

Military Action Against Islamic State: Will Congress Go On Record?

Virtually no one in the Congress likes the president's draft authorization for the use of military force against ISIS, but will Congress come up with its own?

By Gary Feuerberg

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WASHINGTON—Last August, the United States began an attack against the Islamic State (also known as ISIS or ISIL) that is ongoing today and has resulted in more than 2,000 coalition airstrikes and 3,000 military advisers. The legal authority for these actions could be said to be a bit loose.

In February, five months after U.S. military involvement, President Barack Obama sent Congress a draft Authorization for the Use of Military Force (AUMF) that was intended to be tailored to Iraq and Syria.

President Obama had said he wanted to work with Congress on a new AUMF. The administration maintains that the legal justification for the mission in Iraq and Syria is already provided by the 2001 AUMF against al-Qaeda and the Taliban, passed by Congress three days after the 9-11 attack—13 years ago.

But ISIS didn't even exist in 2001. The 2001 AUMF, which is the longest-running authorization in American history, needs a "right-size and update," the president said at a news conference last November. "We now have a different type of enemy. ...How we partner with Iraq and other Gulf countries and the international coalition—that has to be structured differently," Obama said.

Congress is poised now to take shared ownership of the ISIS combat operations and put some limits and requirements on the president's war-making powers. Last December, the Senate passed an AUMF that died with the 113 Congress.

It would be fitting too for Congress to step up. The U.S. Constitution makes the chief executive the Commander in Chief, but reserves the declaration of war to the Congress. The Founding Fathers wanted a check on the president's power to wage wars.

Regrets on the 2002 Iraq AUMF

The importance of voting for or against an AUMF to the future career of a congress member or senator cannot be overstated. Recall that New York Senator Hillary Clinton voted for the Authorization for Use of Military Force Against Iraq Resolution of 2002, a fact that was used against her by candidate Barack Obama, who became the Democratic presidential nominee in 2008.

Dick Durban (D-Ill.), who voted against the 2002 AUMF resolution, observed last year that no members of the Senate really understood what they were voting for. He said, "We were reacting

to the 9/11 attack. ... None of us could have envisioned that we were voting for the longest war in the history of the United States, which still goes on, to this day. None of us could have understood the military aspects and nonmilitary aspects of the commitment that we were making.”

Whether or not Congress acts and passes a new AUMF, the president will continue to bomb the terrorists in Iraq and use the 2001 AUMF as his legal basis.

Criticism of President’s Proposed AUMF

If Congress decides to pass its own AUMF, or work from the president’s proposal, what should it ideally contain?

To answer this question, Human Rights First, held a briefing, April 8. Human Rights First is a nonpartisan human rights organization that “challenges” the U.S. government to play a leadership role in pressing for human rights around the globe, according to Tad Stahnke from Human Rights First, who moderated the discussion.

Gene Healy, from the Cato Institute and author of “The Cult of the Presidency,” said he didn’t believe that the president’s draft resolution contained real limits on the president’s war powers.

“The president’s draft AUMF does not limit military operations to Iraq and Syria and it contains a broad ‘associated forces’ provision that could open the door to the sort of endless target-list proliferation we’ve seen under the 2001 AUMF,” wrote Healy in an opinion in February.

Healy said at the Human Rights first briefing, “There are no real limits on boots on the ground” apart from saying that the AUMF does not authorize the use of “United States Armed Forces in enduring offensive ground combat operations,” where the word “enduring” is fraught with vagueness and open interpretation.

Healy accused presidents George W. Bush and Barack Obama of stretching the language of the 2001 AUMF “to authorize an ever-expanding war against groups that didn’t exist on 9/11 and whose connections with ‘core’ al-Qaeda are ever more tenuous.”

Healy was alarmed concerning Secretary of Defense Ashton Carter’s testimony on March 11 before the Senate Foreign Relations Committee that the 2001 AUMF could be interpreted to apply to Nigeria’s Boko Haram, but had not yet been interpreted that way. Carter left the matter open observing that the thinking focused on a “lasting victory against ISIS” and would not target groups like Boko Haram.

Healy said at the briefing that the president’s proposed AUMF fails “to clarify the application of the 2001 AUMF to the fight against ISIS.” Limitations on the president’s power imposed by an AUMF passed by Congress could be side-stepped by invoking the earlier AUMF.

The Ideal AUMF Against ISIS

Jennifer Daskal, assistant professor of law at American University Washington College of Law, referred to several provisions that should be applied to the AUMF against ISIS that she drew up with other law professors.

All AUMFs should have sunset provisions, where the authority ends unless re-authorized. The president's draft specifies three years, which seems agreeable to all. This doesn't mean the armed conflict would end in 2018, but that Congress and the president in 2018 would have to decide whether to continue or update the AUMF, or allow it to expire. In 2018, "Congress and the American people [would be] basically forced into a point of deliberation and debate as to ... what should be in place in going forward," said Daskal.

The aim of sunseting all the old AUMFs is to avoid "sliding into endless war without deliberation and choice," said National security law professors Jack Goldsmith, Ryan Goodman, and Steve Vladeck in an opinion, in the Washington Post on Nov. 14.

The AUMF 2001 would need to be ended or folded into the AUMF against ISIS. If the 2001 AUMF were to continue in parallel, the AUMF against ISIS would be rendered meaningless, she said. Limitations specified in an AUMF against ISIS set by Congress as to targeted groups, for example, would have no effect if the president could do an end-run, claiming his actions are being carried out under authority granted by the earlier 2001 AUMF.

The president's proposed AUMF at least calls for an end to the 2002 AUMF, the legal basis for the invasion of Iraq. "I do not believe America's interests are served by endless war, or by remaining on a perpetual war footing," said President Obama on Feb. 11.

'Associated Forces'

The administration invokes the AUMF following 9/11 as grounds for the military action against Islamic State, which did not exist, on the logic that ISIS is a "successor entity." For Healy, Daskal, and the allied lawyers, this notion is too broad and they want to see it tightened up for the AUMF against ISIS.

The administration's proposal authorizes the use of force against "associated persons or forces" of ISIS, which include those individuals or organizations that are fighting on "behalf of," or "any closely related successor entity." This wording needs to be further narrowed so that force is authorized only against "armed organizations that actually joined up with ISIL," writes Daskal, and "not merely ideological alignment."

If new threats appear, such as a lone wolf or some unaffiliated group, the country can still defend itself. The president's Article II, Section 2 Commander in Chief powers permit the use of force for defensive purposes.

Transparency

A powerful incentive for the Congress to pass a new AUMF is that it can provide greater transparency and closer oversight by the Congress on U.S. military engagements than what followed 9/11. Daskal and colleague lawyers Ryan Goodman, Harold Hongju Koh, and Steve Vladeck would like to see the president provide a report to Congress every six months that describes the progress made, and "detailed information about civilian and combatant casualties on all sides."