

# Repeal, Don't Replace, the AUMF

For the past 17 years, presidents have used the 2001 Authorization for the Use of Military Force (AUMF) as a blank check to wage war whenever and wherever they please. Congress is now debating several replacement AUMFs—but these, too, pose the danger of granting the president far broader war powers than the Constitution envisioned. At a Capitol Hill Briefing, Cato's GENE HEALY and JOHN GLASER made the case for repealing, rather than replacing, the AUMF.

**GENE HEALY:** We're in the middle of a renewed debate here on Capitol Hill about what role—if any—Congress should play in the choice between war and peace. That's the most fundamental decision any government can make, and it's one our Constitution entrusts to Congress.

But for nearly 17 years now, that choice has been left to the executive branch, with the result that the United States has been almost constantly at war. In President Obama's last year alone, U.S. forces dropped over 26,000 bombs on seven different countries. He left office as the first two-term president in American history to have been at war every single day of his presidency.

That's in large part thanks to a joint resolution Congress passed three days after 9/11: the 2001 Authorization for the Use of Military Force, or AUMF. Three presidents in a row have warped that limited authorization into an enabling act for globe-spanning presidential war, broad enough to cover everything from airstrikes in Waziristan to boots on the ground in Tongo Tongo. The Trump administration's position, like the Obama administration's before it, is that Congress already had its debate on war powers—17 years ago—and it's One Congress, One Vote, One Time.

Maybe, at least once in a generation, Congress should weigh in on the multiple wars we're fighting. But the current debate also presents a serious risk: that Congress will pass a new AUMF that cedes even more power to the president, laying the legal groundwork for another generation or more of presidential war.

Today, John and I are going to make the case that the best way to avoid that danger is to wipe the slate clean: repeal, don't replace, the 2001 AUMF. Recognize that the original authorization has run its course, and sunset it, leaving adequate time—six to nine months—to wrap up ongoing combat operations and for the president to make the case for any new authorization he thinks is needed. If he does, he can make that case to Congress, the way the Constitution envisions.

Our Constitution's Framers thought that going to war should be difficult. James Madison held it as "an axiom that the executive is the department of power most distinguished by its propensity to war, [therefore] it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence." They did that by granting the bulk of the Constitution's military powers to Congress, including control of the decision to go to war in the first place.

That didn't leave the president totally disarmed: he retained defensive authority—the power to "repel sudden attacks," as Madison's notes put it. But, absent an imminent threat, the Constitution gave him no power to launch sudden attacks. "It will not be in the power of a single man . . . to involve us in such distress," Pennsylvania's James Wilson summed up in 1787.

Of course, it hasn't always worked that way. Well before September 11, we can point to examples of American presidents launching wars without congressional authorization: the invasions of Grenada under Ronald Reagan and of Panama under George H. W.

Bush; the air war over Kosovo under Bill Clinton. But the presidential wars of the late 20th century were, for the most part, exceptions to the general rule: geographically limited and temporary departures from a baseline of peace.

Since the terrorist attacks of September 11, 2001, we've watched the emergence of a radically different regime in which going to war is easy, frequent, and rarely debated. This system has made war America's default setting. The use of lethal force is now so ubiquitous, so normalized, that we're hardly able to notice it anymore.

For example, in the run-up to the 2016 election, over Labor Day weekend, the Obama administration launched some 70 airstrikes across six countries: Iraq, Syria, Afghanistan, Yemen, Somalia, and Libya. Twenty years ago, that would have led every news broadcast. But we barely looked up from the grill.

Sen. Tim Kaine (D-VA) is right when he says that "for too long, Congress has given presidents a blank check to wage war," and he's right to want to change that. But if our experience with the 2001 AUMF has taught us anything, it's that presidents will push the authority they're given as far as language will allow—and beyond.

The relevant clause of the 2001 AUMF is 60 words long. It targets the perpetrators of the September 11 attacks and those who "harbored" or "aided them." It says nothing about "associated forces." But that concept has become a bottomless fount of presidential authority to wage war against groups that didn't exist on 9/11, that aren't associated with Al Qaeda and may even be at war with them—in the case of ISIS, for example—and that do not present any serious threat to the U.S. home front.

Most of the replacement AUMFs on the table in Congress, including the one that Sen. Kaine drafted with Sen. Bob Corker (R-

TN), grant far more authority than the original. The Corker-Kaine AUMF starts by providing congressional authorization for war against at least eight enemies in at least six countries.

But that's only the beginning. Under this AUMF, the president can also, at any time, decide to wage war on new enemies, in new countries. The resolution boasts about its rigorous transparency requirements, but it leaves open the possibility that the president can bury the announcement of new targets and new battlefields in a "classified annex," unavailable to the general public. Congress retains the right to object to mission creep, but unless it can muster a veto-proof majority to overturn the president's decision, he gets to expand the war at will. Also under Corker-Kaine, the legislation doesn't sunset. This is not a way of reasserting Congress's constitutional powers, it's a method for institutionalizing the Forever War.

Other members of Congress have introduced somewhat narrower AUMFs. On the House side, a bipartisan group of representatives led by Rep. Mike Coffman (R-CO) has drafted an alternative AUMF that features a five-year sunset. Rep. Adam Schiff's (D-CA) AUMF features a three-year sunset. But both include broad "associated forces" provisions that allow the president to expand the target list virtually at will.

The AUMF introduced by Sen. Jeff Merkley (D-OR) avoids most of those pitfalls. It's about as tightly and smartly crafted as a war authorization can be. It's limited to two countries (Iraq and Afghanistan) and three groups (Al Qaeda, the Taliban, and ISIS); the countries and targets must be published and cannot be classified; and for the most part, it requires the president to come to Congress to add new countries and new groups. Even so, it bypasses the debate we should be having about the need for continuing war authorities against even those three core groups—Al Qaeda, the Taliban, and ISIS.

Instead, John and I argue for a war powers reset: sunseting the AUMF; keeping it separate from a debate about new war authorizations; and restoring America's default setting to peace, not war. And if the president decides that Al Shabab, for example, represents a serious, long-term danger to our national secu-



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riety, he is free to make that case to the people's representatives and secure authorization for war in the way the Constitution envisioned.

We're told that we face grave threats from emerging terrorist groups. But when the Framers crafted the Constitution, they lived in a pretty bad neighborhood. The United States was a small frontier republic on the edge of a continent occupied by periodically hostile great powers and Indian marauders. There were grave threats and dangers, and, nonetheless, our first president George Washington wasn't sure that he had the authority to take offensive action against hostile Indian tribes without authorization from Congress.

When the Framers made the decision to limit the amount of war power that one person could exercise, I think you could argue that the threats were somewhat greater than they are today. And that's something John is going to talk about next.

**JOHN GLASER:** While Gene focused on the legal, constitutional, and political problems with the AUMFs, I'm going to focus on the other side of the coin in this discussion: the strategic and national security implications of this issue.

I want to start by taking stock of the scope and costs of U.S. military action taken under the two post-9/11 AUMFs. And it's important to dwell on these costs because the damage of unchecked executive war powers is not limited to the erosion of constitutional principles and the rule of law. There are also real strategic, financial, and human costs involved.

Currently, U.S. troops are in the air or on the ground fighting terrorists and various nonstate militant groups in 14 different countries. The United States has bombed Syria, for example, more than 13,000 times in the past three and a half years. This past year, President Trump bombed Yemen more than 130 times, targeting Al Qaeda and ISIS militants—that's up from 38 times in 2016.

Since 2014, the Pentagon says anti-ISIS operations have cost roughly \$14.3 billion, likely an undercount. The Iraq and Afghanistan wars, the two main theaters of the two AUMFs at issue, have come with a price tag of roughly \$5 trillion.

Conservative estimates of the number of Iraqis killed as a result of the U.S. war and subsequent occupation exceed 200,000, not to mention the millions of refugees and internally displaced people it generated. Since 2009, the war in Afghanistan has claimed roughly 29,000 civilians lives and injured more than 52,000.

In short, the two existing AUMFs have afforded such wide latitude for war that these ventures can impose enormous costs



and wide-ranging consequences without triggering any pushback from Congress. Given all the terrible costs and negative consequences, have these policies been successful in mitigating the terrorist threat?

It's really hard to answer that question in the affirmative. In some cases, there were some short-term benefits. Drone strikes in Pakistan, for example, had an impact on decimating Al Qaeda's ranks, and in the initial stages of the war in Afghanistan, the capabilities of jihadists depleted as they fled the U.S. military. But in the longer run, as it turns out, military force is not all that effective a tool in mitigating the terrorism threat. And, in fact, there is compelling evidence that our actions have exacerbated the problem.

In 2015, the number of fatalities from terrorism worldwide had increased by a staggering 397 percent compared to 2001. And in the seven countries in which the United States engaged in major military operations after 9/11, the number of individual terrorist attacks between 2001 and 2015 rose by an astonishing 1,900 percent compared to the previous 14 years. And yet the data do not show any such spike in the comparable countries that the United States didn't intervene in. If anything, open-ended authorization for using military force in the Middle East has made us less safe, not more.

I fully understand the impulse to respond to this by saying, "Well, are you suggesting that we do nothing!?" Several responses to that: first, the academic research on how terrorist groups fade doesn't emphasize military force, but rather things like political integration and moderation, prolonged marginalization within stable security environments that cause recruitment and opportunities for violence to dry up, and so on. And we need to be realistic about the limits of what military action can achieve to create those kinds of conditions. Secondly, there is plenty that we can do in the realm of intelligence and law enforcement to tackle existing terrorism threats.

But we do need to scrutinize how much of a threat terrorism actually is. And, in fact, the threat is not the existential menace we're told. It's a pretty minor and manageable one.

Your chances of being killed in a terrorist attack here on U.S. soil are infinitesimally small. Since 9/11, the chances are about 1 in



JOHN GLASER

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40 million. In the years since 9/11, the average number of Americans killed in the United States by Islamist terrorism is about six per year. Compare that, say, with the fact that non-terrorist homicides have killed roughly 20,000 Americans in the past 30 years, and think of the incredibly disproportionate resources devoted to the comparatively tiny threat of terrorism.

The 9/11 attacks were a traumatic event, and led us to misinterpret the nature of the threat from Al Qaeda and related groups. The attacks were an extreme outlier in the history of terrorist attacks and not a harbinger of some new era of global threat. And the

record in the years since speaks for itself. If you catalog all of the attempted terrorist attacks in the United States since 9/11—from the shoe bomber to the underwear bomber to the Lackawanna 6 to the Times Square bomber to Fort Hood to the Boston Marathon—they all essentially fall into one of three categories: (1) the attacker had some operational connection to foreign terrorist groups and through their own incompetence failed miserably to successfully carry out the attack (think here of the genius mastermind who lit a fire in his underwear on a commercial flight); (2) the attacker had precisely zero operational connection to any foreign terrorist group and they committed or attempted to commit some awful attack on their own; (3) the attacker was some poor schmuck who was either induced or, in some cases, was entrapped by an undercover informant to conduct a phony plot cooked up by U.S. law enforcement (the details in most of these cases reveal a stunning level of stupidity and ineptitude, and most experts think these would-be attackers never would have been able, or possibly never would have had the initiative in the first place, to actually carry out any attack in the absence of the fabricated sting operation. See Trevor Aaronson's *The Terror Factory: Inside the FBI's Manufactured War on Terrorism* or John Mueller and Mark G. Stewart's *Chasing Ghosts: The Policing of Terrorism*.)

The national security rationale for a presidential blank check for a global war on terror is extremely weak. Contrary to the hysteria that still surrounds terrorism, it is a minor and manageable threat, not a war to be won. And if Congress were to take our advice that the right course is to repeal the two remaining AUMFs and not replace them with a newer, fresher authorization for continued war, this step should not be confused with tying the hands of the president. Whoever holds that office has inherent powers to repel sudden attacks or seek new, specific authorizations to defend against threats on a case-by-case basis. ■