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RECLAIMING CONGRESSIONAL WAR POWERS

By Anthony Marcum

INTRODUCTION

The Constitution divides war powers between Congress and the Executive Branch, but over time, the president's war powers have expanded to the detriment of congressional participation and oversight. Congress is partially to blame. The War Powers Resolution (WPR), designed to curb presidential unilateralism, has largely failed. In recent years, broad authorizations like the 2001 and 2002 Authorizations for Use of Military Force (AUMFs) have allowed presidents to conduct military operations in nearly 20 countries with little congressional scrutiny.

This R Street short argues that Congress must reassert its war powers. The best first step is to repeal outdated and irrelevant military authorizations, like the 2002 AUMF. Doing so invites the chance for a greater institutional discussion of Congress' Article I authorities and sets the groundwork for other, more lasting reforms.

CONGRESS'S DIMISHING WAR POWERS

Article II of the Constitution confers the president with the title of "commander in chief" of the armed forces.¹ In *Fed-*

eralist 69, Alexander Hamilton described this role as "nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy."² Congress, on the other hand, is empowered with many responsibilities, including the power to "declare war," "raise and support armies" through appropriations, and "make rules for the government and regulation of land and naval forces."³

This division was deliberate, as fears of executive unilateralism in military affairs were on the Founders' minds during the country's early years. After all, these divided powers "distinguished the United States from the King of England, who had the sole authority to declare war, raise troops, and regulate Britain's military."⁴ Ten years after the Constitution's ratification, James Madison similarly observed:

The constitution supposes, what the History of all Governments demonstrates, 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.⁵

Yet in recent decades, this purposeful balance has tilted overwhelmingly toward the executive branch. As one legal scholar observed, this imbalance stems from several changes over the nation's history:

First, as U.S. global power and responsibilities grew after World War II, presidents perceived ever-widening national interests that required deployments of U.S. troops. Second, Congress has supplied the president with a two-million-strong armed force and an array of weapons, with few real restrictions on their use. Third, Congress has generally acquiesced in the steadily growing presidential assertions of military authority.⁶

This third cause—congressional acquiescence to presidential assertions of military action—is the most historically consistent way that the executive branch has gained greater war powers over time. As early as 1798, by President John Adams's request, Congress enacted legislation empowering the president to engage French ships and commission privateers to recapture U.S. vessels—all without declaring war against France.⁷ In 1815, because of growing instances of piracy, Congress similarly did not declare war against Algiers but authorized President James Madison to seize Algerian vessels.⁸

Over a century later, prolonged military engagements in Korea and Vietnam finally led Congress to reexamine the war powers it had largely delegated to the executive branch. The Korean War—lasting three years with over 36,000 Americans

killed—was famously described as a “police action” by President Harry Truman and conducted without explicit congressional approval.⁹ By the 1950s, the United States already had a military presence in Vietnam. In 1964, Congress passed the Gulf of Tonkin resolution, empowering President Lyndon B. Johnson “to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression” in Southeast Asia.¹⁰

Following a drastic uptick in military presence and casualties, the Vietnam War became increasingly unpopular at home. In 1971, Congress repealed the Gulf of Tonkin resolution. President Richard Nixon signed the legislation but argued that he did not need the resolution to continue military operation, citing his authority as Commander in Chief.¹¹ The war continued for another two years, totaling nearly 60,000 deaths during the entire conflict.¹²

In 1973, Congress passed the War Powers Resolution (WPR), overriding a veto by President Nixon. The WPR was designed “to establish procedures for both branches to share in decisions that might get the United States involved in war.”¹³ But the WPR has done little to curb executive unilateralism. Presidents at times have ignored its requirement to “consult” with Congress and defined “hostilities” under the law to exclude common military actions (like prolong air strikes). Likewise, presidents have vetoed bipartisan resolutions to stop hostilities in Yemen and elsewhere.¹⁴

Despite the Executive Branch’s continued defiance and minimization of Congress’s constitutional role, Congress has largely declined to push back. Along with WPR’s ineffectiveness, Congress’s war powers role continues to diminish due to broad and ongoing use of force authorizations from the Executive Branch, with little follow-up or oversight.

Days after the Sept. 11 attacks, Congress passed the 2001 AUMF, authorizing the president “to use all necessary and appropriate force” against those who “planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”¹⁵ The next year, Congress passed the 2002 AUMF, permitting the president to use military force to “defend the national security of the United States against the continuing threat posed by Iraq.”¹⁶

Although these authorizations were passed to combat Al Qaeda and the Taliban in Afghanistan and Saddam Hussein’s regime in Iraq, both AUMFs currently remain on the books. The 2001 AUMF, for instance, has been the basis for dozens of operations across 19 countries, including against groups formed well after the Sept. 11 attacks.¹⁷ Beyond the War in Iraq, the 2002 AUMF was notably relied on, in part, by the Obama administration for actions against the Islamic State

of Iraq and the Levant (ISIL) in Iraq and Syria and by the Trump administration for its strike against Iranian General Qasem Soleimani.¹⁸

Broad use of these AUMFs that go beyond their original intent is the fault of both the Legislative and Executive Branch. Over the country’s history, presidents have consistently been willing to engage in unilateral action, especially when empowered by Congress. Today, because of broadly written military authorizations that are neither geographically tailored nor provisioned with a sunset clause, the president retains an ongoing permission slip to conduct military operations in nearly every corner of the globe.

THE BEST FIRST STEP IS TO REPEAL OUTDATED MILITARY AUTHORIZATIONS

The precise division of war powers between Congress and the Executive Branch has never been clear. Even so, it is universally recognized that, as commander-in-chief, the president has the power and responsibility to defend the United States and repel a sudden attack.¹⁹ At the same time, the Office of Legal Counsel has acknowledged, “the use of force cannot be sustained over time without the acquiescence, indeed the approval, of Congress.”²⁰

With this framework, it is clear that the status quo is unacceptable. Since 2001, there have been over 2,300 military casualties in Afghanistan and over 4,000 in Iraq and surrounding nations.²¹ Al Qaeda has fractured into splinter groups, scattered across the Middle East.²² Saddam Hussein’s government was toppled 18 years ago. Today, Iraq is “a key partner” in the region.²³ But for nearly 20 years, Congress has not taken substantive steps to reexamine the broad authorities that it gave to the Executive Branch.

It is imperative that Congress reassert its constitutional authority. Doing so will require several substantive reforms, including amending the 2001 AUMF and WPR. These reforms are realistically a longer-term goal that will require institutional ambition and cooperation between party leaders. In the short term, Congress can take other pragmatic steps to stop the erosion of its constitutional authority. The most obvious and politically practical includes repealing outdated and irrelevant military authorizations.

Repealing the 2002 AUMF is the logical first step. The 2002 AUMF was passed during a specific era in time to address a specific threat. That time has passed. As stated in the authorization, Congress authorized the president to military force against Iraq largely because it posed “a continuing threat” to the United States by “continuing to possess and develop a significant chemical and biological weapons capability, actively seeking a nuclear weapons capability, and supporting and harboring terrorist organizations.”²⁴ But today, the United

States and Iraq are now allies and the Iraqi government poses no national security threat. Leaving the 2002 AUMF on the books, as is, supposes a different reality.

There are other outdated authorizations that should be swiftly repealed. For example, a 1991 authorization authorizing military force against Iraq for its invasion of Kuwait has never been repealed.²⁵ Going further back, a 64-year authorization is still law, which with the urging of President Dwight D. Eisenhower authorized the armed forces to assist any Middle Eastern nation combating “aggression from any country controlled by international communism.”²⁶

Repealing any of these outdated authorizations would not interfere with today’s national security challenges. The 1991 and 1957 authorizations are clearly obsolete. The 2002 AUMF is rarely used, mainly because it has little relevance for current operations and other authorities offer more legal support. Indeed, as observed by four bipartisan members of Congress, “it has been nearly a decade since the 2002 AUMF has been used as the primary justification for any use of military force by the United States.”²⁷ Furthermore, the White House recently released a statement, which conceded that “the United States has no ongoing military activities that rely solely on the 2002 AUMF as a domestic legal basis, and repeal of the 2002 AUMF would likely have minimal impact on current military operations.”²⁸

Most importantly, not only are these authorizations irrelevant, but their continued presence on the books may also lead to a number of future abuses. Regardless of party affiliation, the Executive Branch often interprets congressional authorizations in a way that maximizes executive power while minimizing congressional intervention. This is contrary to Congress’s important role in policy debates, including when the country goes to war. Whether after the bombing of Pearl Harbor or after the Sept. 11 attacks, Congress holds the ability to quickly grant the president new war authorities, if necessary. The lingering potential to revive decades-old authorizations to fight today’s battles only invites abuse and reduces Congress’s constitutional role.

CURRENT LEGISLATIVE EFFORTS

Fortunately, recent attempts to repeal the 2002 AUMF alongside other outdated authorizations have gained momentum in Congress. This June, the House passed a bill introduced by Rep. Barbara Lee (D-Calif.) that would repeal the 2002 AUMF.²⁹ The legislation easily passed the House, 268-161, which included the support of 49 Republican House Members.

The Senate is also considering legislation to repeal outdated war authorities. One joint resolution, introduced by Sens. Tim Kaine (D-Va) and Todd Young (R-Ind.), would repeal

the 2002 and 1991 AUMFs.³⁰ When introduced this March, Sen. Young stated that “the fact that authorities for both of these wars are still law today is illustrative of the bipartisan failure of Congress to perform its constitutionally-mandated oversight role.”³¹ Sen. Mike Lee (R-UT) similarly noted that “Congress has a responsibility to not only declare war but also to bring conflicts to a close.”³²

CONCLUSION

Congress has an important war powers role. The constitution demands it, and the constituents that lawmakers represent are affected by Congress’s decisions—or inaction. Pushing back against the historical tide of unilateral decision-making by the Executive Branch to use military force will be difficult and require substantive reforms.

As for reclaiming war powers, Congress has the chance to walk before it runs. The most pragmatic first step for Congress, is to repeal outdated AUMFs, including the 2002 AUMF. Like the 1991 and 1957 authorizations, the 2002 AUMF is irrelevant to any current national security challenge and their repeal has gained bipartisan interest. Repealing these authorizations sets the groundwork for Congress to reassert its proper institutional war powers role.

ABOUT THE AUTHOR

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