

## Reforming the War Powers Resolution for the 21<sup>st</sup> Century

*Prepared statement by*

***John B. Bellinger III***

Partner, Arnold & Porter and Adjunct Senior Fellow in International and National Security Law,  
Council on Foreign Relations

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Mr. Chairman, Ranking Member Cole, and members of the Committee, thank you for inviting me to testify today about the War Powers Resolution and congressional and presidential war powers. I appreciate the Committee's interest in this important subject.

To start with my bottom line, I believe that the current statutory authorities governing presidential war powers and authorizing the use of military force are outdated and should be revised. Specifically, the War Powers Resolution of 1973 should be updated to reflect modern military and political realities. In addition, Congress should repeal the 2002 Authorization to Use Military Force relating to Iraq and should revise the 2001 Authorization to Use Military Force against terrorist groups responsible for the 9-11 attacks to authorize the President to use force against terrorist groups that today threaten U.S. persons or U.S. interests. Successive Presidents have adopted increasingly contorted interpretations of all three laws, and Congress has acquiesced in these interpretations. This is bad legal and constitutional practice.

By way of background, I served for nearly two decades as a national security lawyer in both the executive and legislative branches under both Democratic and Republican Presidents. I served as Senior Associate Counsel to President George Bush and Legal Adviser to the National Security Council from 2001 to 2005 and later as the Legal Adviser to the Department of State from 2005 to 2009, reporting to Condoleezza Rice in both positions. I was in the White House Situation Room during the 9-11 attacks and served in the White House during the Iraq War. I was involved in drafting both the 2001 and 2002 AUMFs and in preparing all of the reports submitted by President Bush to Congress under the War Powers Resolution between 2001 and 2009. During this period, I engaged on an almost daily basis in discussions about domestic and international legal issues relating to the use of military force in Iraq, Afghanistan, and elsewhere.<sup>1</sup>

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<sup>1</sup> I previously served as Counsel for National Security Matters in the Criminal Division of the Department of Justice (1997-2001); Of Counsel, Select Committee on Intelligence, U.S. Senate (1996); General Counsel, Commission on the Roles and Capabilities of the U.S. Intelligence Community (1995-1996); and Special Assistant to Director of Central Intelligence William Webster (1988-1991). *The Council on Foreign Relations takes no institutional positions on policy issues and has no affiliation with the U.S. government. All statements of fact and expressions of opinion contained herein are the sole responsibility of the author.*

## Domestic and International Law Governing the Use of Force

When a President and his national security advisers consider the use of military force in or against another country, they must comply with both domestic and international laws governing the use of force. As a matter of U.S. law, these laws include the U.S. Constitution and laws passed by Congress, including the War Powers Resolution of 1973. As a matter of international law, the rules include the U.N. Charter, treaties governing the use of military force, and certain principles of customary international law. I will focus today primarily on domestic legal authorities.

### A. Constitutional Authority

Under Article II of the Constitution, the President has broad authority as Commander-in-Chief and Chief Executive to order the use of force by the U.S. military. His Article II powers include authority not only to order the use of military force to defend the United States and U.S. persons against actual or anticipated attacks but also to advance other important national interests.

Presidents of both parties have deployed U.S. forces and ordered the use of military force, without congressional authorization, on numerous other occasions.<sup>2</sup> For example, President George H.W. Bush ordered U.S. troops to Panama in 1989 to protect U.S. citizens and bring former President Noriega to justice. President Clinton ordered the deployment of U.S. forces to Haiti in 1994 and U.S. participation in NATO bombing campaigns in Bosnia and Kosovo in 1995 and 1999. President Obama ordered the U.S. military to participate in the bombing campaign of Libya in 2011.

The Department of Justice's Office of Legal Counsel has written numerous opinions, under both Republican and Democratic Presidents, determining that the President has the power to commit troops and take military actions to protect a broad array of national interests, even in the absence of a Congressional authorization, including for the purpose of protecting regional stability, engaging in peacekeeping missions, and upholding U.N. Security Council Resolutions. For example, the Office of Legal Counsel concluded that the President had the power, without congressional authorization, to deploy U.S. forces and use military force in Somalia in 1992, in Haiti in 1994, in Bosnia in 1995, in Iraq in 2002, and in Libya in 2011.<sup>3</sup>

Of course, in addition to the powers granted to the President in Article II, Article I of the Constitution gives to Congress the authority to "declare War."<sup>4</sup> But this authority has never been interpreted – by either Congress or the Executive – to require congressional authorization for every military action, no matter how small, that the President may initiate. Indeed, the War Powers Resolution itself, implicitly recognizes that a President may order the U.S. military into hostilities without congressional

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<sup>2</sup> See Barbara Salazar Torreon, Cong. Research Service, *Instances of Use of United States Armed Forces Abroad, 1798-2017* (October 12, 2017).

<sup>3</sup> See, e.g., *Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C. 6 (1992); *Deployment of United States Armed Forces into Haiti*, 18 Op. O.L.C. 173 (1994); *Proposed Deployment of United States Armed Forces into Bosnia*, 19 Op. O.L.C. 327 (1995); *Authority of the President Under Domestic and International Law to Use Military Force Against Iraq* (October 23, 2002); *Authority to Use Military Force in Libya* (April 1, 2011)

<sup>4</sup> Congress has issued eleven declarations of war: Great Britain (1812); Mexico (1846); Spain (1898); Germany (1917); Austria-Hungary (1917); Japan (1941); Germany (1941); Italy (1941); Bulgaria (1942); Hungary (1942); Romania (1942).  
[https://www.senate.gov/pagelayout/history/h\\_multi\\_sections\\_and\\_tasers/WarDeclarationsbyCongress.htm](https://www.senate.gov/pagelayout/history/h_multi_sections_and_tasers/WarDeclarationsbyCongress.htm)

authorization, provided that he notifies Congress within 48 hours and ceases the use of force after sixty days unless he receives congressional authorization.

In several opinions, the Office of Legal Counsel has acknowledged that the “declare War” clause may impose a potential restriction on the President’s Article I powers to commit the U.S. military into a situation that rises to the level of a “war.”<sup>5</sup> This possible limitation appears only to have been recognized by OLC under Democratic Administrations; war powers opinions written by OLC during Republican Administrations do not appear to have recognized that the “declare war” clause places any restriction on the President’s Article II powers. And even during Democratic Administrations, OLC has stated that whether a particular planned engagement constitutes a “war” for constitutional purposes “requires a fact-specific assessment of the “anticipated nature, scope, and duration” of the planned military operations” and that “This standard generally will be satisfied only by prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period.” OLC determined that this standard was not met with respect to President Clinton’s use of the U.S. military in Haiti in 1994 and in Bosnia in 1995 or President Obama’s use of the U.S. military in Libya in 2011.

Although OLC has yet to identify a specific situation where the “declare war” clause would limit the President’s independent authority to order the use of military force and require congressional authorization, this does not mean that such circumstances will never exist. If a President wished to order the U.S. military to launch a prolonged or substantial military engagement that is not in response to an attack or clearly imminent attack and that would expose the U.S. military, U.S. civilians, or U.S. allies to significant risk of harm over a substantial period, there is a strong argument that the President may be required to seek congressional approval. It would certainly be prudent for him to do so.

## B. Congressional Authorization

Although the President has broad constitutional authority to order the use of force without congressional authorization, Presidents of both parties have generally preferred to seek congressional authorization, if it is possible to secure, for any prolonged or substantial use of force.

For example, President George H.W. Bush sought and secured a congressional authorization for the use of force against Iraq in 1991. President George W. Bush sought and secured congressional authorization for the use of force against terrorist groups in 2001 (“2001 AUMF”) and against Iraq in 2002 (“2002 AUMF”). President Obama sought congressional authorizations to use force in Libya in 2011 and against ISIS in 2014 but Congress did not agree; as a result, President Obama relied solely on his constitutional authority for military operations in Libya and on the 2001 and 2002 AUMFs for operations against ISIS.

### 1. The 2001 AUMF

The 2001 AUMF, passed by Congress on September 14, 2001 only days after the 9-11 attacks and signed by President Bush on September 18, 2001, authorizes the President to “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.”

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<sup>5</sup> Deployment of United States Armed Forces into Haiti, 18 Op. O.L. C. 173 (1994); Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327 (1995); Authority to Use Military Force in Libya (April 1, 2011).

On the one hand, the 2001 AUMF is very broad. It authorizes “all necessary force” without restriction as to type of force or geography. It also has no termination date. But it has one important limitation: it authorizes force only against nations, organizations, and persons who planned, authorized, committed, or aided the 9-11 attacks (or harbored such organizations or persons). In other words, the 2001 AUMF requires some nexus to the 9-11 terrorist attacks.

For the last twenty years, Presidents Bush, Obama, and Trump have relied on the 2001 AUMF as statutory authority for a very broad range of U.S. counterterrorism operations against persons and terrorist groups in at least seven countries, including the invasion of and continued military operations in Afghanistan; more than 500 drone strikes in Afghanistan, Pakistan, Yemen, Somalia, Syria, Iraq, and Libya; and detention of thousands of individuals in Afghanistan, Guantanamo Bay, and elsewhere.

The 2001 AUMF continues to serve an important legal purpose to authorize the President to use force against certain terrorist groups. But as time has passed, it has becoming increasingly outdated. It does not provide clear legal authority to use force against terrorist groups that have been formed or expanded after the 9-11 attacks. Executive branch lawyers have spent countless hours debating whether a potential targeted individual or group is associated or affiliated or co-belligerents with the organizations that committed the 9-11 attacks.

In 2014, after Congress was unable to agree on a new AUMF authorizing the use of force against the Islamic State, President Obama announced that the 2001 AUMF (as well as the 2002 AUMF relating to Iraq) provided congressional authorization for military operations against ISIS in Iraq and Syria, because ISIS was an offshoot of al Qaida. This interpretation of the 2001 AUMF was widely viewed and criticized as a legal stretch, because ISIS did not exist in 2001 and was not the group that committed the 9-11 attacks.<sup>6</sup> Nonetheless, relying on the 2001 and 2002 AUMFs allowed President Obama to claim that he was relying on congressional authorization to use force rather than solely on his own constitutional authorities, and it saved Congress from having to vote on a new authorization in an election year. In February 2015, while continuing to insist that existing congressional authorizations provided all the authority he needed to use military force against ISIS, President Obama submitted a draft congressional authorization to Congress that would specifically authorize the use of force against ISIS.<sup>7</sup> However, Congress never acted on the President’s proposed authorization and instead acquiesced in his reliance on the 2001 AUMF (and 2002 AUMF) to conduct operations against ISIS for the remainder of his Presidency.

For more than 15 years, including while I was still in government and since leaving government, I have advocated revising the 2001 AUMF in order to update it to address terrorist threats that have emerged after 9-11 and to clarify the scope of the AUMF’s authorization.<sup>8</sup> An updated AUMF is legally important to give our military clear statutory authority to fight terrorist groups that threaten the United States and

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<sup>6</sup> Bruce Ackerman, “Obama’s Betrayal of the Constitution,” *New York Times*, September 12, 2014, [https://www.nytimes.com/2014/09/12/opinion/obamas-betrayal-of-the-constitution.html?\\_r=1](https://www.nytimes.com/2014/09/12/opinion/obamas-betrayal-of-the-constitution.html?_r=1); Ben Wittes, “Not Asking the Girl to Dance,” *Lawfare*, September 10, 2014, <https://www.lawfareblog.com/not-asking-girl-dance>.

<sup>7</sup> Letter from the President -- Authorization for the Use of United States Armed Forces in connection with the Islamic State of Iraq and the Levant, February 11, 2015; <https://obamawhitehouse.archives.gov/the-press-office/2015/02/11/letter-president-authorization-use-united-states-armed-forces-connection>.

<sup>8</sup> Over a decade ago, in 2010, I wrote an op-ed in the *Washington Post* arguing that the 2001 AUMF should be updated: “*As U.S. forces continue to target terrorist leaders outside Afghanistan, it is increasingly unclear whether these terrorists, even if they are planning attacks against U.S. targets, are the same individuals, or even part of the same organization, behind the Sept. 11 attacks.*” John B. Bellinger III, “A Counterterrorism Law in Need of Updating,” *Washington Post*, November 26, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/25/AR2010112503116.html>.

constitutionally important to demonstrate that Congress has authorized and supports the actions our military is taking, rather than simply acquiescing in increasingly strained Executive branch interpretations of the 2001 AUMF enacted twenty years ago before most members of the 117th Congress were elected.

More recently, I have testified on several occasions before the House and Senate urging that the 2001 AUMF be repealed and updated. I especially applaud Senator Tim Kaine for his efforts over many years to try to forge a bipartisan consensus in the Senate to revise the 2001 AUMF. In May 2018, I testified before the Senate Foreign Relations Committee in support of S.J. Res 59, the Authorization to Use Military Force Act of 2018, drafted by Senators Kaine and Corker, which would have updated the 2001 AUMF.<sup>9</sup>

Members of Congress have understandable and valid concerns about approving a broad new authorization and extending what many view as a “Forever War.” However, I am convinced that Congress can come together to agree on a new AUMF that provides the President and our military the clear legislative authorization, with appropriate limitations, they need to defend the United States against persistent threats from modern terrorist groups. It is important that Congress refresh the legislative authorization to use force against terrorist groups, rather than rely on a twenty-year-old authorization or encourage the President rely solely on his own Article II authority.

## 2. The 2002 AUMF

The 2002 AUMF, signed by President Bush on October 16, 2002, focused on Iraq and the failure of Saddam Hussein to comply with Iraq’s obligations under a series of U.N. Security Council Resolutions. It authorized the President to “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.

Although the threat posed by Saddam Hussein’s regime was the primary focus of the 2002 AUMF, it has continued to be cited by Presidents Bush, Obama, and Trump as congressional authorization for a range of military activities in Iraq through 2020. President Bush relied on the 2002 AUMF for the initial invasion of Iraq in 2003 and for subsequent military operations in Iraq through 2009. President Obama continued to rely on the 2002 AUMF during the armed conflict in Iraq throughout his Presidency. And, as noted above, in 2014, President Obama cited the 2002 AUMF (in addition to the 2001 AUMF) as authority for the use of force against ISIS in Iraq. Even more controversially, President Trump cited the 2002 AUMF as congressional authorization for the U.S. drone strike on January 2, 2020 that killed Iranian intelligence chief Qassem Soleimani while he was visiting Iraq.<sup>10</sup> In my view, both of these latter interpretations of the 2002 AUMF were both strained and unnecessary. Although legal arguments can possibly be made that some continued U.S. military activities in Iraq are authorized by the 2002 AUMF, for the rare circumstances where the U.S. may need to use force in Iraq or Syria, it is preferable for the President to rely on his constitutional authorities. In contrast to the 2001 AUMF, which should be updated, the 2002 AUMF should be repealed.

## C. War Powers Resolution

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<sup>9</sup> [https://www.foreign.senate.gov/imo/media/doc/051618\\_Bellinger\\_Testimony.pdf](https://www.foreign.senate.gov/imo/media/doc/051618_Bellinger_Testimony.pdf)

<sup>10</sup> [https://foreignaffairs.house.gov/\\_cache/files/4/3/4362ca46-3a7d-43e8-a3ec-be0245705722/6E1A0F30F9204E380A7AD0C84EC572EC.doc148.pdf](https://foreignaffairs.house.gov/_cache/files/4/3/4362ca46-3a7d-43e8-a3ec-be0245705722/6E1A0F30F9204E380A7AD0C84EC572EC.doc148.pdf)

When authorizing the use of force or deployment of U.S. armed forces, Presidents must also take into account the War Powers Resolution of 1973. Section 4 of the War Powers Resolution requires the President to notify Congress within 48 hours after U.S. armed forces are introduced 1) into “hostilities” or where hostilities are imminent; 2) into the territory, airspace or waters of a foreign nation, while “equipped for combat”; 3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation. Section 5(b) of the Resolution requires the President to terminate any introduction or use of US armed forces into hostilities within 60 days unless Congress issues a specific authorization.<sup>11</sup> Presidents of both parties have concluded that some parts of the War Powers Resolution are unconstitutional, though all Presidents have tried to act “consistent with” the Resolution’s provisions, including by submitting regular reports to Congress. As I noted above, between 2001 and 2009, I was involved in preparing of the war powers reports submitted to Congress by President Bush.

Although Presidents have sometimes had difficulties complying with the 48-hour reporting requirement, they have struggled in particular with the Resolution’s 60-day termination requirement. President Obama continued the use of U.S. military force against Libya for more than 60 days in 2011 after concluding (contrary to the purported advice of the Justice Department and Defense Department) that U.S. military operations did not constitute “hostilities” within the meaning of the Resolution. He later continued the use of U.S. military force against ISIS in Iraq and Syria for more than 60 days in 2014 after concluding that the use of force against ISIS was authorized by Congress under the 2001 and 2002 AUMFs, even though al Qaida had distanced itself from ISIS.

On several occasions, members of Congress or of the public have sued the President for allegedly violating the War Powers Resolution by using force for longer than sixty days without specific congressional authorization. The courts have generally dismissed these suits, finding that the legislators or members of the public lack standing or that the suits raise non-justiciable political questions.<sup>12</sup>

I have previously recommended that Congress revise and update the War Powers Resolution to address contemporary conflicts and take into account increasing congressional reluctance to vote to authorize the use of force. This Committee may wish to review the valuable 2008 report of the National War Powers Commission, a bi-partisan commission chaired by former Secretaries of State James Baker and Warren Christopher, which called the War Powers Resolution “impractical and ineffective.”<sup>13</sup> The Commission stated that no President has treated the Resolution as mandatory and that “this does not promote the rule of law.” They recommended the Resolution be repealed and replaced with a mandatory consultation process. In 2014, Senators McCain and Kaine introduced the War Powers Consultation Act of 2014 to implement the Commission’s recommendations.<sup>14</sup> Congressman Lee Hamilton, the former Chairman of the Foreign Affairs Committee and a member of the National War Powers Commission said: “The War Powers Consultation Act of 2014 offers a practical, fair and realistic approach to getting the President and the Congress to consult meaningfully and deliberate carefully before committing the country to war.” Unfortunately, no hearings were held on the proposed legislation in the Senate, and companion legislation was never introduced in the House.

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<sup>11</sup> The 60-day termination provision applies only to the introduction of U.S. armed forces into hostilities or imminent hostilities.

<sup>12</sup> See, e.g., *Campbell v Clinton*, 52 F. Supp 2d 34 (DDC 1999)(dismissing suit against President Clinton relating to NATO bombing campaign in Serbia)(citing cases); *Smith v. Obama*, 217 F. Supp 3d 283 (DDC 2016)(dismissing suit against President Obama relating to operations against ISIS in Iraq and Syria) (appeal pending).

<sup>13</sup> <http://web1.millercenter.org/reports/warpowers/report.pdf>

<sup>14</sup> <http://thehill.com/blogs/floor-action/senate/195704-senate-bill-amends-war-powers-act>

I urge the House to hold hearings on recent presidential and congressional practices under the War Powers Resolution and ultimately to revise and update the Resolution to reflect modern military and political realities, including the President's need to respond quickly to contemporary threats and congressional reluctance to enact new authorizations.

### International Law

It is important for Congress to understand that the AUMF only authorizes the use of force under U.S. domestic law. The United States must separately comply with international law rules governing the use of force. The U.N. Charter, a treaty to which the U.S. is a party, prohibits the use of force in or against another U.N. member state unless the state has consented, the U.N. Security Council has authorized the use of force, or the use of force is in self-defense in response to an armed attack or imminent armed attack. It is important that the United States observe international law rules governing the use of force not only because the U.S. has agreed to be bound by the U.N. Charter but because we want other countries like Russia and China to follow the same rules. As I explained in my Lloyd Cutler Rule of Law Lecture in November 2016:

If the United States violates or skirts international law regarding use of force, it encourages other countries -- like Russia or China -- to do the same and makes it difficult for the United States to criticize them when they do so. If the United States ignores international law, it also makes our friends and allies who respect international law -- such as the UK, Canada, Australia, and the EU countries -- less likely to work with us. Unlike Russia and China, the United States has many friends and allies who share our values, including respect for the rule of law. But we lose our friends when we do not act consistent with law and our shared values.<sup>15</sup>

### The Biden Administration's Use of Force in Syria

On February 25, President Biden ordered airstrikes against targets in eastern Syria, apparently his first use of military force as president. The president directed the strikes in response to rocket attacks against U.S. forces in Iraq, including an attack on February 15 that injured a U.S. service member and killed a Filipino contractor. On February 27, the president reported the military action to Congress in his first report to Congress under the War Powers Act.<sup>16</sup> As the domestic law authority for the action, the president cited only his constitutional authority as commander in chief and chief executive. He did not seek to rely on either the 2001 Authorization to Use Military Force (AUMF)—against those responsible for the 9/11 attacks—or the 2002 AUMF—relating to Iraq. This is understandable as it would have been a legal stretch for him to have argued that Congress had authorized his action.

President Biden also stated that he was acting “pursuant to the United States’ inherent right of self-defense as reflected in Article 51 of the United Nations Charter.” He stated further that “The United States always stands ready to take necessary and proportionate action in self-defense, including when, as is the case here, the government of the state where the threat is located is unwilling or unable to prevent the use of its territory by non-state militia groups responsible for such attacks.” Although the War

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<sup>15</sup> John B. Bellinger III, “Law and the Use of Force: Challenges for the Next President,” Sixth Annual Lloyd Cutler Rule of Law Lecture, <http://lawfare.s3-us-west-2.amazonaws.com/staging/2016/Lloyd%20Cutler%20Lecture.pdf>.

<sup>16</sup> <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/27/a-letter-to-the-speaker-of-the-house-and-president-pro-tempore-of-the-senate-consistent-with-the-war-powers-resolution/>

Powers Resolution requires a President to report only the “the constitutional and legislative authority” for the use of U.S. Armed Forces, it was appropriate for President Biden to explain to Congress how his action complied with international law.

### Conclusion

I appreciate the opportunity to appear before the Committee today. I hope that Congress will repeal and update 2001 AUMF, repeal the 2002 AUMF, and hold further hearings to consider potential revisions to the War Powers Resolution.