

# The Constitution and War

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The Congress shall have Power... To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

- The Constitution, Article I, Section 8 Clause 11

While Article I of the U.S. Constitution states that Congress has the power to declare War, Article II, Section 2 grants the President the authority as Commander-in-Chief. This is significant because as of December 2018, the United States will mark 17 years of military operations in Afghanistan—becoming the longest period of US military intervention. Since the founding of the United States over 240 years ago, Congress and the President have enacted 11 separate formal Declarations of War against foreign nations in five different wars. The last official declaration occurred after the Japanese attack on Pearl Harbor and was against the Axis Powers: 6 separate Declarations against the nations of Japan, Germany, and Italy in 1941 and against Romania, Hungary and Bulgaria in 1942. Some have argued that the Authorization for Use of Military Force (AUMF) approved by Congress in 2001 and again in 2002 grants the President the ability to conduct the overall Global War on Terror which accounts for the size and scope of military operations in Afghanistan and around the world. But that argument seems to ignore the fact that the US has been at war for close to 17 years. When there is a formal Declaration of War, it “creates a state of war under international law and legitimates the killing of enemy combatants...” whereas an Authorization uses military “force against a named country or unnamed hostile nations” (Elsea & Wood, 2014). The passage of the 1973 War Powers Resolution (Public Law 93-148), sought to ensure that both legislative and presidential branches would deliberate and share in the decision for the United States to become involved in war. From 1975 until March 2017, under the War Powers reporting provision, Presidents have submitted 168 reports that “generally cite the President’s authority to conduct foreign relations and as Commander-in-Chief” (Weed, 2017). The purpose of this paper is to inform the reader of the Presidential usage of the AUMF by providing a timeline, discussion of subsequent operations and unintended consequences of such AUMF usage. There have been multiple attempts to bring up a motion to repeal that AUMF, while others have tried to introduce a new bill that would limit the implementation of military intervention. The scope of this paper will not argue for war powers to belong to the Legislature or Executive branch but rather presents facts that have been evident with both 2001 and 2002 AUMF. In truth, what we see through such comparison and discussion is the Founding Fathers’ vision of the deliberate dialogue between co-equal branches of government.

The events of September 11, 2001 changed the way the United States and the world viewed security that day. In a Joint Resolution, the Authorization for Use of Military Force was passed by both chambers of Congress on September 14, 2001 and enacted by the President on September 18, 2001. It is known as the “Authorization for Use of Military Force or AUMF” and has been used by the last three administrations to conduct military operations. Few would have

known that when this resolution was passed that it would still be in use today. The main provision of Senate Joint Resolution 23 (S.J. Res. 23) states 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.

In 2002, the Bush administration argued that Iraq posed a national security threat based on the repeated violations on United Nations Security Council resolutions and was intent on acquiring weapons of mass destruction. President Bush emphasized that if Iraq refused to fulfill its obligations to comply with U.N. Security Council resolutions, the United States would see that those resolutions were enforced. The House debated and passed the H.J. Res. 114 bill on October 10, 2002 which subsequently saw the Senate pass the House version of H.J. Res. 114 the following day on October 11. President Bush signed the Authorization for Use of Military Force Against Iraq Resolution of 2002 into law (P.L. 107-243) on October 16, 2002. The main provision authorizes the President:

to use the armed forces of the United States “as he determines to be necessary and appropriate in order to—(1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.”

These key phrases have been cited by all three administrations both Republican and Democrat in order to expand the role of military operations against “terrorist” for the last 17 years. According to Pena (2017), “the U.S. has military personnel deployed and equipped for combat in at least 19 countries: Afghanistan, Iraq, Syria, Yemen, Somalia, Libya, Kenya, Niger, Cameroon, Uganda, South Sudan, Democratic Republic of Congo, Central African Republic, Djibouti, Jordan, Turkey, Egypt, Cuba, and Kosovo.” Outside of Afghanistan and Iraq, few would have thought that the other 17 countries would be positioned to receive military forces based on the AUMF of 2001 and 2002. The CRS article written by Weed (2017) states that the authorization of military action against “organizations or persons” is an unprecedented use that goes against the traditional norms of nations or particular aggressors.

Of concern is the broad interpretation that each administration has utilized the AUMF. While President Bush used this to pursue military action in Afghanistan, his administration also sent military personnel to conduct operations to several countries in the Central and Pacific Command areas. These operations resulted in the largest call-up of Reserve and National Guard soldiers, sailors, Marines and airmen since the Vietnam conflict. While not a full-scale mobilization, these call-ups did change the way strategic planners viewed the Reserve and National Guard forces. With the pace of deployments and the rates of mobilization, these forces were no longer considered Strategic Reserves to be used in extreme emergency; they became an Operational Reserve.

While the Bush administration used the AUMF to fight the “War on Terror” over there instead of on America’s shore, the Obama administration utilized it to expand military operations in the

continent of Africa. In a very broad interpretation, the Obama administration identified the Islamist militant group in Somalia, Al Shabab, as part of the armed conflict that Congress authorized against the perpetrators of the Sept. 11, 2001 terrorist attacks. As Savage, Schmitt and Mazzetti write (2016), this interpretation “is intended to shore up the legal basis for an intensifying campaign of airstrikes and other counterterrorism operations, carried out largely in support of African Union and Somali government forces.” What has happened is an increase in kinetic activity that included the use of drone strikes besides non-conventional special forces.

The Obama administration argued heavily that the AUMF justified the counterterrorism targeting operations that utilized manned and unmanned aircraft, special forces and other methods to neutralize the enemy. As Brady and Goldsmith write, “counterterrorism targeting outside of areas of active hostilities became much more prominent (and controversial).” The interpretation included “membership and associated forces” that justified the use of military force against Al Shabab in Somalia, Al Qaeda in the Arabian Peninsula in Yemen and the Khorasan Group in Syria. It was during the fall of 2014 that the administration used the AUMF in order to conduct missions against the Islamic State or IS. The reasoning went that the IS was descended from Al Qaeda in Iraq which was part of or associated with Al Qaeda.

Following the election of Donald Trump as President, his administration used the AUMF to continue the war on terrorism outside of Afghanistan based on the legal precedence set by the Obama administration. In testimony before Senate Foreign Relations Committee, Secretary of Defense James Mattis said, “A new [war authorization] is not legally required to address the continuing threat posed by al Qaeda, the Taliban, and ISIS.” (Pena 2017) Adhering to the same legal argument that the Obama administration used, the Trump administration framed the strikes against Syria as being against the same associated forces and in the protection of US military forces overseas. Article II of the Constitution and both AUMFs, “provide safe, sufficient legal authority for us to engage and defeat the current threat -- which we are doing by working by, with and through our allies and partners,” Mattis said. This has led to a growing chorus from members of Congress to reopen the discussion of the role of War Powers by the Executive and Legislative branches.

This is not a new phenomenon as the debate has occurred between the Legislative and Executive branches dating back to President Washington and the Neutrality Proclamation of 1793. The current situation in which Congress is looking at several options to include the revocation of AUMF is not unique either as Congress had repealed the 1964 Tonkin Gulf Resolution in 1971 due to the expansion of military efforts into Cambodia and Laos by the Nixon Administration. Lost in the legal interpretation of the three administrations is the actions of Congress during the last 17 years that have supported the war effort through funding regardless of party affiliation. During a televised discussion on C-SPAN by the CATO institute, the speaker Mr. Gene Healy stated that “three presidents in a row have limited authorization into an enabling act for globe-spanning war.” The reality of the AUMF was that the language was written broadly so as to provide the President with the necessary tools to execute his role as Commander-in-Chief of the military. Mr. Healy argued that the best course of action is to repeal the AUMF and replace it with a more stringent bill in order to avoid the “forever war”. In April of this year, Senators Bob Corker (R-TN) and Tim Kaine (D-VA) introduced a bill that would keep the spirit of the original bill but would require the President to add new groups that fit the definition of “associated” with.

The main argument for this bill is that it brings Congress back into the discussion on where and when US military force is used unlike in the past where legal terminology and interpretation by the Executive branch granted the President. While these are two options represented, there have been several other bills that have stalled in committees that have also sought to address this issue.

This month marks 17 years that Congress passed a bill providing the President the authorization to use military force in response to the attacks on US soil. The AUMF has been interpreted by each administration to allow the President to exercise his role as Commander-in- Chief. From President Bush first use of the AUMF in sending military forces first into Afghanistan and then Iraq to President Obama using the legal interpretation of associated force to strike at Al Shabab, or President Trump justification to bomb targets in Syria, their interpretation of the authorization allowed their actions. Congress has always funded the effort in order to provide the resources necessary for the last 17 years. The main challenge to the use of the AUMF depends on how the two branches differ in their interpretations by the respective war powers of the President and Congress as outlined in the Constitution. The current arguments between the Executive and Legislative branches of government are not unique as they have occurred as early as 1793. In looking at the back and forth discussions between Congress and the President is the process by which each branch discusses their role in War Powers. While not expedient or quick for some especially today, the President presents the Congress with a proposed plan and is given the opportunity for deliberative consultation as outlined by the Constitution and the original framers.

## REFERENCES

Bradly, C.A. and Goldsmith J. L. (2016, Aug 24) Obama's AUMF Legacy. Retrieved from [https://law.yale.edu/system/files/bradley\\_and\\_goldsmith.pdf](https://law.yale.edu/system/files/bradley_and_goldsmith.pdf)

Cato Institute. (2018, May 30) Recapturing Congress's War Powers: Repeal, Don't Replace, the 2001 AUMF. Podcast retrieved from <https://www.cato.org/events/recapturing-congress-war-powers-repeal-dont-replace-2001-aumf>

Cronk, T. M. (2017, Oct 17) Mattis: Military Force Authorizations Remain Sound. *United States Central Command*, Retrieved from <http://www.centcom.mil/MEDIA/NEWS-ARTICLES/News-Article-View/Article/1360082/mattis-military-force-authorizations-remain-sound/>

Elsea, J. K. and Weed, M. C. Congressional Research Service (2014, Apr 18). Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications (CRS Report, RL31133)

Friend, A.H. (2017, Oct 26). What Does Niger Have to Do with the AUMF? *Center for Strategic & International Studies*. Retrieved from <https://www.csis.org/analysis/what-does-niger-have-do-aumf>

Pena, C. (2017, Dec 4) Here's why authorization to use military force is so important. *The Hill*. Retrieved from <https://thehill.com/opinion/national-security/363182-heres-why-authorization-to-use-military-force-is-so-important>

Savage, Schmitt and Mazzetti. (2016, Nov 27). Obama Expands War With Al Qaeda to Include Shabab in Somalia. *The New York Times*. Retrieved from <https://www.nytimes.com/2016/11/27/us/politics/obama-expands-war-with-al-qaeda-to-include-shabab-in-somalia.html>

“S.J.Res. 23 — 107th Congress: Authorization for Use of Military Force.” [www.GovTrack.us](http://www.govtrack.us). 2001. September 23, 2018 <<https://www.govtrack.us/congress/bills/107/sjres23>>

Weed, M. C. Congressional Research Service (2017, Mar 28). The War Powers Resolution: Concepts and Practice. (CRS Report, R42699)

White House, “President’s Remarks at the United Nations General Assembly,” press release, September 12, 2002, Retrieved from: <http://georgewbush-whitehouse.archives.gov/news/releases/2002/09/print/20020912-1.html>;

White House, “President Discusses Iraq, Domestic Agenda with Congressional Leaders,” press release, September 18, 2002, Retrieved from: <http://georgewbush-whitehouse.archives.gov/news/releases/2002/09/print/20020918-1.html>.

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