

NEW BIPARTISAN BILL COULD GIVE ANY PRESIDENT THE POWER TO IMPRISON U.S. CITIZENS IN MILITARY DETENTION FOREVER

A new Authorization to Use Military Force, supposedly aimed at restricting presidential power, could expand it in a terrifying way.

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A U.S. military guard carries shackles before moving a detainee inside the U.S. detention center for "enemy combatants" on September 16, 2010 in Guantanamo Bay, Cuba. Photo: John Moore/Getty Images

ONE OF THE most outrageous acts of Barack Obama's presidency was his failure to veto the National Defense Authorization Act for fiscal year 2012.

The fiscal year 2012 NDAA included provisions that appeared to both codify and expand a power the executive branch had previously claimed to possess — namely, the power to hold

individuals, including U.S. citizens, in military detention indefinitely – based on the Authorization to Use Military Force passed by Congress three days after 9/11.

The New York Times [warned](#) that the bill could “give future presidents the authority to throw American citizens into prison for life without charges or a trial.” Not surprisingly, Obama’s decision generated enormous outcry across the political spectrum, from Rep. Ron Paul, R-Texas, [on the right](#) to Sen. Bernie Sanders, I-Vt., [on the left](#).

However, the NDAA did provide some weak restraints on the executive branch’s ability to use this power. In theory, the NDAA’s provisions only apply to someone involved with the 9/11 attacks or who “substantially supported al-Qaeda, the Taliban, or associated forces.”

But now, incredibly enough, a bipartisan group of six lawmakers, led by Sens. Bob Corker, R-Tenn., and Tim Kaine, D-Va., is proposing a new AUMF that would greatly expand who the president can place in indefinite military detention, *all in the name of restricting presidential power*. If the Corker-Kaine bill becomes law as currently written, any president, including Donald Trump, could plausibly claim extraordinarily broad power to order the military to imprison any U.S. citizen, captured in America or not, and hold them without charges essentially forever.

Even opponents of the bill do not believe this is the goal of Corker, Kaine et al. “I think they’re acting in good faith,” says Elizabeth Goitein, co-director of the Liberty & National Security Program at the Brennan Center at New York University Law School. Kaine himself has [explained](#) that they authored the bill because “for too long, Congress has given presidents a blank check. We’ve let the 9/11 and Iraq War authorizations get stretched. ... Our proposal finally repeals those authorizations and makes Congress do its job by weighing in on where, when, and with who we are at war.”

But thanks to a combination of sloppy drafting and clear reluctance to take the executive branch head-on, Corker and Kaine’s proposed AUMF could do the opposite, handing genuinely tyrannical powers over to the president. Christopher Anders of the ACLU characterizes the bill as “a legislative dumpster fire.”

THE INTERCEPT

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“There’s such a desire to put Congress back in the game,” says Goitein. The perspective of the new AUMF’s authors, she believes, seems to be “we have to do something. This is something. Therefore, we have to do this.”

Understanding the terrible potential consequences of this bill requires a close look at the relevant history and law.

CAN THE PRESIDENT hold U.S. citizens apprehended far away from a battlefield without charges in the military detention system?

During peacetime, the answer is obvious: absolutely not. It would be one of the clearest violations of the Bill of Rights imaginable.

But this changes in wartime. The [2001 AUMF](#) did not explicitly give this power to the executive branch, but the George W. Bush administration claimed that this language from the resolution provided it implicitly:

The administration used this purported power after José Padilla, a U.S. citizen born in Brooklyn, was arrested at Chicago’s O’Hare Airport in May 2002 when returning from the Mideast. Bush designated Padilla as an “enemy combatant,” claimed he was “closely associated with Al Qaeda,” and had “engaged in conduct that constituted hostile and war-like acts.” On this basis, Bush placed him in a military prison without charges or a trial.

The Supreme Court [never ruled](#) on whether this was legitimate; the Bush administration moved Padilla to the civilian court system before it could do so. But prior to Padilla’s transfer, a three-judge panel from the U.S. Court of Appeals for the 4th Circuit [declared](#) that the 2001 AUMF did, in fact, give the president “the power to detain identified and committed enemies such as Padilla.” At the time, Padilla’s lawyer [said](#) this could mean “that the president

conceivably could sign a piece of paper when he has hearsay information that somebody has done something he doesn't like and send them to jail – without a hearing [or] a trial.”

This was the state of play when the FY 2012 NDAA was being written. The executive branch had claimed that the 2001 AUMF gave it the right to indefinitely detain individuals, including U.S. citizens who had not been captured on a battlefield, and a court had concurred.

Significantly, however, Congress had not explicitly affirmed anything on this subject. That changed with the now-notorious Section 1021 of the [NDAA](#):

So this provided a congressional codification of the executive branch's power “to detain covered persons” under the 2001 AUMF. But it also expanded it, giving a legislative imprimatur to previous broad executive and judicial interpretations of the AUMF. The AUMF had spoken only to anyone involved in the 9/11 attacks, in language that the NDAA reproduced in paragraph (b)(1) above. But paragraph (b)(2) defines “covered persons” to also include “a person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.”

The NDAA provision did not define “associated forces,” “a belligerent act,” or “direct support” – terms which, in the hands of an unscrupulous president, could mean anything, including criticizing the U.S. government.

It does, however, define the “disposition under the law of war” to which covered persons are subject. This can include detention by the military without trial until the 2001 AUMF is repealed, or even transfer to a foreign country:

Does this mean that the NDAA explicitly grants the president the power to detain any U.S. citizen forever? Not exactly. Sen. Dianne Feinstein, D-Calif., attempted to amend the NDAA so that it clarified that the above language did not apply to Americans, but was voted down. However, this paragraph was added to Section 1021:

But there is less here than meets the eye: Again, the executive branch had *already* successfully claimed that the 2001 AUMF alone gave it the authority to detain Padilla and by extension, other U.S. citizens. So while the NDAA did not affirm this, it also did not repudiate it. It simply

appears not to address it – while expanding the universe of malefactors for which a U.S. citizen could be accused of performing “a belligerent act.”

With Padilla and others moved to the civilian court system, the purported presidential power to detain U.S. citizens had for years “flown under the radar because of decisions made during the late Bush administration and the Obama administration that this was more trouble than it’s worth,” according to Deborah Pearlstein, a professor of constitutional and international law at Cardozo Law School. But, she says, it remained “latent.”

This was made clear by Obama’s [signing statement](#) for the NDAA. In it, he declared that Section 1021 “does nothing more than confirm authorities that the Federal courts have recognized as lawful under the 2001 AUMF,” but “my Administration will not authorize the indefinite military detention without trial of American citizens.” In other words, the president *can* hold Americans indefinitely, but Obama himself was choosing not to.

On the other hand, supporters of the NDAA’s new provisions excitedly averred that they were new and did apply to U.S. citizens. Sen. Lindsay Graham, R-S.C., [claimed](#) that the bill would “basically say in law for the first time that the homeland is part of the battlefield,” and individuals could now be imprisoned by the military without charge, “American citizen or not.”

A group of journalists and human rights activists, including Chris Hedges, Daniel Ellsberg, Noam Chomsky, and Alexa O’Brien, soon sued the government, claiming the NDAA would chill their speech and put them at risk for arrest. Their case had enough merit that U.S. District Judge Katherine Forrest found Section 1021(b)(2) unconstitutional and issued a permanent injunction preventing the government from relying on it. The U.S. Court of

Appeals for the 2nd Circuit [later vacated the injunction](#) on the basis that the NDAA “has no bearing on the government’s authority to detain the American citizen plaintiffs.”

THAT BRINGS US to the present day and the proposed new AUMF from Corker and Kaine.

There are often small, banal bits of legislative housekeeping tucked away at the end of bills. The ACLU’s Christopher Anders points out that this appears to be the case with the new AUMF too – unless you read this section very carefully:

This language means that if the Corker-Kaine AUMF becomes law, the NDAA will be amended to read:

*Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force (Public Law 107–40; 50 U.S.C. 1541 note) **and the Authorization for Use of Military Force of 2018** [i.e., the Corker-Kaine AUMF].*

This matters because the Corker-Kaine AUMF allows the president to decide that he has the power to use force against any “organization, person, or force” *essentially at will*, by designating them as associated with previously named enemy groups.

Here’s how it works: The Corker-Kaine AUMF codifies an expanded list of entities against whom the president is authorized to use force. They are “the Taliban, al Qaeda, the Islamic State in Iraq and Syria, and designated associated forces.” The associated forces designated by the bill are Al Qaeda in the Arabian Peninsula; Shabab; Al Qaeda in Syria; the Haqqani Network; and Al Qaeda in the Islamic Maghreb.

Then when the bill is passed, the president is invited to designate additional “associated forces” to the list. And going forward, the president can add more at any time. All he needs to do is inform “the appropriate congressional committees and leadership” that he’s doing so.

It’s true that the new AUMF would be a small step forward for clarity, since, until now, presidents have decided that groups scattered across the planet were associated forces of Al Qaeda, etc., without necessarily letting Congress know. It’s also true that the Corker-Kaine bill attempts to make it easier than it would normally be for members of Congress to force a vote on such presidential designations. But it [would not require such a vote](#), and in any case, Congress would almost certainly need a two-thirds supermajority in both houses to override a presidential veto and reject a designate – so in practice, it would be near impossible. Thus, the AUMF essentially turns Congress’s constitutional war-making power on its head: Now the president would decide where to go to war, and it would be up to Congress to stop him.

The dangerous flexibility this would grant the executive branch is clear. The new AUMF forbids a president from designating a “sovereign nation” as an associated force of Al Qaeda, the Taliban, or ISIS. But could he, for instance, designate Iran’s Islamic Revolutionary Guard Corps? Questioned by email, Kaine’s office stated this would not be possible because they are part of the military of a sovereign nation. But there’s no clear language in the AUMF to prevent it. Moreover, the Trump administration has already [flirted with](#) designating the IRGC specifically as a terrorist organization – even though Iran overall has been a designated state sponsor of terrorism since 1984 – and the U.S. has [previously claimed](#) the IRGC has associations with Al Qaeda. It’s easy to imagine Trump deciding the Corker-Kaine AUMF authorized him to attack the IRGC, thus inevitably starting a wider war with Iran (or Syria).

Then from the perspective of U.S. citizens, there’s an even more alarming prospect. As the ACLU’s Anders points out, there’s nothing in the Corker-Kaine AUMF that prevents a president from naming an American organization or individual to the list.

And where the executive branch has the power to use force, three presidents have now either proclaimed, or at least refused to disavow, that they also have the power to use the military to indefinitely detain U.S. citizens without charges.

Kaine’s office protests that the new AUMF would encourage congressional debate about the president’s detention authorities. But it’s difficult to imagine this happening in any significant way, given the fact that it’s taken Congress 17 years to get around even to considering the problems with the 2001 AUMF.

So that’s the extraordinary peril that Americans would face under the Corker-Kaine AUMF. It was bad enough with the 2001 AUMF, when U.S. citizens could be imprisoned forever if they had some connection to 9/11. The NDAA made it worse by expanding this to any connection to Al Qaeda, the Taliban, and “associated forces.” But the Corker-Kaine AUMF would give the president the power to seize anyone on earth, including Americans, just by sending a piece of paper to Congress asserting that a person or organization is associated with an already-named terrorist group. And like the 2001 AUMF and the NDAA before it, the Corker-Kaine AUMF does not prohibit the executive branch from using the military to apprehend and detain Americans in the U.S. itself.

Worst of all, the Corker-Kaine AUMF, like the one passed in 2001, has no sunset clause. If passed, repealing it would likely require supermajorities in both houses of Congress, so it could outlive all of us. The executive branch would potentially be able to hold prisoners without charge forever.

Both Corker and Kaine appear eager to bring their bill to a vote in the Senate Foreign Relations Committee, which Corker chairs. But no full hearings have been scheduled to examine the AUMF’s meaning in detail, and Corker has so far declined to commit to any.

“There has been so much preparatory work done on this,” he cheerily declared in April. “I think people understand the implications.”

Top photo: A U.S. military guard carries shackles before moving a detainee inside the U.S. detention center for “enemy combatants” on Sept. 16, 2010, in Guantánamo Bay, Cuba.

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