



Bringing An End To The Forever War

Gene Healy

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“The Constitution supposes, what the History of all Governments demonstrates,” James Madison wrote to Thomas Jefferson in 1798, “that the Executive is the branch of power most interested in war.... It has accordingly with studied care, vested the question of war in the Legislature.” As James Wilson had earlier explained to the delegates at the Pennsylvania ratifying convention: “This system will not hurry us into war; it is calculated to guard against it.”

In the post-9/11 era, the United States has drifted towards a radically different regime. Two successive presidents have treated the 2001 Authorization for Use of Military Force (AUMF) as a wholesale, potentially permanent delegation of congressional war powers — a writ for war without temporal or geographic limits.

The 2001 AUMF was passed by the 107th Congress three days after the 9/11 attacks and targeted those who “planned, authorized, [or] committed” the attacks and those who “aided” or “harbored” them. This referred to, respectively, al-Qaeda and the Taliban although they were not named in the authorization. Judging by what they said at the time, the legislators who passed the resolution did not imagine that they’d sanctioned an open-ended, multi-generational war. This AUMF was nothing like the Gulf of Tonkin Resolution that authorized the Vietnam War, then-Sen. Joe Biden insisted after the vote. This authorization was limited: “we do not say pell-mell, ‘Go do anything, any time, any place.’”

The post-9/11 AUMF has now been in effect for over twice as long as the Gulf of Tonkin Resolution, and our two post-9/11 presidents have stretched it into the boundless grant of power Biden disclaimed. Over the last decade and a half, the 2001 AUMF has served to underwrite a far-flung conflict against a shifting succession of jihadist groups with ever more tenuous connections to the resolution’s language and original purpose. Lately, the Obama administration has invoked the 2001 AUMF as legal cover for war with ISIL — a conflict that the army chief of staff has said will last some “10 to 20 years” more. This system will not hurry us into peace.

The 2001 AUMF and the War against ISIL

Even as the Obama administration relentlessly expanded its interpretation of the 2001 AUMF, the specific terrorist threat it was passed to combat dramatically receded. Shortly after U.S. Navy SEALs killed Osama bin Laden in the summer of 2011, then-Secretary of Defense Leon Panetta announced that the United States was “within reach” of “crippl[ing] al-Qaeda as a threat to this country.” By March 2013, Director of National Intelligence James R. Clapper confirmed that

“core” Al Qaeda had been “degraded...to a point that the group is probably unable to carry out complex, large-scale attacks in the West.”

That same month found senior Obama administration officials admitting to *The Washington Post* that they were “increasingly concerned that the law is being stretched to its legal breaking point.” That was before the administration stretched the AUMF still further in order to provide legal cover for the war against ISIL President Obama launched in August 2014.

“We have not yet detected specific plotting against our homeland,” President Obama explained in his September 10, 2014 speech on U.S. war aims, but “if left unchecked, these terrorists could pose a growing threat” beyond the Middle East. “I have the authority to address the threat,” he insisted, while declining to identify any particular source.

It soon emerged that the president planned to rely, once again, on the 2001 AUMF. At first, the administration seemed reluctant to outline exactly how the post-9/11 authorization could be stretched to cover a new war against a new enemy, nearly a decade and a half after its passage. But, as the mission expanded, the president’s spokespeople grew bolder. Last fall, as the administration deployed “boots on the ground” to fight ISIL in Syria, White House press secretary Josh Earnest insisted that “Congress in 2001 did give the executive branch the authority to take this action. There’s no debating that.”

The administration’s current legal theory seems to be that ISIL basically *is* al-Qaeda — or *an* al-Qaeda — based on its predecessor organization’s past connections to the group targeted by the 2001 AUMF and ISIL’s current claims that it is “the rightful successor to bin Laden’s legacy.” That Osama bin Laden’s actual, designated successor, Ayman al-Zawahiri, has repudiated and excommunicated ISIL presents something of a problem for that theory as does the fact that the two groups are engaged in open warfare against each other. Indeed, headlines like “ISIS Beheads Leader of Al Qaeda Offshoot Nusra Front,” or “Petraeus: Use Al Qaeda Fighters to Beat ISIS” might give one cause to wonder — or even *debate* — whether ISIL is the same enemy Congress authorized President Bush to wage war against back before Steve Jobs unveiled the first iPod.

“Take a Vote”

Thus far, however, there’s been all too little debate over our continuing drift toward the normalization of perpetual presidential war. In his 2016 State of the Union address, President Obama practically taunted Congress over its lethargy and irrelevance: “[A]uthorize the use of military force against ISIL. Take a vote,” he demanded — while making clear in the very next sentence that “with or without congressional action,” the war would continue.

The 114th Congress has seen the introduction of a number of proposals to rein in the expansive war powers the president claims. Bills drafted by Sen. Ben Cardin (D-MD) and Rep. Barbara Lee (D-CA) attack the source of those claims directly, sunseting and repealing the 2001 AUMF. But a stand-alone repeal currently appears politically impossible. A package deal retroactively authorizing the war that the president’s been waging without Congress may be a necessary precondition for war powers reform. That’s the theory behind proposals introduced by Rep.

Adam Schiff (D-CA) and Sen. — and now Democratic vice-presidential candidate — Tim Kaine (D-VA).

Given the history of past AUMFs —which suggests that presidents will stretch the authority they grant as far as language will allow and possibly further — Congress should reject any new authorization unless it is carefully crafted to reduce the potential for presidential abuse.

Any new AUMF Congress considers should do the following:

Repeal Prior AUMFs

Unless a new AUMF clearly supersedes past authorizations, the next president will remain free to flout its restrictions by claiming that his or her actions are being carried out under prior authorizations for different wars. Thus, any new AUMF should repeal the 2001 authorization and the 2002 Iraq War AUMF, which the Obama administration has invoked as an alternative legal basis for the fight against ISIL.

Impose Time Limits

Any new AUMF should also include an expiration date, preventing future presidents from claiming authorization-in-perpetuity. The Schiff bill and the Kaine/Flake AUMF both impose a three-year sunset, which, as in the PATRIOT Act context, could force Congress to regularly deliberate on whether the authority granted continues to be necessary.

Impose Geographic Limitations

A new AUMF should also guard against “mission creep” to new theaters of war. Sending U.S. troops to Libya to combat ISIL elements was not on the president’s “horizon at the moment,” Secretary of State John Kerry said in February 2016, but “the president will never eliminate every option forever,” if things change. By May, the administration begun deploying special operations forces for a possible ground campaign against ISIL associates in Libya and by August, begun a renewed round of airstrikes. Congress should restrict the president’s options, requiring the him or her to seek authorization for any new expedition beyond Iraq and Syria.

Restrict Ground Combat Operations

Tactical mission creep has already occurred with U.S. special operations forces’ growing combat role in Iraq and Syria. Ideally, a new AUMF would address that problem directly, but a proposal drafted by Rep. Schiff in late 2015 offers a compromise that would require the president to notify Congress of the use of ground forces and fast-track member action to restrict their use.

Mandate Transparency

Most important, any new authorization must remove the veil of secrecy that has allowed 15 years of mission creep under the 2001 AUMF. As law professors Jack Goldsmith, Ryan Goodman, and Steve Vladeck have argued: “Any new AUMF should require the president to identify the groups against which force is used, along with related details, regularly in a report to Congress.”

In a May 2013 speech, President Obama expressed misgivings — however obliquely — about the aggressive interpretations of presidential authority he'd advanced. “The AUMF is now over 12 years old,” he intoned, “unless we discipline our thinking, our definitions, our actions, we may be drawn into more wars we don't need to fight, or continue to grant Presidents unbound powers.” He quoted James Madison's caution that “No nation could preserve its freedom in the midst of continual warfare.”

We've been testing Madison's proposition for going on 15 years now. A new president and a new Congress can and should bring this dangerous experiment to an end.

Gene Healy is a vice president at the Cato Institute and author of The Cult of the Presidency.