

Reclaiming Congressional War Powers

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Chairman Meeks, Ranking Member McCaul, members of the Committee, thank you for inviting me to speak with you today.

I want to address three matters today. First, I will explain why I think it is wise to repeal the 1991 and 2002 Authorizations for the Use of Military Force in Iraq. Second, I will outline what I see as key priorities in the effort to repeal and replace the 2001 Authorization for the Use of Military Force. Third, I will speak about top priorities for war powers reform more generally.

(1) 1991 and 2002 Authorization for the Use of Military Force Repeal

I will begin with [1991](#) and [2002](#) AUMF repeal. I understand that Senators and Representatives on both sides of the aisle have [introduced](#) legislation that would formally end the Gulf and Iraq wars by repealing these now effectively defunct AUMFs.

At the time the 2002 AUMF was passed, only 15 of the current members of the Senate were in office, and only 37 of the current members of the House. At the time of the 1991 AUMF, only 4 of the current members of the Senate were in office, and only 7 of the current members of the House.

These authorizations were enacted by past Congresses for purposes that have long since been achieved. The 1991 authorization permitted then-President George H.W. Bush to use military force pursuant to UN Security Council Resolution [678](#), a resolution that required Iraq, then led by Saddam Hussein, to withdraw from Kuwait, which it had invaded and occupied, no later than January 15, 1991. The 2002 AUMF was enacted primarily in response to fears that Saddam Hussein's Iraq possessed weapons of mass destruction that posed a direct threat to the United States and its allies. It authorized 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." The purposes of these authorities have long ago been met. The government of Iraq was long ago expelled from Kuwait, the UN resolutions referred to in the resolutions have long since expired, and Iraq does not pose a threat to the United States or its allies. Although it is true that new terrorist threats emerged in Iraq after the war that began in 2003, they are more properly addressed under the authority Congress provided in the 2001 AUMF. Leaving the 1991 and 2002 AUMFs on the books simply leaves the door open to their misuse without giving Presidents any additional legitimate basis for military action.

The last reference to the 2002 AUMF by the Executive Branch illustrates these concerns. During the debate over President Donald Trump’s decision to take a lethal strike against Qasem Soleimani in early 2020, members of the Administration improperly relied on the 2002 AUMF as a source of legal authority—which most [experts agree](#) did not in fact provide any authority for the operation. It is important here to focus on the specific and limited authority Congress granted in the AUMF. As noted earlier, it gives authority for two purposes: to “defend the national security of the United States against the continuing threat posed *by Iraq*,” and to “enforce all relevant United Nations Security Council resolutions regarding Iraq.” The Security Council Resolutions referenced in the AUMF are no longer operative. And Soleimani was an Iranian, not Iraqi, government official. Hence a use of force against him cannot be said to be a use of force to “defend the national security of the United States against a threat posed *by Iraq*.” Indeed, the only way in which the AUMF has any ongoing relevance is if we believe that the government of Iraq, which we are actively assisting and supporting, poses an ongoing threat to the United States’ national security.

(2) 2001 Authorization for the Use of Military Force Repeal and Replace

Next, I turn to the 2001 AUMF. Here, I will note that the authorization was enacted mere days after the horrific attacks on the United States on September 11, 2001. The authorization was necessarily vague because the government was not yet entirely confident as to the group or groups responsible for the attack.

There has long been bipartisan agreement that the 2001 AUMF is outdated. That is not news. The devil has been in the details of the replacement. Here I will outline three key elements that reflect a fairly broad consensus as to what should be included in a replacement.

I will preface this by saying that while some would argue that no replacement is necessary, I worry that the United States will continue to face terrorist threats, and in the absence of a statute, the President would rely on his Article II authorities as Commander in Chief to carry out counterterrorism operations he thinks necessary. If Congress speaks clearly in outlining the scope and limits of an updated counterterrorism authority, it will likely be in a better legal position to press back against Presidential uses of force that exceed those express authorities.

There are three key priorities for AUMF reform:

First, a new AUMF must include a *reauthorization requirement*. If we have learned anything in the last two decades, it is that authorizations without a requirement for continued congressional engagement become quickly outdated and take on a life of their own without any input from Congress. Congress must stay engaged in the process of defining our military operations abroad. That is its constitutional role. It should not delegate that authority for all time. Indeed, the Constitution itself envisions such a requirement. Article I of the Constitution forbids Congress from “support[ing] Armies” with any “Appropriation of money...for a longer Term than two Years.” This was meant to ensure that every member of Congress, at some time during his or her term in office, had the opportunity to make a decision about whether to continue any ongoing military efforts. Alexander Hamilton explained in the Federalist Papers ([No. 26](#)): “The legislature of the United States will be obliged, by this provision, once at least in every two years, to deliberate upon the propriety of keeping a military force on foot; to come to a new resolution on the point;

and to declare their sense of the matter, by a formal vote in the face of their constituents.” The logic behind this principle applies not only to appropriations, but to AUMFs as well. A two-year reauthorization requirement would reaffirm this constitutional requirement and ensure that every member of Congress has an opportunity to vote to reauthorize our military efforts.

Second, a new AUMF should *define the enemy*. The current practice of deferring to the Executive Branch to determine which groups are “associated forces” of al Qaeda cuts Congress out of its constitutional role. While that may have made sense in the early days after the 9/11 attacks, it no longer does. Congress should be directly engaged in deciding when and with whom we are at war. And it should make clear that the concept of co-belligerency should not be used to expand the footprint of the war without seeking specific authority from Congress. Any decision to expand the AUMF to new (not simply rebranded) groups or new geographic locations should be reported and approved by Congress.

Third, a new AUMF should include *clear reporting requirements* to the appropriate committees, including the House Foreign Affairs Committee, about the progress of the military operations. The expectation should be that the wars will not be endless. There must be a clear, achievable objective and Congress should be regularly apprised of progress toward it.

(3) Priorities for War Powers Reform

Last, I want to say a few words about war powers reform. War powers reform is complex, and I cannot cover it comprehensively here. But I will focus on what I consider to be some of the top priorities.

First and foremost, it is essential to define the term “hostilities.” One of the fateful decisions made by the authors of the War Powers Resolution was to tie the reporting requirements to “hostilities,” but then fail to define that term. The [House report](#) on the War Powers Resolution explained the choice of the word as follows:

The word hostilities was substituted for the phrase *armed conflict* during the subcommittee drafting process because it was considered to be somewhat broader in scope. In addition to a situation in which fighting actually has begun, *hostilities* also encompass a state of confrontation in which no shots have been fired, but where there is a clear and present danger of armed conflict. “*Imminent hostilities*” denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict.

Perhaps because the meaning was self-evident to those involved, the term was not defined in the legislation. That has left it open to wildly differing interpretations since. For example, during the Libya intervention, the Obama Administration [argued](#) that it did not need to seek Congressional authorization to continue military operations past 60 days because the U.S. military operations in the country were not “hostilities.” Recognizing that the statute did not define the term “hostilities,” the administration adopted a novel four-factor test that excluded the Libyan operation. If the Resolution is to be revived, Congress should start by filling this key gap in the statute. An ideal definition of “hostilities” would make explicit the original intent of the War Powers Resolution: that it encompasses any situation involving any use of lethal or potentially lethal force by or against

United States forces. This would apply regardless of the domain and intermittency, intensity, or severity of such force. It might include, as well, actions taken to directly participate in lethal operations by partners—such as the “in-flight refueling of non-United States aircraft conducting missions as part of the ongoing civil war in Yemen” identified as “hostilities” in the [2015 joint resolution](#) to direct the removal of United States Armed Forces from hostilities in the Republic of Yemen that have not been authorized by Congress. This level of U.S. participation in an active armed conflict can be clearly distinguished from security cooperation and assistance activities that do not entail direct U.S. participation in lethal operations.

Second, the Resolution must be *more effectively enforced*. The most effective tool Congress possesses is the power of the purse—that is the power to *terminate funding*. Right now, a central problem for Congress is that when the President acts, Congress is left with little recourse. It could theoretically vote to cut off funding for an operation already under way, but aside from the political challenges that would face, any such resolution faces the certainty of a veto from the President who has ordered the very operation Congress seeks to stop. To avoid this difficulty, Congress should instead make clear in the text of the War Powers Resolution that the President is prohibited from using any funds for any activity by United States forces that is inconsistent with the revised War Powers Resolution. It is crucial that the termination not require a separate Congressional vote but instead is automatic and tied to compliance with the resolution. This would give bite to the Resolution that it presently lacks.

Third, there should be an effective mechanism for Congress to challenge an interpretation of the revised Resolution by the Executive Branch in court. For too long, the Executive Branch has held a virtual [monopoly](#) on legal interpretations in the war powers space. This is due in part to the dominance of the Office of Legal Counsel in the Department of Justice as an interpreter of the law for the Executive Branch—and its issuance of memoranda on contested war powers matters. This has stacked the decks heavily against Congress, because while the lawyers in that office are generally outstanding lawyers, they work for the President and across administrations have adopted views that favor the institutional interests of the President. Meanwhile, previous efforts to seek judicial review by members of Congress have been dismissed on both standing and political question grounds. The revised War Powers Resolution should designate actors to represent each House in challenging misinterpretations of the War Powers Resolution in court. Under recent judicial precedent, such a provision could help overcome the justiciability barriers that have impeded judicial review in the past.

Thank you again for giving me this opportunity to speak with you today. I look forward to your questions.