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Policy Brief

The Increasing Concentration of War Powers in the Executive Branch: A Legislative History of Exercised War Powers

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Abstract

Constitutional constraints on a President's ability to lead the nation to war have been unrealized repeatedly since WWII. A legislative trend of granting broad and unchecked authority to the President to use military action has changed the nature of American entry into armed conflicts. The most frequently relied upon legislative method for granting war powers today, Authorizations for Use of Military Force (AUMFs), grant broad-reaching war powers to the executive branch. The 2001 and 2002 AUMFs have granted four consecutive Presidents the ability to act swiftly and divisively to combat enemies of the state across the globe without Congressional deliberation or authorization (United States Senate Committee on Foreign Relations, 2017, p. 2). While civil liberties groups and Constitutional scholars have widely recognized that this authority poses a threat to the balance of power and transparency of a democratic society (Bradley & Goldsmith, 2005, p. 88), constitutional originalists recognize unilateral power of the executive in military action (Ramsey, 2002, p. 21) and defense officials value security and stress the importance of retaining secrecy as to minimize the global recognition of small but dangerous terrorist groups (Cronk, 2017, p. 1). The Biden administration has called for a new AUMF to replace the outdated and unilateral authorizing language of the post-9-11 war powers that have been utilized to wage war across the globe. This call must be swiftly acted upon by Congress, as it would enact a return to Congressional oversight of presidential war powers not seen in contemporary U.S. military history.

Keywords: AUMF, war powers, domestic-law authority, international affairs

Backdrop of Constitutional War Powers in Twenty-First Century Conflicts

The nation's founding documents separated powers in the authorization of wartime military action through legislative checks on executive power. Article 1, Section 8, Clause 11 of the Constitution gives Congress the power to declare war. The Congressional authority to declare war, however, has been repeatedly bypassed in military conflicts for decades.

The attacks of September 11th accelerated the transition of increased war powers to the executive with congressional bipartisan approval. The 2001 Authorization for Use of Military Force (AUMF), passed within the week of attacks on domestic soil, shifted counterterrorism American policy in making use-of-force authorizations a lasting authorizing force granting the President unilateral military intervention powers.

The post 9/11 AUMFs, 2001 and 2002 AUMFs, have not been amended and remain legal justification for military use-of-force across the globe. Despite its explicit unitary aim to empower the Bush administration to intervene in Iraq where Saddam Hussein was alleged to have weapons of mass destruction, the lack of clear guidance and the permanent nature of the 2002 AUMF led the Obama administration to cite the 2002 AUMF as "alternative statutory basis", alongside the 2001 AUMF, for war against ISIS (Savage, 2014, p. 1). Similarly, in January of 2020, the Trump Administration cited the 2002 AUMF as basis for the assassination of Iranian general Qassem Soleimani

The long-gone formalism of declaring war has decreased accountability and increased costs in the exercising of war powers. As precedent for war powers shifts away from the legislative branch, use-of-force legislation today has allowed four consecutive Presidents to deploy troops at his discretion and often without Congressional knowledge.

Historical Use of War Powers Following WWII

The checks on the executive's power to wage war have been largely co-opted since WWII. Congressional war powers have not been traditionally utilized since 1941 when war was declared on Germany, Japan, and Italy. To send U.S. troops into the Korean War, President Truman bypassed Congressional approval, justifying his administration's refusal to recognize Congressional war powers by labeling the American intervention not a war but, "a police action under the United Nations" (Fisher, 1995, p. 34). President Johnson followed precedent, knowingly utilizing faulty Gulf of Tonkin information to encourage a bypass of Congressional war powers for the unilateral guarantee of power that the Gulf of Tonkin Resolution provided throughout the rest of the Vietnam War. These executive actions led to Congressional development of bipartisan policy checking presidential war powers.

In 1973, Congress passed the War Powers Resolution Act over President Nixon's veto (H.J. Res. 542). This legislation sought to reinforce Congressional authority over Presidential war powers by necessitating Congressional approval. Specifically, the joint resolution requires that the president notify Congress within 48 hours of sending armed forces into conflict and requires that without subsequently obtaining a Congressional declaration of war or an AUMF, troops must remain no longer than 60 days, with an additional 30 days granted for withdrawal. The War Powers Resolution, however, has been repeatedly bypassed. President Clinton did not obtain Congressional approval for the bombing campaign of Kosovo in 1999 in the required time frame. Similarly, President Obama's administration did not obtain Congressional authorization for intervention in Libya in 2011. These actions were objected to by both liberal and conservative members of Congress, but legislative action has not been taken against any specific alleged violations of the War Powers Resolution.

War Powers Authorization Post- War Powers Resolution: The AUMF Model

The repeated bypass of Congressional oversight set out in the War Powers Resolution Act set a precedent for common use of AUMFs, the common legislative method for approving military action following Cold War U.S. military policy. AUMFs grant broad-

reaching emergency war powers to the executive. The most frequently utilized by the executive branch today are the 2001 and 2002 AUMFs.

Congress passed the 2002 AUMF to authorize presidential use of the armed forces as deemed "necessary and appropriate" to "defend U.S. national security against the continuing threat posed by Iraq" and to "enforce all relevant Security Council resolutions regarding Iraq." This AUMF was introduced with the intent of waging war against Saddam Hussein's regime in Iraq on the grounds of violation of the U.N. Security Council resolution for possessing weapons of mass destruction, information later revealed to be untrue. Despite the 2002 AUMF's narrow intended authorization purpose, the Obama and Trump administrations have cited the authorization as authority for broad military force. The Obama administration cited it as "alternative statutory basis", alongside the 2001 AUMF, for war against ISIS (Savage, 2014, p. 1). In January of 2020, the Trump Administration cited the 2002 AUMF as basis for the assassination of Iranian general Qassem Soleimani (House Committee on Foreign Affairs, 2020, p. 8).

While the 2002 AUMF was tailored to specifically justify use of force only against Hussein's Iraqi regime, the 2001 AUMF authorized military action against all groups with any broadly defined connection to the September 11th attacks. Specifically, the 2001 AUMF authorized Presidential use of all necessary and appropriate force against "those nations, organizations, or persons he determines planned, authorized, committed, or aided" the September 11th attacks (S.J. Res. 23) (H.J. Res. 64). Subsequent court cases have interpreted this broad language to include "associated forces" which played no part in the 9/11 attacks, may not haven even existed at the time, but are deemed by the President to be associated with those groups (D.C. Cir. 2010) (Boumediene v. Bush, 553 U.S. 723, 2008).

In a 2004 Supreme Court Decision, *Hamdi v. Rumsfeld*, the Court interpreted the 2001 AUMF as granting the authority to detain enemy combatants, even if enemy combatants were U.S. citizens, until hostilities ended (124 S. Ct. 2633, 2004). The ruling rested on the clause of the AUMF which grants the executive power to use "all necessary and appropriate force".

In 2018, a bipartisan group of senators led by Tim Kaine (D-VA) and Bob Corker (R-TN) introduced legislation to repeal and replace the 2001 and 2002 AUMFs with updated war powers authorizations that fit current military targets (S.J. Res. 59). Their 2018 AUMF would have authorized presidential war intervention specifically against al Qaida, the Taliban, and the Islamic State in Iraq and Syria (ISIS). No further action was taken on the bill after its introduction in the Senate. However, the bill was re-introduced with bipartisan sponsors on March 3, 2021, as Senators expressed frustration with the Biden administration's airstrikes in Syria against Iranian militia groups which were carried out without Congressional authorization (Desiderio & O'Brien, 2021, p. 1). A similar bill to repeal the 2002 AUMF, H.R. 256, passed in the House with bipartisan support. It is important to note that the newly introduced bill call for the repeal of the 1991 and 2002 AUMFs. They would not repeal the broadest contemporary war authorization legislation, the 2001 AUMF.

Two days after the re-introduction of this bill, press secretary Jen Psaki announced the Biden administration's support for repealing active AUMFs and replacing them "with a narrow and specific framework that will ensure we can protect Americans from terrorist threats while ending the forever wars" (Bender & Desiderio, 2021, p. 1). Former President Obama had similarly called for the repeal of the 2001 and 2002 AUMFs and in 2015, his administration issued a formal request for a new AUMF to authorize military action against the Islamic State (Bradley & Goldsmith, 2016). Despite Obama's call, Congress did

not introduce a new AUMF, and instead funded operations against ISIS under the 2001 and 2002 AUMFs despite their intended use for action against a different enemy.

One would expect that Congress would abide by the President's request, as repealing outdated AUMFs and replacing them with new versions would provide Congress with more oversight of the nation's military efforts. Congressional refusal to consider these changes in 2015, however, recognizes that the body's interests are not primarily in providing constitutional oversight of Presidential war powers. Instead, international relations scholars like Stephen M. Walt (2021) have suggested that Congressmembers recognize military interventions as a sensitive matter amongst their constituency and prefer to remain removed from war authorization legislation as to allow themselves to either criticize or take credit for military actions depending on constituents' perceptions (Walt, 2021, p. 2). The Biden administration's support and the newly introduced Senate bill provide Congress once again with the opportunity to rebuild a responsible war powers policy framework. Whether or not this opportunity is taken will define whether the executive branch can continue the near 75-year escalation towards a unilateral and undemocratic process of initiating acts of war.

Value Orientations to Current Status

AUMFs today have granted Presidents the ability to act swiftly and divisively to combat enemies of the state across the globe without domestic or international approval. These enemies are increasingly shadow groups and non-nation states, so the broad executive powers granted by existing AUMFs empower the President with what defense officials label the necessary power to use military force against these groups without public knowledge or debate as to the righteousness of intervention (Cronogue, 2012 p. 393-395). While civil liberties groups and Constitutional scholars have argued that this authority poses a threat to the balance of power and transparency of a democratic society (Bradley & Goldsmith, 2005, p. 88), constitutional originalists recognize unilateral power of the executive in military action (Ramsey, 2002, p. 21) and defense officials in valuing security and stressing the importance of retaining secrecy as to minimize the global recognition of small but dangerous terrorist groups (Cronk, 2017, p. 1).

Stakeholders Amidst Calls to Repeal, Rewrite, Replace Longstanding AUMFS

Rep. Barbara Lee (D-CA13) cast the sole dissenting vote in the House of Representatives approval of the 2001 AUMF. In her statement, she cautioned, "If we rush to launch a counterattack, we run too great a risk that women, children, and other non-combatants will be caught in the crossfire" (C-SPAN, 2015, p. 1). She declared Congress' granting of war powers to President Lyndon Johnson in 1964 to be an "abandoning [of] its own constitutional responsibilities" and broadly expressed caution, "as we act, let us not become the evil that we deplore". Ten years later, in 2011, the Obama administration did not obtain Congressional authorization for intervention in Libya. Instead, the administration's intervention was justified with legal counsel of Caroline D. Krass, Principal Deputy Assistant Attorney General, who wrote that the President had the "constitutional authority to direct the use of military force in Libya because he could reasonably determine that such use of force was in the national interest" (Krass, 2011, p. 1). Krass also found legality of the President's actions due to the "limited operations" of the intervention.

In response to President Obama's unilaterally authorized naval and military intervention in Libya, liberal interest groups including the American Civil Liberties Union (ACLU), Appeal for Justice, The Constitution Project, and others have labeled the 2001

AUMF as too broad and called for, in a letter to the House Foreign Affairs Committee, future AUMFs to be "clear, specific, tailored to the particular situation for which force is being authorized" (American Civil Liberties Union, 2017, p. 1).

Opposition to rewriting or repealing 2001 and 2002 AUMFs comes from the Department of Defense as well as senior administration officials. In October 2017, the Senate Foreign Relations Committee called now-former Defense Secretary Jim Mattis and now-former Secretary of State Rex W. Tillerson to speak to determine as former Republican Committee Chair, the Hon. Bob Corker said, "the appropriate oversight role for Congress" in the continued use of the AUMFs. The ranking member of the Democratic party, Hon. Benjamin J. Cardin said their appearance was needed to obtain an update "on the use of the 2001 AUMF" and to "[hear] the Secretaries' belief as to what authorizations exist today for military operations against North Korea". It is important to note that Democratic members questions expressed explicit support for re-writing or repeal of the 2001 AUMF while Republican members' questions acknowledged its continued importance in the War on Terror. Tillerson and Mattis' statements were both in opposition to rewriting the 2001 AUMF (S. HRG. 115–639, 2017).

The Department of Defense stands to absorb concentrated costs inherent in revisions to broad executive war powers granted by 2001 and 2002 AUMFs. Concentrated costs in this case are important to note as reigning in current AUMFs would extensively drawback the Department of Defense's policymaking capability. In comparison, policy benefits would be diffused or dispersed among a larger population which is less likely to lobby for policy change as they will feel the effects less directly. The pressure of these concentrated costs allows us to expect the Department of Defense to lobby extensively against changes to existing AUMFs (Stone, 1988, p. 238-243).

Policy Scholars on Vagueness

There is consensus among policy scholars and stakeholders alike that the vagueness of the 2001 AUMF allows for broad executive interpretation in the implementation of the legislation. Policy scholars broadly agree that this vagueness must be addressed to revitalize Congressional oversight and approval over military use. Benjamin Wittes argues that updating ambiguities within the AUMF would constrain the nearly endless uses for which it can be applied to today (Wittes, 2012, p. 3). Eliminating these ambiguities would require replacing 'support' and 'aid' for the enemy, as justification for intervention, with more specific, intent-based acts. Wittes recommends maintaining 'harboring' of the enemy as necessary in changes to current AUMFs. Broad languagelike 'supporting' the enemy allows for intervention against groups which have only relative or tenuous connection to enemy groups whereas a shift in the language of AUMFs to 'harboring' requires knowledge of or intent to foster enemy groups.

Another prominent scholar on military authorization policy, Graham Cronogue, proposes a similar expansion of explicit language in a revised AUMF. Specifically, Cronogue stipulates that Congress clearly name the targeted actors in a use-of-force authorization, an action which he argues would provide clearer guidance of executive action (Cronogue, 2012, p. 402).

Conclusion

The 2001 and 2002 AUMFs created the unusual precedent of war powers authorization without an expiration date and as an effect, has retained active war powers in the executive branch for four consecutive presidents. War authorization powers are constitutionally a congressional jurisdiction yet the proliferation of broad-reaching AUMFs, especially after

the fear entrenched policy decisions following 9/11, have given unchecked and unilateral military power to the sitting President. Repealing the 2001 and 2002 AUMFs is vitally important to the transparency of future military action and the democratic functioning of war powers authorization in future conflicts. Redefining targeted groups in specifically tailored language is necessary to prevent the continuation of guileful legal opinions by the Justice Department that utilize the widely encompassing language of the 2001 and 2002 AUMFs to provide grounds for actions of war across the globe.

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