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Restoring War Powers: Repealing the 2001 AUMF

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EXECUTIVE SUMMARY

After the September 11th terrorist attacks, the United States Congress enacted the Authorization for Use of Military Force (2001 AUMF; P.L. 107-40; 50 U.S.C. §1541 note) to enable the use of military force against those thought to be the perpetrators and supporters of the attacks. Since October 2001, the U.S. Armed Forces have used the 2001 AUMF to conduct military operations primarily in Afghanistan but also around the world. As armed conflict against terrorist groups like Al Qaeda and the Taliban expanded, so did the applicability of the U.S. 's use of military force under the 2001 AUMF. It has since expanded to include targets in Ethiopia, Libya, Pakistan, Somalia, Syria, Yemen, and more.

Both the Obama and Bush administrations found themselves relying on the 2001 AUMF heavily, not only for continuing the U.S.'s fight in Afghanistan but also to promote a new campaign against the Islamic State in the interest of U.S. national security. Moreover, both administrations left open the possibility of expansion to other countries if the Islamic State or other associated groups expanded their reach as well. As a result, many members of Congress have begun to question whether this continued reliance on the 2001 AUMF as the primary and effective authority for U.S. military action is truly good for the country or if this dependency has taken the 2001 AUMF outside its intended scope.

Since 2001, Congress has considered a number of proposals to refine and change the 2001 AUMF's authorization. The most commonly cited solution, outside of total repeal, is to change the congressional role in its oversight. This paper suggests that while such a shift in congressional oversight of military authorization is needed, it should accompany a repeal of the 2001 AUMF. The resolution has for too long been a terror authorization for the U.S. Commander in Chief and the actions taken under it prove not only that repeal is necessary, but also that the authorization for use of military force should not lay in the hands of a single world leader, and instead be in the hands of Congress.

A Hasty Response to an Unprecedented Attack

Immediately following the September 11, 2001, terrorist attacks against the United States, Congress enacted the Authorization for Use of Military Force (2001 AUMF; P.L. 107-40; 50 U.S.C. §1541 note) enable the use of military force against those thought to be the perpetrators and supporters of the attacks. The Bush Administration quickly identified the terrorist group known as ‘Al Qaeda’ as the group primarily responsible for the attacks. At the same time, he identified the terrorist group known as ‘The Taliban’, the group that is now, as of August 2021, and was then, in control of the governance of Afghanistan, as harboring Al Qaeda within their territory. Under an authorization approved by the 2001 AUMF and later sanctioned by the UN Security Council, President Bush sent in armed forces to Afghanistan to conduct military operations in October 2001 that were “designed to disrupt the use of Afghanistan as a terrorist base of operations and to attack the military capability of the Taliban regime.”¹ More than a decade later, in December 2014, President Obama declared “the end of the combat mission in Afghanistan” but U.S. Armed Forces would remain in Afghan territory for another 7 seven years until August 2021, when the Biden Administration officially led the U.S.’s withdrawal from the territory, a process hastened by the Taliban’s successful takeover on August 15th, 2021.²

As armed conflict against terrorist groups like Al Qaeda and the Taliban expanded, so too did the applicability of the U.S.’s use of military force under the 2001 AUMF, and the resolution’s notable lack of geographic limits aided this effort significantly. After the U.S. invaded Afghanistan, many members of Al Qaeda moved out of the country and into the neighboring territories of Pakistan, Iran, and Tajikistan. In response, the United States began to conduct unmanned aerial vehicle (UAV) missile strikes against Al Qaeda and Taliban targets in these countries under the authority of 2001 AUMF, though they primarily took place in Pakistan. Moreover, the U.S. has since identified other groups in the Middle East and Africa that it considers “associated forces” of Al Qaeda, that is, “organized forces that have entered alongside Al Qaeda in its armed conflict with the United States and its coalition partners”.³ Consequently, the U.S. has used force against these Al-Qaeda associates in a number of other coun-

tries, including Yemen, Somalia, Libya, Ethiopia, and more⁴. Additionally, President Obama relied in part on the 2001 AUMF as authority for his campaign against the Islamic State (also known as ISIS or ISIL) in Iraq and against the Khorasan Group of Al Qaeda in Syria. Since 2001, the 2001 AUMF has been cited 41 times and gone on to embolden U.S. military actions in over 19 countries and the high seas.⁵

Notably, the 2001 AUMF, as many proponents and presidents have argued, does not authorize all uses of military force in furtherance of U.S. counterterrorism objectives. Though the most often cited criticism of the authorization is its seemingly “too-wide scope”, many are quick to point out its limits. For example, in May 2014, the Obama Administration stated clearly that the 2001 AUMF authorizes “only those uses of military force against Al Qaeda, the Taliban, and their associated forces, and, when such actions are taken outside of Afghanistan, only in cases of imminent threat of attack against the United States”.⁶ As a result, other legislation and presidential powers under Article II of the Constitution are needed to carry out all other U.S. counterterrorism activities at the global level because the 2001 AUMF only authorizes some uses of military force based solely on perpetrators. This seemingly myopic “perpetrator-first” view is what has motivated some observers and members of Congress to call for the 2001 AUMF repeal. Many believe the resolution has been stretched and, in some cases, distorted to fit actions not fathomed during the resolution drafting and that wouldn’t have otherwise been sanctioned. Those less-inclined to “handicap” the immediacy of counterterrorist U.S. military operations still call for an update, one that reflects the evolution of the terrorist threat and war-making abilities and one that perhaps grants greater oversight to Congress.

The Biden Administration has indicated its willingness to address concerns about the 2001 AUMF and continued uses of military force in support of counterterrorism goals, even supporting the total repeal of the 2002 authorization that authorized the U.S.’s invasion in Iraq. However, despite the campaign promise to “end the forever war in Afghanistan”, the Biden Administration still finds itself hesitant to change the 2001 AUMF, with military officials citing the need for its flexibility and immediacy as critical to U.S. counterterrorism objectives moving forward.⁷ The administration leaves the door open for reform, but no action has been

taken just yet regarding the authorization.⁸ Notably, nearly all military action taken during the Biden administration thus far has cited Article II of the Constitution as their domestic legal basis and importantly, the 2001 AUMF has yet to be cited at all.

In the face of these issues, Congress has for decades now considered a number of proposals to refine and change the 2001 AUMF's authorization (either by amendment or revocation). The most commonly cited solution, outside of total repeal, is to change the congressional role in its oversight. This paper suggests that while such a shift in congressional oversight of military authorization is needed, it should accompany a repeal of the 2001 AUMF. The resolution has for too long been a terror authorization for the U.S. Commander in Chief and the actions taken under it prove not only that repeal is necessary, but also that the authorization for use of military force should not lay in the hands of a single world leader, and instead be in the hands of Congress.

The 60 Words Which Started the Global War on Terror

The 2001 AUMF was signed into law very quickly after the September 11th, 2001, terrorist attacks, on September 18th, 2001. The resolution authorized the U.S. President to use the U.S. Armed Forces to combat the nations, groups, and individuals responsible for the perpetuation and support of the September 11, 2001, attacks and those who harbored them. Section 2(a) of the 2001 AUMF authorizes the use of force in response to the September 11 attacks:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,...

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL.—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in

order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

The 2001 AUMF's Lacks Scope and Limits

The authorizing language of the 2001 AUMF was intentionally very broad in its scope, concerning the prevention of *any* future acts of terrorism perpetrated against the United States. Its limits are only in its circumstances—authorizing the targeting *only* of those nations, organizations, or persons involved in perpetrating the September 11 attacks or harboring those who perpetrated the attacks.

The lack of geographic barriers to the action authorized under the resolution continue to be a large point of criticism. Whereas similar legislation, such as the authorizations for use of force that came before it, had always voluntarily provided geographic limits to their actions, the 2001 AUMF was the first to intentionally exclude such language.¹⁴

Of particular note is the exclusion of both 'Al Qaeda' and the Taliban from the exact language of the resolution. Although the Bush Administration did publicly identify the former as well as individuals associated with the group as the perpetrators of the attack, and the latter as an entity harboring these actors, these actors were intentionally not named in the 2001 AUMF's language. As a result, the 2001 AUMF was an all-new approach to modern-era military force authorizations. For the first time the President was empowered to target non-state actors, to as specific as the individual level, instead of only states.

Its Scope Got More "All-Encompassing" With Time

Authorizations for use of force pursuant to the 2001 AUMF authority began on October 7, 2001, with the first authorization of the U.S. Armed Forces to "neutralize the terrorist threat in that country by targeting Al-Qaeda elements and infrastructure and removing the Taliban from power".¹⁴ The full U.S. combat mission continued in Afghanistan until December 2014, though the full removal of U.S. troops from the country was not completed until August 2021.

The Bush Administration

In the weeks after the September 11, 2001, terrorist attacks, a group of Bush administration officials, Vice President Cheney intentionally side stepped ongoing interagency processes to get several related pieces of legislation passed and set two notable precedents: one, that when it comes to achieving counterterrorism objectives, rules do not apply, and two, that the 2001 AUMF was a much broader authority expansion than previously envisioned. This is because when the legality of these moves was challenged, the argument was consistently made that the President had the vast authority to act alone based upon his Command-in-Chief authority during wartime; and that Congress had implicitly authorized a broad range of wartime activities, even on the homeland, by enacting the 2001 AUMF.¹⁷

The Obama and Trump Administrations

The Obama Administration stretched the 2001 AUMF in a number of unexpected ways. One way that he did so in particular, was in the stretched reading of the statute to include “associates” of Al-Qaeda. This allowed for an unprecedented expansion of the 2001 AUMF’s scope, far beyond anything the Bush Administration had done. So although the Obama administration reported that most of the core al-Qaeda leadership in Pakistan had been killed or dispersed by late 2012, including chief 2001 perpetrator Osama bin Laden in May 2011, the administration shifted its attention to new groups considered Al-Qaeda “associates” because they were reportedly “gaining strength”. The Trump Administration relied heavily on the precedents set by the Obama Administration and expanded them significantly, but it didn’t promote any new extensions itself. That said, President Trump was able to successfully veto a jointly passed War Powers Resolution in 2019, prohibiting a historic reestablishment of checks and balances on the Executive Branch’s war powers.

The Biden Administration Intends to Continue the Practice

The Biden administration’s views on the 2001 AUMF have not been fully presented to the public, though there are some clues as to where the new Command in Chief stands. Despite then-candidate Biden promising to “end forever wars in Afghanistan and the Mid-

dle East”, his administration seemingly sees the 2001 AUMF as a necessary underpinning in at least some of its counterterrorism operations still occurring in the Middle East.²⁶ General Milley, Chairman of the Joint Chiefs of Staff, said as recently as June that the “2001 AUMF is the one we need to hang on to...it is the critical one for us to continue operations”.²⁷ Still, the administration has left a door open for reform, saying it will work with Congress to ensure that outdated authorizations for the use of military force are replaced with a narrow and specific framework”.²⁸

This emphasis of reform is further emphasized through the Biden Administration’s support of H.R. 256, a resolution in the House of Representatives that would repeal the Authorization for Use of Military Force Against Iraq Resolution of 2002 (2002 AUMF).²⁹ As context, the 2001 AUMF provided the domestic legal authority needed for the Bush administration’s 2003 invasion of Iraq. It was then subsequently used by the Obama Administration to end its military campaign against Isis and again by the Trump Administration as the basis for its strike on the Iranian General Qassem Soleimani in 2020.³⁰ If successfully repealed, it would be the first time and half a century the use of force authorization has been repealed by Congress. Having said that, the success, if realized, is far less meaningful for matters of peace and war. As General Milley so aptly points out, “no current U.S. military operations depend on the 2002 AUMF and thus its repeal would not affect the United States ongoing Wars”.³¹ This repeal costs the Biden administration little to nothing in the context of the continued existence of other war powers, including the 2001 AUMF. It simply makes the latter’s repeal or revision all the weightier.

The 2001 AUMF Poses a Number of Threats to the Constitutional Separation of Powers

The tendency of previous Presidencies to rely heavily on the 2001 AUMF to authorize military action against a broad range of previously undefined counterterrorism targets has raised a number of concerns among scholars, analysts, and congressmen alike. Many of these issues concern the role of Congress in presidential war-making and in U.S. military action in general. In particular, many have questioned what Congress’

constitutional role is in declaring, funding, and even executing war and other counterterrorism activities that have been authorized under the declaration. While the current administration remains committed to working with Congress to amend and eventually repeal the 2001 AUMF, it as well as previous administrations have each testified to the fact that actions thus far sanctioned under the 2001 AUMF were then and are now valid uses of presidential war powers.

An Unprecedented Expansion of Presidential Authority

The first procedural concern of the continued existence of the 2001 AUMF is that in maintaining it, the 2001 AUMF as current law might complicate congressional efforts to shape future authority granted to the President to use military force against other threats, which will be especially important when settling the ongoing debate over authorizing military force against the Islamic State.³⁵

Because the 2001 AUMF limits the scope of what operations can be authorized to only those against targets involved in or associated with the September 11, 2001, terrorist attacks, the implementation of the 2001 AUMF required the creation of frameworks and procedures that would standardize the determination of which uses of force fall under the 2001 AUMF's authority and which don't. A result of this, however, was an almost unilateral abdication of interpretation to the executive branch, wherein presidents could decide how and when the AUMF applied without Congressional approval.

The Obama Administration's use of the AUMF perfectly exemplifies this problem. It was allowed to determine for itself which interpretations of the scope fell within the overall framework of the presidential authority to use military force against those who pose a threat to U.S. national security. As a result, it was allowed to make statements without congressional approval or oversight such as:

- The 2001 AUMF is primarily an authorization to enter into and prosecute an armed conflict against Al Qaeda and the Taliban in Afghanistan.⁹
- The 2001 AUMF authorizes the President to use military force against Al Qaeda and the

Taliban outside Afghanistan, but such uses of force must meet a higher standard of threat to the United States and must use limited, precise methods against specific individual targets rather than general military action against enemy forces.¹⁰

- Because the 2001 AUMF authorizes U.S. involvement in an international armed conflict, the international law of armed conflict informs the authority within the 2001 AUMF. This law permits the use of military force against forces associated with Al Qaeda and the Taliban as co-belligerents; such forces must be operating in some sort of coordination and cooperation with Al Qaeda and/or the Taliban, not just share similar goals, objectives, or ideologies.¹¹

Another example of this was when the Obama Administration used the 2001 AUMF to authorize a U.S.-led coalition to begin airstrikes against ISIS in Iraq on August 7th, 2014, and quickly expanded the campaign to include Syria in the following days.¹² In total contrast to the above interpretation, the Obama Administration's 2014 notification of the use of force to Congress to inform them of the airstrikes and other military movements in Iraq and Syria posited that the "2001 AUMF authorized the President to order certain U.S. military strikes against the Islamic State in Iraq and Syria, as well as the Khorasan Group of Al Qaeda in Syria".¹³ This dependency on the 2001 AUMF marked a notable shift in the Administration's previously stated interpretation of the 2001 AUMF's authority in two important ways. First, the Administration's military campaign against the Islamic State marked the expansion of the scope of military operations undertaken outside of Afghanistan under 2001 AUMF authority to now include Iraq and Syria, whilst also establishing precedent to include many others. Second, the authority of the 2001 AUMF no longer needs to be justified in association with September 11, 2001, terrorist attacks so long as the reasons for the proposed use of military force rest on regional stability and counterterrorism efforts generally.

The Constitutional Separation of Powers in War Making

Related to the unparalleled expansion of Presidential War Powers is the conversation on the Congressional War Powers. Presidents have demonstrated greater power to wage wars since the end of World War II, but no legislation has relinquished as much of Congress's role in war-making as the 2001 AUMF.

Article I, Section 8, Clause 11 of the U.S. Constitution grants Congress the power to declare war. The President, however, derives the power to direct the military only after a Congressional declaration of war from Article II, Section 2, which names the President Commander-in-Chief of the armed forces. These provisions clearly stipulate cooperation between the President and Congress regarding military affairs, with Congress declaring and funding the operation and the President directing it. Some scholars believe that because Congress was the body responsible for the enactment of the 2001 AUMF, it directly and explicitly "abdicated" its role in directing the use of U.S. military force to counter terrorist threats by allowing the President to move forward with the power of declaring and designing operations abroad. Others contend that Congress's authorization of the use of military force was made in haste during the initial reaction to the September 11, 2001 attacks, and their subsequent inability to further legislative action to tailor the use of such force to current circumstances showcases that no one in a "clear state of mind" would've made such a decision as easily as we did.³² This is because they believe, in any other situation, such a decision would've been unrealistic.

Moreover, many lament how Congress has neither voiced concerns over transparency nor asserted its role in decision-making as designated in the 1973 War Powers Resolution and subsequent legislation. With the Obama Administration's unprecedented reliance on and expansion of the 2001 AUMF authority to execute its military campaign against the Islamic State and the Trump Administration's further expansions of these policies, many have called for the 2001 AUMF's repeal as well as the termination of any newly enacted authority within three years as a direct result of what they've seen when Congress has no oversight over war. It's clear there is a call to find a swift legislative end to the seemingly blank check for war.

Proponents of limited Congressional control over the U.S. military contend that so long as a war has been declared by Congress, which was what the 2001 AUMF effectively did with the War on Terror, the President has complete authority to wage it as he deems fit. They interpret all actions taken under the 2001 AUMF as simply uses of force under a unilateral declaration of war. Legal experts Noah Feldman and Samuel Issacharoff explain that while the Constitution empowered Congress to make and end war, it intended the president to have the power to wage war effectively, once an authorized war was begun.⁴⁸ They further that "in the modern era, no country—not even a parliamentary democracy—has been so foolhardy as to place a war under the guidance of a legislative body, rather than a single, unified command".

In response to this, it must be noted that a President's power to wage war effectively as defined by the Constitution is not meant to be without Congressional oversight or transparency, and another equally if a not more important part of the constitution stipulates a system of checks and balances on our three systems of government. Recognizing that the President has time and time again over the last two decades intentionally side-stepped Congress while waging war and done so to less than effective results proves that the Presidential War Powers, constitutionally sanctioned or otherwise, continue unchecked. Even now, there remain ongoing concerns that transparency in the Executive Branch is waning with regard to its operations under the 2001 AUMF, particularly with regard to the use of unmanned aerial vehicles (UAVs). Consequently, regardless of whether or not this shift of war powers from Congress to the President is constitutionally sound from the perspective of war powers, it's not with regard to the system of balances our country was founded upon, and that alone is a reason to stipulate a shift back towards Congressional oversight of war.

"The president has been commander in chief since 1789, but this notion that they can go to war whenever they want, and [ignore] Congress, that's a post-World War II attitude," says Louis Fisher, scholar in residence at the Constitution Project.⁴⁷

The Boundless Scope of the 2001 AUMF

Many assert that, by its own terms, the 2001 AUMF has become obsolete. After all, its originally intended fo-

cus was to directly prevent the perpetrators of the September 11, 2001, attacks from carrying out anything further against the United States and its allies, and that objective is nearly complete. Most of the individuals identified as having been involved in the attacks have been killed or captured.³³ Despite this, the 2001 AUMF remains a critical part of the executive branch’s justification for expanding efforts against Al Qaeda and other counterterrorist threats globally. Administration officials from all four previous presidential administrations have asserted the 2001 AUMF as a key authority to conduct counterterrorism operations in “any country where terrorist groups operate and plan to attack the United States or U.S. interests”.³⁴

Of note is the exclusion of both ‘Al Qaeda’ and the Taliban from the exact language of the resolution. Although the Bush Administration did publicly identify the former as well as individuals associated with the group as the perpetrators of the attack, and the latter as an entity harboring these actors, these actors were intentionally not named in the 2001 AUMF’s language. As a result, presidents have been empowered to target non-state actors, to as specific as the individual level, instead of only states.

Aided additionally by the lack of geographic and temporal scope in the written legislation and a number of extensive judicial and executive expansions, the executive branch has targeted terrorist groups that have only negligible connections to the groups who perpetrated or supported the September 11, 2001, attacks. An example of this is the Obama Administration’s citation of the 2001 AUMF as the legal justification for U.S. military airstrikes and other operations against forces of the Islamic State and the Khorasan Group of Al Qaeda in Iraq and Syria in late 2014. Many members of Congress believed this to be an entirely new military campaign that would require a separate congressional authorization but because no new authorizations were ever passed (despite multiple proposals in both the 113th and 114th Congress), the Obama Administration, as well as the Trump Administration, continued to rely on the 2001 AUMF and other authorities for their efforts against the Islamic State.

Members of Congress who support the continued use of the AUMF, however, suggest that this isn’t the entire story. They contend that despite being generally considered a broad authorization, the 2001 AUMF is

nonetheless technically limited in scope— military movements and operations authorized under the 2001 AUMF can only target only those who perpetrated or supported those attacks. Though seemingly broad, this limitation is important and direct from it came a number of instituted procedures from the prior three administrations to help determine which actors are lawful targets of military force and which are not. Moreover, language and procedures have been added to determine which parts of the world such a force might be used.

Additionally, many lament that the 2001 AUMF was already a compromise and a notable improvement from the legislation originally proposed by the Bush Administration in the wake of the September 11, 2001, attacks. The originally proposed resolution would have provided the authority to use military force against all terrorist threats generally, not only against Al Qaeda and the Taliban, regardless of their connection to the 2001 attacks:

Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled—

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, harbored, committed, or aided in the planning or commission of the attacks against the United States that occurred on September 11, 2001, and to deter and pre-empt any future acts of terrorism or aggression against the United States.

This resolution and the subsequent revision to include a more limited scope is often cited as proof that Congress deliberately chose to limit the presidential authority. In response to this, it must be remembered that a better solution isn’t always itself good. The 2001 AUMF already being a compromise in legislation proves not that it’s a good resolution, but instead, that Congress, even in its compromises, sometimes acts too quickly and without fully realizing the situation at hand.

Controversial Activities and Policies Under the 2001 AUMF

In addition to the general, procedural concerns with the 2001 AUMF’s duration, scope, and applicability, many

of its authorized activities have come under scrutiny for the harm and casualties caused.

Detention of Terrorism Suspects and Enemy Combatants

Many have objected to the detention practices first instituted under the AUMF by the Bush Administration regarding terrorism suspects and enemy combatants, regardless of citizenship status— in other words, including U.S. citizens— believing that the conditions at the Guantanamo Bay Detainment facilities are inhumane. Moreover, many cite the indefinite detention of certain individuals, the use of rendition to foreign governments, and constitutional due process concerns as reasons to revisit the 2001 AUMF’s authorization of the use of the facility as well as how the resolution itself covers activities such as detention, torture, and more.

Unmanned Aerial Vehicles

One of the controversial activities invoked using the 2001 AUMF’s authority by any President is undoubtedly the Obama Administration’s increased use of unmanned aerial vehicles (Drones) to target and strike terrorist elements abroad, away from the conventional battlefield. Not only is the practice of drone strikes not sufficiently transparent— leaving Congress and the public alike without any information to provide good or need oversight— but the drones themselves target far too many individuals that have no stake in the war the U.S. is fighting.³⁶ Of the 563 drone strikes undertaken by the Obama Administration, an estimated 380 to 801 civilians were killed and there was a noted emphasis on the targeting of low-level terrorist operatives.³⁷ The involvement and subsequent killing of U.S. citizens brings up a number of constitutional due process concerns in addition to the moral and ethical ones commonly cited.

Domestic Use of Military Force

A number of government officials have indicated that the 2001 AUMF could, in the near future, authorize a domestic use of U.S. military force. Though highly criticized, this view comes with a number of unprecedented concerns about the U.S. military’s role over U.S. citizens. Critics, however, are quick to interject stating that because 2001 AUMF does not contain ex-

plicit language for the use of force “within the United States,” it does not meet the applicable legal requirements for the use of U.S. military force domestically under the Posse Comitatus Act (which states that the military cannot be used on U.S. territory to execute the law unless expressly authorized by the Constitution or an act of Congress).³⁸ In response, many that hold this concern are quick to point out that the Article II Presidential War Powers could be a potential loophole.³⁹

Furthering this, Obama Administration officials stated in 2016 that they believe domestic uses of military force should only be permitted in “the most extraordinary circumstances”, and when such action is “necessary to neutralize an identified domestically based threat to U.S. national security”.⁴⁰ As a result, however likely the event may be, the issue of whether the 2001 AUMF could legitimately be interpreted to authorize domestic military action without specific authorizing language remains of concern.

A Path Forward: Recommendations For AUMF Reform

For the last twenty years, Presidents Bush, Obama, and Trump have depended on the 2001 AUMF as the almost sole authority for a very broad range of U.S. counterterrorism operations against people and groups related to the September 11, 2001, terrorist attacks, including the recently concluded military operations in Afghanistan, the more than 600 drone strikes authorized by the Bush and Obama administration in Afghanistan, Pakistan, Yemen, Somalia, Syria, Iraq, and Libya, as well as the detention of thousands of persons in detention centers around the world.

Members of Congress have understandable and valid concerns regarding the continued existence of the 2001 AUMF and the issues outlined above warrant a repeal. More than that, however, it’s imperative that such a repeal is accompanied by a complete shift and increase in congressional oversight over military force authorizations. The resolution has for too long been a terror authorization for the U.S. Commander in Chief and the actions taken under it prove not only that repeal is necessary, but also that the authorization for use of military force should not lay in the hands of a single world leader, and instead be in the hands of Congress.

Repeal the 2001 Authorization For Use of Military Force and Reasserting Congressional War Powers

To solve the issues outlined above, Congress must reassert its authority over war authorized both through the Constitution and the 1973 War Powers Resolution and reject the militarized approach to counterterrorism that the 2001 AUMF proliferated. The 2001 AUMF should be repealed without replacement. Only by repealing the 2001 AUMF will Congress be able to meaningfully curb the executive overreach characteristic of the actions taken under the authorization by the previous four presidential administrations.

Opponents may argue that repealing the 2001 AUMF isn't the only way to ensure congressional oversight and that an amendment to the legislation is a better-suited solution. That said, even if congressional oversight could be added, though amendments, to the original legislation, there is no longer a need for the 2001 AUMF as written given its original objectives have already been realized. Moreover, if congressional oversight was added to the legislation in the way that it needs to be, it would remove all of the assets that continue to make the 2001 AUMF the primary legal framework for U.S. war-making. Namely, it would remove the President's ability to act as swiftly as he once had, it would emplace geographic and temporal limits to the actions the legislation could authorize, and it would like include a sunset clause to see the eventual repeal of the legislation anyways. Resultantly, the continued existence of the 2001 AUMF, even with amendments, isn't fruitful.

Require the Use of Specific, Unequivocal Language in Future Authorizations

The most notable expansion of scope of the 2001 AUMF was the Obama Administration's move to include "associated forces" of Al-Qaeda in the targeted groups of the authorization. This language did not exist at the time of the attacks and it demonstrates the need for greater specificity in authorizations and resolutions regarding war powers moving forward. Any future resolution authorizing the use of military force should include the following:

- **Sunset clause:** Every AUMF should have an automatic expiration date and Congress should set a standard expiration timeline (ex. 3 years) that Presidents must receive authorization to deviate from.⁴¹
- **Clear military targets:** To avoid the unauthorized expansion of war and war-fighting targets, Congress should identify a clear objective for using force and require a specific citation of each group or country that the U.S. is waging war against, whilst also specifically prohibiting any unauthorized use of each new AUMF.⁴²
- **Geographic restrictions:** To avoid the unauthorized expansion of war to encompass previously unrelated and uninvolved territories, Congress should require the specification of the exact geographic locations in which military operations are being authorized.⁴³

Additionally, if existing authorizations, such as those passed in 1957, 1991, and 2002, are not repealed, they should be updated to adhere to the above requirements.

Define "Hostilities" As Referenced In the 1973 War Powers Resolution

Notably, the 1973 War Powers Resolution did not define "hostilities," despite the word being one of its key terms. This omission has since been used by many to argue that military action did not qualify under it. In 2011 specifically, Obama argued that the United States' involvement in a military campaign against Muammar Gaddafi's regime in Libya—a campaign that lasted over six months, included a U.S. bombing campaign and the deployment of 11 naval ships, and ended with the overthrowing and death of Gaddafi himself—did not amount to "hostilities."⁴⁴ Congress should close this loophole by defining "hostilities" to include, at a minimum, "armed conflict" or "clear and present danger of armed conflict,".

Require Increased Transparency From the Executive Branch On All Uses of Force

In 2013, the Pentagon told Members of Congress that the full list of Al-Qaeda "associated forces" with whom the U.S. was either "at war" with or "authorized to use force against" was classified.⁴⁵ This is one of the many examples of how the Executive Branch has not

only used the 2001 AUMF to justify military forces against an increased number of only tenuously related “associated forces” but they have also used its authority to further conceal their military operations and counterterrorism objectives. The secrecy is even greater regarding the UAV drone strikes, particularly those undertaken by the CIA in Pakistan and Yemen under the Obama Administration.⁴⁶ Since the 2001 AUMF’s passage, the Executive branch has withheld critical information about its drone campaigns and paramilitary operations from Congress and any method of reform should include requirements for purposeful and swift consultation with Congress whenever U.S. government employees of any status are involved or about to be involved in armed conflict. Mechanisms for public notice can be further explored.

Opponents argue that increased transparency in this regard is a risk to U.S. national security but this only proves that it should be pursued cautiously. Constitutionally, the Executive branch was never meant to have this much-unchecked power and an increase in transparency will not only shift the war powers back to their constitutionally designated allocations but similarly set the precedent that the Executive Branch, in all areas, needs to cooperate more with the other branches of the government.

Further Recommendations For Reform

In addition to the above reforms, more emphasis should be placed on counterterrorism efforts that don’t involve military force. A perfect foreign policy strategy would attempt to balance all three tools available to it to complete its goals: defense, development, and diplomacy. Unfortunately, the United States and other global superpowers rely far too heavily on their military might to complete their objectives; and the 2001 AUMF is only the first example.

Such non-defense actions might include disrupting terrorist financing and communications networks, promoting economic development and assistance programs to populations vulnerable to terrorist influence, and increasing law enforcement actions to arrest and prosecute terrorist suspects.

Conclusion

Though the argument that the 2001 AUMF was an expected and appropriate response to the September 11th, 2001 terrorist attacks can be made, the United States and its Congress cannot let their emotions from that tragedy continue to blind them from what the legislation has become. In 60 words on September 16th, the United States would begin the Global War on Terror, encompassing not only their military but the militaries of many allies aboard, and it would come at the cost of thousands of innocent lives and Congress’s powers over war making.

The importance of the latter cannot be overstated. The U.S. Constitution outlined the need to separate executive and legislative control over U.S. war making to ensure the proper checks and balances on each branch. With how the 2001 AUMF has expanded the executive branches power over the U.S. military and over governing general, what we’ve seen is an unprecedented amount of congressional sidestepping and executive warmongering. When the Chief Executive answers to no one when approving actions of war, he has proven time and time again that he will do whatever he feels necessary to achieve his goals. It’s time the legislative branch takes back the blank check it gave the executive nearly two decades ago.

The expansion of the use of military force relating to the 2001 AUMF is one of the most contentious military issues surrounding the Commander-in-Chief today and it will likely stay that way until repealed. The actions taken under the 2001 authorization are a prime example of the harms of an unchecked executive power, and Congress and the American public must do all everything in their power to prevent it from growing. Resultantly, only a repeal of the 2001 Authorization for Use of Military Force, accompanied by protections preventing a replicate legislation, will solve for the issues the AUMF creates and perpetuates abroad.

Endnotes

1. Jim Garamone, America Launches Strikes Against Al Qaeda, Taliban, American Forces Press Service, October 7, 2001, <http://www.defense.gov/news/newsarticle.aspx?id=44680>
2. Michael R. Gordon, Vivian Salama and Jessica Donati. 2021. “Inside Biden’s Afghanistan Withdrawal Plan: Warnings, Doubts But Little Change”. WSJ. <https://www.wsj.com/articles/inside-the-biden-administrations-push-to-exit-afghanistan-11630855499>
3. Mark Mazzetti and Eric Schmitt, “In a Shift, Obama Extends U.S. Role in Afghan Combat,” The New York Times, November 21, 2014, <http://www.nytimes.com/2014/11/22/us/politics/in-secret-obama-extends-us-role-in-afghancombat.html>.
4. Weed, Matthew. 2018. “Presidential References to the 2001 Authorization for Use of Military Force in Publicly Available Executive Actions and Reports to Congress.” Congressional Research Service. <https://sgp.fas.org/crs/natsec/pres-aumf.pdf>.
5. Brandon-Smith, Heather. 2021 “The 2002 Iraq AUMF: What It Is and Why Congress Should Repeal It.” *Friends Committee On National Legislation*, <https://www.fcnl.org/updates/2021-07/2002-iraq-aumf-what-it-and-why-congress-should-repeal-it>.
6. Ibid
7. Request, Defense. 2021. “Defense Department Fiscal Year 2022 Budget Request”. C-SPAN.Org. <https://www.c-span.org/video/?512740-1/defense-department-fiscal-year-2022-budget-request&live=>.
8. The Executive Office of the President - Office of Management and Budget. 2021. “Statement of Administration Policy on H.R. 256 — Repeal of Authorization for Use of Military Force Against Iraq Resolution of 2002.” White House. <https://www.whitehouse.gov/wp-content/uploads/2021/06/SAP-HR-256.pdf>.
9. “2001 Authorization for Use of Military Force: Issues Concerning Its Continued Application.” 2015. *Congressional Research Service*, (April).
10. Ibid.
11. Ibid.
12. “Timeline: The Rise, Spread, and Fall of the Islamic State.” Wilson Center. <https://www.wilsoncenter.org/article/timeline-the-rise-spread-and-fall-the-islamic-state>.
13. Available at: <https://obamawhitehouse.archives.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-iraq>
14. “2001 Authorization for Use of Military Force: Issues Concerning Its Continued Application.” 2015. *Congressional Research Service*, (April).
15. Murray, Shoon Kathleen. “The Contemporary Presidency: Stretching the 2001 AUMF: A History of Two Presidencies.” *Presidential Studies Quarterly* 45, no. 1 (2015): 175-198
16. Ibid.
17. Ibid.
18. Ibid.
19. Brennan, John. 2011. “Strengthening Our Security by Adhering to Our Values And Laws.” Speech presented at Harvard Law School, Cambridge, MA, September 16. <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>
20. Herr, Lukas D. 2020. “Rolling Back the Imperial Presidency? Joe Biden and the Future of U.S. War Powers.” *E-International Relations*. <https://www.e-ir.info/2020/12/15/rolling-back-the-imperial-presidency-joe-biden-and-the-future-of-u-s-war-powers/>
21. Ibid.
22. Ibid.
23. Ibid.
24. Congress.gov. “H.R.1591 - 110th Congress (2007-2008): U.S. Troop Readiness, Veterans’ Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007.” May 2, 2007. <https://www.congress.gov/bill/110th-congress/house-bill/1591>.

25. Herr, Lukas D. 2020. "Rolling Back the Imperial Presidency? Joe Biden and the Future of U.S. War Powers." E-International Relations. <https://www.e-ir.info/2020/12/15/rolling-back-the-imperial-presidency-joe-biden-and-the-future-of-u-s-war-powers/>
26. Barrow, Bill. 2019. "Biden Promises to End 'Forever Wars' as President." Military Times. <https://www.militarytimes.com/news/pentagon-congress/2019/07/11/biden-promises-to-end-forever-wars-as-president/>.
27. Request, Defense. 2021. "Defense Department Fiscal Year 2022 Budget Request". C-SPAN.Org. <https://www.c-span.org/video/?512740-1/defense-department-fiscal-year-2022-budget-request&live=>.
28. The Executive Office of the President - Office of Management and Budget. 2021. "Statement of Administration Policy on H.R. 256 — Repeal of Authorization for Use of Military Force Against Iraq Resolution of 2002." White House. <https://www.whitehouse.gov/wp-content/uploads/2021/06/SAP-HR-256.pdf>.
29. Ibid.
30. Finucane, Brian, Brian Finucane, Eugene Fidell, Heather Hurlburt, Eric Rosand, Rod Schoonover, and Erin Sikorsky et al. 2021. "Putting AUMF Repeal Into Context". *Just Security*. <https://www.justsecurity.org/77088/putting-aumf-repeal-into-context/>.
31. The Executive Office of the President - Office of Management and Budget. 2021. "Statement of Administration Policy on H.R. 256 — Repeal of Authorization for Use of Military Force Against Iraq Resolution of 2002." White House. <https://www.whitehouse.gov/wp-content/uploads/2021/06/SAP-HR-256.pdf>.
32. Bradley, Curtis A., and Jack L. Goldsmith. "Congressional authorization and the war on terrorism." *Harv. L. Rev.* 118 (2004): 2047.
33. Lovelace, Douglas. *TERRORISM: COMMENTARY ON SECURITY DOCUMENTS VOLUME 142: Security Strategies of the Second Obama Administration: 2015 Developments*. United Kingdom: Oxford University Press, 2016.
34. "2001 Authorization for Use of Military Force: Issues Concerning Its Continued Application." 2015. *Congressional Research Service*, (April).
35. Weed, Matthew C. A new authorization for the use of military force against the Islamic state: issues and current proposals. Congressional Research Service Washington United States, 2017.
36. The Executive Office of the President - Office of Management and Budget. 2021. "Statement of Administration Policy on H.R. 256 — Repeal of Authorization for Use of Military Force Against Iraq Resolution of 2002." White House. <https://www.whitehouse.gov/wp-content/uploads/2021/06/SAP-HR-256.pdf>.
37. Purkiss, Jessica, and Jack Serle. 2017. "Obama's Covert Drone War In Numbers: Ten Times More Strikes Than Bush." The Bureau of Investigative Journalism. <https://www.thebureauinvestigates.com/stories/2017-01-17/obamas-covert-drone-war-in-numbers-ten-times-more-strikes-than-bush>.
38. Barnes, Beau D. "Reauthorizing the War on Terror: The Legal and Policy Implications of the AUMF's Coming Obsolescence." *Mil. L. Rev.* 211 (2012): 57.
39. Murray, Shoon Kathleen. "The Contemporary Presidency: Stretching the 2001 AUMF: A History of Two Presidencies." *Presidential Studies Quarterly* 45, no. 1 (2015): 175-198.
40. Letter from Attorney General Eric Holder to Senator Rand Paul, March 4, 2013, available at <http://www.cq.com/pdf/govdoc-4231653>.
41. Brandon-Smith, Heather. 2021 "The 2002 Iraq AUMF: What It Is and Why Congress Should Repeal It." *Friends Committee On National Legislation*, <https://www.fcnl.org/updates/2021-07/2002-iraq-aumf-what-it-and-why-congress-should-repeal-it>.
42. Ibid.
43. Ibid.
44. Chollet, Derek, and Ben Fishman. "Who Lost Libya." *Foreign Aff.* 94 (2015): 154.
45. US Senate Committee on Armed Services. 2013. "The Law of Armed Conflict, The Use of Military Force, and the 2001 Authorization for Use of Military Force." https://www.armed-services.senate.gov/imo/media/doc/lawofarmedconflict_useofmilitaryforce_2001aumf_hearing_051613.pdf.
46. Johnson, Loch K. "Intelligence analysis and planning for paramilitary operations." *J. Nat'l Sec. L. & Pol'y* 5 (2011): 481.

47. "Balance of U.S. War Powers." Council on Foreign Relations, 2017. <https://www.cfr.org/backgrounder/balance-us-war-powers>.
48. Feldman, Noah, and Samuel Issacharoff. "Congress' War Powers." Slate Magazine. Slate, March 5, 2007. <https://slate.com/news-and-politics/2007/03/congress-war-powers.html>.