

27. Reclaiming the War Power

Congress should

- repeal the 2001 Authorization for the Use of Military Force and the 2002 Iraq War authorization;
- debate a narrowly tailored, time-limited authorization for military action against ISIS; and
- amend the War Powers Resolution to clarify its application to remote weaponry and include an automatic funds cutoff for unauthorized wars.

“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, and most prone to it. 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 toward a radically different regime. The 2001 Authorization for Use of Military Force (AUMF) was enacted to target the perpetrators of the September 11th attacks. Yet, two successive presidents have treated it as a wholesale, potentially permanent delegation of congressional war powers. Fifteen years later, that authorization has been transformed into an open-ended writ for globe-spanning presidential war. By the end of his tenure, President Barack Obama, who campaigned on “seek[ing] a new dawn of peace,” had bombed seven countries, launched 10 times as many drone attacks as his predecessor, and, as the *New York Times* noted in July 2016, was poised to become “the first two-term president to have presided over a nation at war for every day of his presidency.”

Nor, it seems, is there any end in sight. A top Pentagon official told the Senate in 2013 that the original war against al Qaeda will last “beyond the second term of this president . . . at least 10 to 20 years.” Our latest war in the Middle East, against the so-called Islamic State (ISIS), will also take some “10 to 20 years,” the Army chief of staff affirmed in 2015. “It’s going to be a [generational struggle](#),” echoed the vice chairman of the Joint Chiefs. *This* system will not hurry us into peace.

The 2001 AUMF: An Enabling Act for Limitless War

The 2001 AUMF, passed by the 107th Congress three days after the 9/11 attacks, targeted those who “planned, authorized, [or] committed” the attacks (al Qaeda) and those who “aided” or “harbored” them (principally, the Taliban). Judging by what they said at the time, the legislators who passed the resolution didn’t imagine that they had sanctioned an open-ended, multigenerational war. This authorization was nothing like the Gulf of Tonkin Resolution that underwrote the Vietnam War, then-Sen. Joe Biden insisted after the vote: “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 set of far-flung conflicts against a shifting succession of jihadist groups with ever more tenuous connections to the resolution’s language and original purpose.

By the spring of 2013, senior Obama administration officials were [telling the *Washington Post*](#) 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, to provide legal cover for the war against ISIS that President Obama launched in August 2014.

At first, the administration seemed reluctant to outline just 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. The Obama team’s earliest attempts at legal justification came in the form of [unsigned “talking points”](#) and statements by anonymous administration officials. But as the mission expanded, the president’s spokespeople grew bolder. In October 2015, as the administration deployed “boots on the ground” to fight ISIS 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."

How, exactly, does the language of the 2001 AUMF cover the Islamic State, a group that neither perpetrated the 9/11 attacks, "aided" them, nor "harbored" those who did? The Obama administration argued that ISIS 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 ISIS's current claims that it is "the rightful successor to bin Laden's legacy." That bin Laden's actual, designated successor, Ayman al-Zawahri, has repudiated and excommunicated ISIS 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" and "Petraeus: Use al Qaeda Fighters to Beat ISIS" might give one cause to wonder—or even *debate*—whether ISIS is the same enemy Congress authorized President George W. Bush to wage war against, back before Steve Jobs unveiled the first iPod.

"Take a Vote" on an ISIS AUMF

Thus far, there's been all too little debate in Congress over the legal basis for our latest war. In his 2016 State of the Union address, President Obama practically taunted Congress over its lethargy and irrelevance: "authorize 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.

During the 114th Congress, several members offered proposals for reining in the expansive war powers the president claims. Bills drafted by Sen. Ben Cardin (D-MD) and Rep. Barbara Lee (D-CA) aimed at the source of those claims directly, sunseting and repealing the 2001 AUMF. But a stand-alone repeal is highly unlikely. When Lee's proposal, in the form of an amendment to the 2017 National Defense Authorization Act, got to the floor, it failed by a [nearly 150-vote margin](#). A package deal retroactively authorizing the war against ISIS may be a necessary precondition for AUMF reform. That's the theory behind proposals introduced by Rep. Adam Schiff (D-CA) and senators Tim Kaine (D-VA) and Jeff Flake (R-AZ).

Given the history of past AUMFs—which suggests that presidents will stretch the authority they are granted 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. An ISIS AUMF should, at a minimum:

- **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 ISIS.
- **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 with the PATRIOT Act, 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. ground troops to Libya to combat ISIS 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 of that year, the administration [had begun deploying](#) special operations forces for a possible ground campaign against ISIS associates in Libya. Congress should restrict the president’s options for him, requiring him 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 forces’ growing combat role in Iraq and Syria. Ideally, a new AUMF would address that problem directly, barring the use of ground forces outside of special, specifically enumerated circumstances. The Schiff proposal drafted in late 2015 offers a compromise that would require the president to notify Congress of the use of ground forces and would 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.”

The Challenge of War Powers Reform

Revoking the “blank check” of the 2001 AUMF is necessary, but not by itself sufficient, to restoring legal restraints on presidential war making. After all, President Obama’s expansion of the 2001 AUMF wasn’t his only dangerous innovation in the field of constitutional war powers. He launched his first “war of choice,” the 2011 campaign against the Muammar el-Qaddafi regime, without reference to any congressional authorization whatsoever. Instead, the president advanced the extraordinary argument that seven months of regime-change bombing in Libya was not a “war” for constitutional purposes, nor did it even rise to the level of “hostilities.”

Shortly after ordering airstrikes against the Libyan government, Obama assured Congress that the campaign would last “days, not weeks.” But as the weeks dragged on, the administration faced a legal dilemma in the form of the War Powers Resolution (WPR), passed by Congress in 1973 to “fulfill the intent of the framers of the Constitution . . . [and] insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities.” Section 5(b) of the WPR stipulates that the president “shall terminate” U.S. forces’ engagement in “hostilities” after 60 days unless Congress specifically authorizes the intervention. But our NATO (North Atlantic Treaty Organization) allies, it turned out, were incapable of completing the mission without active participation of U.S. warplanes and drones.

Though the Office of Legal Counsel (OLC), the executive branch’s principal legal adviser, had been willing to bless the initial air campaign in a memo arguing it wasn’t “a ‘war’ within the meaning of the Declaration of War Clause,” OLC’s attorneys balked at the notion that daily bombing raids weren’t “hostilities” within the meaning of the War Powers Resolution. The OLC, the Pentagon’s general counsel, and the president’s own attorney general all told him the WPR applied, and active participation by U.S. forces would have to cease when the 60-day clock ran out. So the president went to the State Department’s top lawyer, who came up with the legal cover he wanted.

How threadbare that cover was can be seen in [the report](#) the president submitted to Congress on June 15, 2011, nearly 90 days after he’d unilaterally launched the war. “U.S. military operations are distinct from the kind of ‘hostilities’ contemplated by the Resolution’s 60 day termination provision,” it argued, because they didn’t “involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve the presence

of U.S. ground troops, U.S. casualties or a serious threat thereof.” As former Bush OLC head Jack Goldsmith put it at the time, “the administration argues that once it starts firing missiles from drones, it is no longer in ‘hostilities’ because U.S. troops suffer no danger of return fire. . . . The implications here, in a world of increasingly remote weapons, are large.”

Indeed, under President Obama’s interpretation of the WPR, any future president would be legally entitled to rain down destruction from cruise missiles and remote-controlled aircraft at will and at length, so long as the country we’re bombing can’t easily hit us back. It’s an odd, even grotesque, doctrine for a liberal, internationalist president to advance. Put starkly, it says, “Killing a bunch of foreigners isn’t *war*. War is what happens when actual *Americans* might get hurt.” It’s also inconsistent with the plain language and the legislative history of the WPR. Given that outrage over the [illegal bombing of Cambodia](#) was part of the backdrop to the resolution’s passage, it would have been pretty strange if its drafters thought presidential war making was permissible if done from a great height.

Tendentious and implausible as it is, Obama’s redefinition of “hostilities” will surely serve as precedent for future commanders in chief unless Congress forecloses that possibility. Brigham Young University law professor Eric Talbot Jensen argues that “for the WPR to achieve the aim it was originally intended to accomplish, Congress will need to amend the statute to cover emerging technologies that do not require ‘boots on the ground’ to be effective.” One way of doing that would be to revise the WPR’s statutory triggers to cover “all offensive strikes” and the introduction of “United States Armed Forces *personnel, supplies, or capabilities*” into active or potential hostilities.

Yet even before the Obama administration invented its drone warfare loophole, the WPR was never terribly effective at achieving what it was drafted to accomplish: “fulfill[ing] the intent of the Framers” by restraining presidential war making. In the four decades since its passage, presidents have repeatedly evaded the WPR’s constraints to put troops in harm’s way and launch wars unilaterally.

Accordingly, war powers reformers in the academy and in Congress have proposed amendments designed to give the resolution teeth. A “Combat Authorization Act,” proposed in 1993 by the legal scholar John Hart Ely, would shorten the current 60-day “free pass” to 20 days and command the courts to hear suits by legislators seeking to start the clock. If the court determined that hostilities were imminent, and if Congress did not

authorize the intervention, funds would automatically be cut off after the clock ran out. In 2007, Rep. Walter Jones (R-NC) drafted legislation with similar features, including a congressional standing provision and an automatic funds cutoff for unauthorized wars.

Jones's "Constitutional War Powers Resolution" would be an improvement on the existing framework of the WPR, but hardly a panacea. Even if it could be passed today, and even if the courts, defying most past practice, grew bold enough to adjudicate claims made under it, there would be still another difficulty: as Ely put it, "When we got down to cases and a court remanded the issue to Congress, would Congress actually be able to follow through and face the issue whether the war in question should be permitted to proceed? Admittedly, the matter is not entirely free from doubt."

No framework statute, however thoughtfully crafted, can force Congress to restrain an imperial president if it lacks the political will to do so. Ironically enough, that's a point Barack Obama stressed well before his transition from "peace candidate" to "war president." On October 2, 2007, then-Senator Obama gave a speech at DePaul University in Chicago, timed to mark the fifth anniversary of his 2002 [peace rally speech](#) against a "dumb," "rash war" in Iraq. "We all know what Iraq has cost us abroad," he told the 2007 audience, "but these last few years we've seen an unacceptable abuse of power at home. . . . All of this has left us where we are today: more divided, more distrusted, more in debt, and mired in an endless war." Obama continued, "We thought we learned this lesson; after Vietnam, Congress swore it would never again be duped into war, and even wrote a new law—the War Powers Act—to ensure it would not repeat its mistakes. But no law can force a Congress to stand up to the President. . . . No law can give Congress a backbone if it refuses to stand up as the co-equal branch the Constitution made it." That's the challenge facing the 115th Congress today.

Suggested Readings

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