

“Authorizing the Use of Military Force: S.J. Res. 59”

Prepared statement by

John B. Bellinger III

Partner, Arnold & Porter

Adjunct Senior Fellow in International and National Security Law, Council on Foreign Relations

Before the

Committee on Foreign Relations

United States Senate

2nd Session, 115th Congress

Mr. Chairman, Ranking Member Menendez, and members of the Committee, it's a privilege for me to appear again before this Committee. I am pleased to be here to testify in favor of S.J. Res. 59, which would provide an updated Authorization for the Use of Military Force against the Taliban, al Qaeda, the Islamic State in Iraq and Syria, and designated associated forces.

Mr. Chairman, I especially want to commend you, together with Senator Kaine, and your respective staffs for your determined efforts over the last several years to forge a bipartisan consensus on a new AUMF against terrorist groups. I know it has not been easy, but your work is important and represents good constitutional government. I am pleased to see that Senators Flake, Coons, Young, and Nelson are co-sponsors of S.J. Res. 59. I also want to recognize Ranking Member Menendez for his efforts when he was Chairman to report an AUMF against ISIS in December 2014 and Senator Cardin, who was ranking member when I testified in support of a new AUMF in June 2017 and when a bipartisan consensus begin to emerge in this Committee.

As this Committee knows, I was involved in drafting both the 2001 and 2002 AUMFs when I served as the Legal Adviser to the National Security Council from 2001 to 2005. I later served as the Legal Adviser to the Department of State from 2005 to 2009, a position to which I was confirmed by the Senate. Between 2001 and 2009, I engaged on an almost daily basis in discussions about legal issues relating to the use of military force, including detention, arising under both AUMFs.¹

¹ I previously served as Counsel for National Security Matters in the Criminal Division of the Department of Justice (1997-2001); Of Counsel, Select Committee on Intelligence, U.S. Senate (1996); General Counsel, Commission on the Roles and Capabilities of the U.S. Intelligence Community (1995-1996); and Special Assistant to Director of Central Intelligence William Webster (1998-1991).

I have long advocated, both while I was still in government and since leaving government, revising the 2001 AUMF in order to update it to address terrorist threats that have emerged after 9-11 and to clarify its parameters.² An updated AUMF is both legally important to give our military clear statutory authority to fight terrorist groups that threaten the United States and constitutionally important to demonstrate that Congress has authorized and supports the actions our military is taking, rather than simply acquiescing in increasingly strained Executive branch interpretations of the 2001 AUMF enacted seventeen years ago.

In June 2017, I testified before this Committee to urge Congress to pass a new AUMF that would repeal the 2001 and 2002 AUMFs and replace them with a comprehensive new AUMF that authorizes the use of force against the Taliban, Al Qaida, ISIS, and associated groups. I have attached a copy of my testimony and have quoted key excerpts below:

- An updated AUMF is legally necessary to ensure that our military has clear statutory authorization to use force against new terrorist groups that threaten violence against the United States and to ensure that U.S. military operations, including detention, withstand legal challenges in U.S. courts.
- An updated AUMF should remove the limitation in the 2001 AUMF to organizations that committed the 9-11 attacks. As I have discussed above, it is increasingly difficult to demonstrate that new terrorist groups that have emerged in the last few years, such as ISIS, are associated with Al Qaida. A new AUMF should authorize the use of force against new groups that pose significant threats of violence to the United States whether they are associated with Al Qaida or not.
- A new AUMF is especially important if the United States detains members of new terrorist groups such as ISIS.³ If members of such groups are able to challenge their detention in US courts, they will undoubtedly argue that ISIS is not covered by the 2001 AUMF. A new AUMF that specifically authorizes the use of force against ISIS would provide a clear legal basis for detention of members of ISIS.
- A updated AUMF should authorize the President to use all necessary force against named terrorist groups and associated organizations that have attacked or have an intention to attack the United States or U.S. persons. The AUMF should include a list of specific groups (which would presently include at least the Taliban, Al Qaida, and ISIS, and may include other named groups) but allow the President to use force against additional organizations if he notifies Congress (in either public or classified form) that he has determined that the additional organizations are associated with one of

² 2 In 2010, I wrote an op-ed in the Washington Post entitled “A Counterterrorism Law in Need of Updating,” in which I argued that the 2001 AUMF should be updated because it provides “insufficient authority for our military and intelligence personnel to conduct counterterrorism operations today and inadequate protections for those targeted or detained, including U.S. citizens...As U.S. forces continue to target terrorist leaders outside Afghanistan, it is increasingly unclear whether these terrorists, even if they are planning attacks against U.S. targets, are the same individuals, or even part of the same organization, behind the Sept. 11 attacks.” John B. Bellinger III, “A Counterterrorism Law in Need of Updating,” Washington Post, November 26, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/25/AR2010112503116.html>.

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

the named organizations and are engaged in hostilities or plan to engage in hostilities against the United States.

- Geography. A new AUMF should not be limited geographically to certain countries.
- Sunset. As a former executive branch lawyer, I would oppose a sunset provision from a legal perspective. A sunset creates legal uncertainty for the President and the military. Moreover, a sunset provision may telegraph a lack of political resolve to the terrorist groups who threaten us. ...Having said this, I appreciate that many members may be highly uncomfortable voting to approve an open-ended authorization, especially in light of the wide range of counterterrorism activities that have been conducted pursuant to the 2001 AUMF over the last sixteen years. I can understand that some kind of a sunset or review provision may be politically necessary to achieve consensus on a new AUMF.
- Scope of Military Force. As an executive branch lawyer, I would oppose provisions in a new AUMF that would seek to restrict or micromanage the use of force by the President and the military, such as an absolute prohibition on ground combat operations. The President and the military need flexibility to conduct necessary military operations to defend the United States.
- Detention. Although not strictly necessary as a legal matter, I believe it would still be legally helpful, both for the military and for potential detainees, for a new AUMF to specifically authorize detention of terror suspects captured by the military outside the United States.
- Transparency and Reporting. It would also be reasonable and valuable for Congress to include reporting requirements in a new AUMF that would require the President to report, in public and classified forms, the counterterror activities conducted pursuant to the new AUMF, including information regarding additional groups against which the President plans to use force and countries where he plans to use force under the AUMF, specific terror suspects targeted, captured or killed, and numbers of civilians killed.

Last October, Secretaries Tillerson and Mattis testified before this Committee. Although they did not argue that a new AUMF is necessary, they did not oppose a new AUMF, provided that any new authorization meets three criteria: first, that it does not repeal the previous 2001 and 2002 AUMFs without simultaneously enacting a new AUMF; second, that a new AUMF not be time restricted; and third, that a new AUMF not be geographically limited.

I am pleased that S.J. Res. 59 addresses the parameters I recommended when I testified before the Committee in June and the prerequisites articulated by the Secretaries of State and Defense. S.J. Res. 59 appropriately balances the need for the President and our military to have a broad and flexible congressional authorization to use force against the terrorist groups that threaten the United States today with the understandable concerns of members of Congress from both parties not to authorize an entirely open-ended use of force. It authorizes all necessary and appropriate force against the Taliban, al Qaeda, ISIS, and associated forces designated by the President. It specifically lists five groups as associated forces and allows the President to designate additional entities—other than a sovereign nation—that fall within the statutory

definition of associated forces. It is not geographically limited, but does require the President to notify Congress within 48 hours of using force in a country other than Afghanistan, Iraq, Syria, Somalia, Yemen, and Libya. It does not include a sunset but does include a quadrennial congressional review requirement. It specifically provides that the authorization to use force under both the 2001 AUMF and S.J. Res. 59 includes the authority to detain members of the Taliban, Al Qaeda, ISIS, and designated associated forces. And it requires congressional reports while allowing the Executive branch to provide certain information in classified form.

S.J. Res. 59 is a clear improvement over the 2001 AUMF with respect to the concerns of both the Executive branch and Congress. Important from an Executive branch perspective, it removes the limitation in the 2001 AUMF to use force only against persons, nations, or organizations that planned, authorized, aided, or committed the 9-11 attacks. It clearly authorizes the use of force against ISIS and groups or organizations that are associated forces of the Taliban, Al Qaeda, and ISIS. It also provides clear statutory detention authority for members of these groups. And important from a Congressional perspective, it includes a statutory definition of associated forces, reporting requirements before new associated forces or new countries are added, and expedited congressional review procedures for the addition of new associated forces or countries and on a quadrennial basis. It does not authorize the President to designate a sovereign nation as an associated force. I will close by addressing three specific issues raised S.J. Res. 59.

Associated Forces. S.J. Res. 59 authorizes the President to use force against “associated forces” of the Taliban, al Qaeda, and ISIS that he designates in accordance with the provisions of the resolution. This is an important addition for the Executive branch because the 2001 AUMF did not specifically provide authorization to use force against “associated forces” of the nations, persons, or organizations that had committed the 9-11 attacks. Instead, successive Presidential administrations have concluded, as a matter of legal interpretation and without congressional guidance, that the authority provided by the 2001 AUMF also applies to associated forces. But the new authority provided by S.J. Res. 59 is not unfettered. The President must notify Congress within 48 hours of determining that a new organization, person, or force is an associated force covered by S.J. Res. 59. And any new associated force must meet the definition set forth in Section 8(2) of S.J. Res. 59. This definition is based on the criteria that the Executive branch uses to identify associated forces, according to letters submitted to the Committee by the Secretaries of State and Defense. Although some members of Congress may be concerned that S.J. Res. 59 would authorize the use of force against groups of which Congress is currently unaware or that may not even have been formed at the time S.J. Res. 59 is passed, the alternative is to allow the President to continue to rely on the 2001 AUMF, which has no limitations at all.

Uninterrupted Authority. Some have expressed concern that repealing the 2001 AUMF might call into question the legality of Executive branch actions, such as detention of members of ISIS, that have been conducted in reliance on it, even if those authorities are replaced with a clear new authorization. I believe that S.J. Res. 59 satisfactorily addresses these concerns in several ways. First, Section 6(b) clearly states that S.J. Res. 59 “provides uninterrupted authority for ongoing military operations conducted pursuant to” the 2001 AUMF. Second, Section 10 would amend section 1021 of the NDAA of 2012 to provide that the authorizations in the 2001 AUMF and S.J. Res. 59 include the authority to detain members of the Taliban, al Qaeda, ISIS, or associated forces. And third, Section 2 states that the purpose of S.J. Res. 59 is to replace the 2001 AUMF with an updated authorization that provides uninterrupted authority to use force against these

groups. Congress could certainly add additional legislative history to emphasize that the enactment of S.J. Res. 59 shall not be construed to treat as unlawful or not authorized actions (such as detention) that the Executive branch has taken pursuant to the 2001 AUMF.

No Authorization Against Sovereign Nations. S.J. Res. 59 authorizes the President to designate additional organizations, persons, or forces – other than a sovereign nation – that the President determines have entered the fight alongside and are cobelligerent with al Qaeda, the Taliban, and ISIS. Accordingly, S.J. Res. 59 does not authorize the President to designate a sovereign nation as an associated force. This does not mean the President does not have authority to use force against a sovereign nation that he determines is supporting a terrorist group or that the force is a necessary and appropriate element of the force used against the Taliban, Al Qaeda, ISIS, or associated armed forces. He could rely on his constitutional authority as Chief Executive and Commander in Chief to use force against a sovereign state in appropriate situations. He could also return to Congress to seek a broader authorization to use force against a sovereign state.

Conclusion

In sum, I congratulate Chairman Corker, Senator Kaine, and the co-sponsors of S.J. Res. 59 for producing a strong, balanced, and bipartisan authorization to use force against terrorist groups. An updated AUMF to replace the 2001 AUMF is both legally and constitutionally important. I urge the Committee to approve S.J. Res. 59 and to recommend it to the full Senate.