and complex undertaking. Should the Senate Foreign Relations Committee decide to take up a new AUMF, it should start with Senator Merkley’s proposal. This proposal takes an astute approach that would reassert and maintain Congress’ authority over the hard decision to go to war.