

---

**ARTICLE**

# Legalizing a Political Fight: Congressional Abdication of War Powers in the Bush and Obama Administrations

SARAH BURNS

*For decades, presidents and members of Congress have actively shifted the separation of powers to provide the executive branch with more room for unilateral action in the realm of war. While this imbalance is clearest when presidents decide to act without the consent of Congress, it is still present and arguably more dangerous when Congress does provide authorization. By examining the legal language used in the Gulf of Tonkin Resolution and the subsequent Authorizations for the Use of Military Force (AUMF), I demonstrate how members of Congress crafted documents that were not designed to ensure presidential accountability and this allowed for the execution of poorly designed policy. Drawing on the work of scholars who emphasize the positive ends of constitutional grants of power, this essay establishes a metric for evaluating congressional deliberations on military operations. I apply this metric to deliberation about the 2003 war in Iraq and the military operation against ISIS in 2014. Neither operation compelled deliberation about the merits of action from Congress or ensured accountability from the executive after the fact.*

Keywords: war powers, presidency, War Powers Resolution, executive-congressional relations, American foreign policy, Bush, Iraq War, Syrian civil war, Islamic State

In the realm of war powers, many debates over presidential power focus on the legally dubious claims from presidents about their formal powers to carry out military operations without congressional authorization. The problem comes from both the legislative and executive branches. Over the course of the Cold War, Congress gradually lost the incentives needed to effectively require presidents to seek their permission, and in turn, presidents have developed alternatives to congressional permission when they decide to use the military. Since the creation of the UN and NATO, both institutions have issued appeals to their members to intervene in a variety of conflicts. Presidents have cited these documents as if they provide the same type of sanction as congressional authorization,

---

**Sarah Burns** is a senior fellow at the Institute for Humane Studies, a fellow at the Quincy Institute, and an associate professor of political science at the Rochester Institute of Technology. She is the author of *The Politics of War Powers*.

removing the need for approval from the legislative branch. Presidents from both parties combine the sanction provided by international organizations with a reinterpretation of Article II to create the appearance of legally legitimate military action in order to avoid the need to expend political capital to court Congress and achieve domestic authorization.<sup>1</sup>

This reinterpretation started during the Second World War when Robert Jackson made a constitutionally suspect argument to support Franklin Roosevelt's decision to trade destroyers for bases (Burns 2019, 146–48). Using executive branch lawyers to expand the definition of the Vesting, Take Care, and Commander in Chief Clause to claim a broadened version of their constitutional powers in the realm of military affairs helps executives avoid the increasingly unnecessary task of bringing their requests to Congress. In turn, members of the legislative branch often cite their formal powers and offer a narrower reading of the president's Article II powers. Without a collective effort to constrain presidential unilateralism in the realm of war or a Supreme Court willing to require it, presidents continue to enjoy a broadened scope for unilateral action when it comes to initiating and carrying out military operations.

While members still have the capacity to use certain tools to hold the president accountable after the fact, by holding hearings or at the extreme by drawing down troops, I argue that these measures still fall well short of the legislature acting as a responsible constitutional agent. This account moves beyond legal discussions and into the realm of positive ends constitutionalism. Rather than focusing on the legal claims made by presidents, members of Congress should mount a collective effort to probe the merits of military action.

The narrow focus on legal claims has more significant implications. As an example, one can very clearly assess the problematic nature of the discussion around military operations in the case of Barack Obama's decision to overthrow Muammar Qaddafi in 2011. As Mariah Zeisberg explains, the focus on the legal argument both among political actors and among scholars leaves us with important constitutional questions unanswered. When discussing Obama's unilateral decision in 2011, the debate over his action centered around his failure to consult with Congress, let alone seek their authorization prior to action (Ackerman 2011; Paul 2011; Savage 2011). It moved on to the weakness of the War Powers Resolution's (WPR) power to stop presidents from overstepping the 90-day limit (Burns 2019; Glennon 2011; Rowland 2011). It closed with the audacious claim by Harold Koh, then a State Department lawyer, that American actions in Libya did not constitute hostilities because the actual military operations fell below the threshold of hostilities as understood in the War Powers Resolution (Fisher 2012; Hendrickson 2015; Starobin 2011).

<sup>1</sup> It should be noted that the majority of legal scholars and members of Congress do not accept these arguments as a legitimate means of obviating the need for domestic authorization. This has not, however, stopped presidents since Harry Truman from using it, and Congress has consistently failed to impede presidents from acting unilaterally when they cite authorization from the UN and NATO (Adler 2000; Fisher 2013; Hendrickson 2015). It should also be noted that there is a great deal of scholarship on the imbalance of power (Edelson 2013; Fisher 2013; Hendrickson 2015; Pious 2011; Silverstein 1996) and empirical claims about the incentive structure in the branches (Chafetz 2017; Howell 2003; 2015; Howell and Pevehouse 2011).

Questions about the legal legitimacy of the action do not clarify whether the branches have deliberated about (1) the necessity of military action or (2) the capacity of the operation to achieve the desired ends. What we learned after that event points to a deeper problem: Congress lacks the incentives to deliberate about the merits of an operation, let alone impede a president from action, and this has significant consequences for security. They did not address the salient nonlegal questions such as “whether the Libyan intervention actually was as significant to regional peace, NATO and UN credibility, and US domestic interests as Obama claimed” (Zeisberg 2013, 5).

The problems caused by presidential unilateralism and congressional abdication are even more clear when it appears that Congress has fulfilled its constitutional duties. In the case of the 2001 and 2002 Authorizations for the Use of Military Force (AUMF), Congress provided the president with all the legal legitimacy he required in order to launch large-scale operations. In the first instance, Congress provided an AUMF in response to an attack. In the second instance, the president courted Congress and made a case (which they thought to be factual at the time) for coercive diplomacy and the possibility of a military operation that would be longer and larger than he could accomplish without congressional sanction.<sup>2</sup> Looking at the constitutional text, the WPR, and the dialogue between the branches, each appeared to fulfill their constitutional duties.<sup>3</sup> Looking at the language of the authorizations, however, Congress has clearly failed to act as an authorizing agent, let alone one that puts any parameters on presidential action. The president’s signing statement for the 2002 AUMF echoes the view that he appreciates but does not need their authorization.

The purpose of this work is to demonstrate the limitations of using a legal framework to diagnose the constitutional failure associated with the current imbalance in the separation of powers system. As Zeisberg, Griffin, and others have argued, passing a legal authorization for war does not fully exhaust Congress’s responsibilities; they also have substantive responsibilities relating to the assessment of the president’s proposal. When they fail on this measure, it has significant consequences for the translation of policy desires (such as victory in war) into tangible outcomes.

The long-term problems created by the 2001 and 2002 AUMFs demonstrate the importance of nonlegal ways to assess the capacity of Congress to exercise its role in military affairs, such as whether members of Congress effectively constructed an authorization that places constraints on presidential autonomy regarding whether to act as well as evaluating the policy objectives and the tools proposed to meet them. These questions

<sup>2</sup>. As Burns and Stravers discuss, when presidents need to move a large military into place, they require congressional sanction to pull these troops off of bases located all over the United States in a variety of districts. Without authorization, presidents would face significant objections from members of Congress if they moved the number of troops required for a large land war (Burns and Stravers 2020, 75; see also Thorpe 2014, 130).

<sup>3</sup>. The discussion here does not rise to the level of constitutional duty suggested by Hallett. Where Hallett states that it is “absolutely necessary” for countries to create a proper declaration of war in order “to establish a coherent relationship between the ends sought and the means deployed” in the text of the declaration (Hallett 2012, 125), I am making a narrower or more flexible claim. Congress must hold the president accountable in the realm of war. That involves discussions prior to authorizing to ensure the necessity of the operation. The language of the authorization must include some means of ensuring that the president is actually accountable to the legislative branch rather than feigning accountability.

and more did not come to the fore during the discussions over passing either of the War on Terror AUMFs nor did Congress manage to correct their error in the years afterward. As a consequence, both Barack Obama and Donald Trump could reach back to those documents, claiming them as a continued sanction to carry out operations deemed necessary by the executive branch without seeing it as a restraint or a measure in place to ensure accountability. In particular, Obama's bombing campaign against ISIS demonstrates the remarkable freedom of action within the executive branch and the lack of accountability for those actions after the fact from Congress. In these instances, without a prior restraint placed on presidents from the AUMFs, what obligations does Congress have after the initiation of hostilities to hold presidents accountable? To understand why these congressional authorizations acted as an insufficient restraint to presidential actions and why this does not satisfy the constitutional requirement, it is necessary to look at the way in which AUMFs have become a means for Congress to shirk its constitutional responsibility rather than a means to hold presidents accountable prior to, during, and after military operations. The actions against Saddam Hussein's government and against ISIS provide more clarity on the issue at hand.

### Assessing Deliberation about War

The incentive structure in the federal government has undergone a dramatic shift in the last 70 years. In the area of defense, this has resulted in presidential unilateralism, while members of Congress now see a political advantage in staying on the sidelines, rather than challenging the executive. Problematically, even when members of Congress provide authorization, they do not act as constraints on presidential action. Since the Gulf of Tonkin Resolution, Authorizations for the Use of Military Force (AUMF) have provided presidents with congressional sanctions to engage in whatever military action they deem necessary. This stands in contrast to the language of war declarations and the responsibility assumed by Congress to ensure the proper prosecution of the war. For example, Woodrow Wilson had to justify the initiation of hostilities against Germany by providing Congress with a detailed listing of that country's offensive actions against the United States. In turn, Congress provided a declaration claiming the necessity of defending the United States militarily. They "authorized and directed" the president "to put the country in a thorough state of defense, and also to exert all of its power and employ all of its resources to carry on war against the Imperial German Government and to bring the conflict to a successful termination" (Pub. L. 65-1).<sup>4</sup>

This language provides a clear signal to the president about the responsibilities he now assumes as commander in chief during a large-scale military operation. Congress has clarified who the United States is fighting: in this instance, the Imperial German Government, not the German people or another government if this one falls. They

<sup>4</sup> Hallett requires a higher degree of "substantive text" in order to consider a declaration "adequate to its purposes." As he notes, by this standard, the Constitution produces a "fatally impractical division of the sovereign's war powers" (Hallett 2012, 126–27).

provided instructions for the president when he defends the nation, including what tools he can use in order to engage in this military operation—in this case, “all of [the United States’s] resources” (Pub. L. 65-1). Finally, it identifies what will signal the successful conclusion of the operation. These specifics allow Congress to hold presidents accountable for their performance during war as well as determining when the military conflict has terminated, returning the two countries to a peace footing. These standards not only hold presidents accountable to Congress, but also hold members of Congress accountable for their constitutional role in the war, such as how much funding they provide; how they respond when wars alter their course or become larger in scope; and how they investigate wrongdoing in the course of the prosecution of the war or after it. These are positive ends associated with a separation of powers system where the deliberative and energetic branches work in tandem to defend the nation effectively. When attempting to develop a theory about how Congress can fulfill its role as the deliberative branch holding the executive accountable, there are a variety of models that focus on the positive ends to assess the proper functioning of a constitutional system.

According to one school of thought, the Constitution is meant to achieve certain positive ends, and those ends should discipline how we construct the meaning of the constitutional language. In the realm of war, developing a method for assessing whether members of Congress have interrogated the plans of executives requires a combination of normative and practical components. Due to the broad consensus regarding the necessity of maintaining a large standing military stationed all over the world, Congress has limited power to impede presidents from engaging in small-scale operations. With the exception of the Korean War, however, presidents have consistently gone to Congress to receive their consent prior to engaging in large-scale, long-term military operations. When presidents do provide Congress with an opportunity to consent to military plans prior to the initiation of operations, what is required of Congress to ensure that they have performed their duty?

In order to properly fulfill their constitutional role, there must be a normative standard that goes beyond an accounting of the formal division of powers between the branches. As Benjamin Kleinerman notes, the two branches have remarkably different institutional incentives and capacities. The presidency enjoys “unity,” making it “better suited to protecting our national security” (Kleinerman 2005, 802). During a moment of crisis, emergency, or insecurity, there is a logical flow of power to the executive branch. To ensure sound constitutional governance, as Kleinerman notes, “we should expect the executive to proceed with the prudence and caution commensurate with an awareness that such crises could, even unintentionally, destroy the constitutional republic” (2005, 803).

The legislative branch needs to have a corresponding duty, ensuring an accurate assessment of the emergency faced by the country and providing the executive with the tools he needs to address it as well as ensuring he does not exploit the emergency to enhance his power to the detriment of the constitutional order. As Joseph Bessette notes, these two branches embody different elements needed for “effective and competent governance”: energy and deliberation (1997, 30). Where the executive embodies energy, “deliberation puts a premium on reason, order, information, commonality of interest, and farsightedness” and suits a branch of government with a large number of people from all

over the country (Bessette 1997, 21). The drawback of this mechanism in this forum is that even when it is “directed toward wise policies,” it is “often a slow, untidy, and contentious process in which ‘differences of opinion’ and the ‘jarring of parties’ play a central role” (Federalist No. 70 as quoted in Bessette 1997, 31). Conversely, the “energetic administration of government ... requires a hierarchical institution ... that can act quickly, decisively, consistently, and often secretly.” While this does not preclude any type of deliberation in the executive branch, “it is directed to, and bound by the necessities of, decisiveness, and often immediate action.” For this reason, it cannot achieve the level of substantive discourse seen in the legislative branch (Bessette 1997, 31).

George Thomas expands on this constitutional point in terms of how the institutions should function in tandem. As he writes, “rather than being entrusted to a single body, power is deliberately divided among institutional forms as a central feature of maintaining the Constitution. This division necessarily invites ‘a concurrent right to expound the constitution’ yielding multiple and conflicting views of the Constitution as an inherent—even healthy—part of the constitutional order” (Thomas 2008, 15). In the realm of national security, this contentious relationship needs to remain robust. As Sotirios Barber notes, “the right to criticize the government’s defense policies may thus be seen as integral to any hope for national security itself, as opposed to the government’s conception of national security, which may be false and will be false sooner or later, assuming that human fallibility that deliberately established constitutions manifestly assume” (Barber 2003, 50).

This does not, however, assume either wisdom or virtue among those in office. As Bessette notes, the discussion of the Constitution in *The Federalist Papers* demonstrates a deep concern about creating a structure that “suppl[ies] ... by opposite and rival interests, the defect of better motives” (Federalist No. 51, Hamilton, Madison, and Jay 2003). For this reason, the deliberative standard produced by Mariah Zeisberg for sound constitutional reasoning around military operations may go beyond what Publius intended, or perhaps thought possible. She provides a theoretical standard to which we can compare the functioning of Congress when they attempt to engage with the reasoning for military policy presented by the executive branch.

Zeisberg claims each branch should assert “the most important constitutional claims at stake” and then battle over their claims (2013, 42). Each branch should present reasons for their argument and based on the vigor with which they are willing to argue, they demonstrate how strongly they wish to assert a particular claim.

The last condition of her model relates to the shared powers of the legislative and executive branches. When they do attempt to engage in questions of war, the overlapping powers and the interconnection of the two branches “may activate the conflictual possibilities inherent in their independent sources of authority (condition one) and distinctive perspectives on public matters (condition two).” When the branches adhere to these criteria for developing policy around questions of war, “interbranch conflict is both endemic and consequential” (Zeisberg 2013, 30).

How well do they do in the realm of war? Each branch must present independent judgment. Here we see what passes and what fails as a standard when dealing with the nation’s security. It is certainly important for the president to “act quickly, without

conferring with Congress” to maintain the safety of the country. As the sphere of what constitutes American safety has enlarged over time, this has also enlarged the president’s sphere of action. Congress, in turn, must have its own independent judgment with regard to these actions. Its members must be “authorized and equipped to judge the constitutional and policy claims that it confronts while conducting its business” (Zeisberg 2013, 32). Each branch must think through the “*security realities they encounter.*” They need to connect these “*arguments ... to their substantive agendas for security policy*” (Zeisberg 2013, 33).

Members of both branches must address substantive questions. What is at stake due to the actions of the branch? Alternatively, what happens if there is inaction? Will this policy lead to more security? These are just three of the possible questions that members of each branch must have the capacity to answer as they formulate their perspectives. Their capacity to reason in this way should be aided by their clear connection to the desires of the public (in contrast to the judiciary, which is insulated from it).<sup>5</sup> Finally, they must do all of this while representing the diversity of opinion in the United States, making the normative standard remarkably high. Based on these criteria, she develops the “*relational conception of war authority.*” As she states, if they “reach similar constitutional and policy positions even given the different political functions they are designed to serve...then there are good reasons for endorsing these conclusions as constitutionally adequate” (Zeisberg 2013, 41).

Understanding the normative standard discussed in *The Federalist Papers*, and further expounded among these scholars, demonstrates how limiting discussions of congressional authorization can be. Much like claims of threats to national security or an imminent attack can be a means of circumventing substantive questions about *how* to address what is causing the threat, legal discussions can be similarly distracting. Focusing on what authorization Congress provided prior to the initiation of hostilities (or what presidents do without authorization) can obscure deliberations about the merits of the military operation and the capacity of a military operation to increase security. The debate over the imbalance between the branches and the problems of consensus among the branches does not reach a core task given to the legislative branch: by failing to hold presidents politically accountable for their actions, Congress does not satisfy its substantive role in the constitutional system.

As Griffin notes, the imbalance that facilitated the expansion of presidential control points to a deeper problem for the constitutional system. We see that whether presidents seek authorization is less important than whether the operation is “underwritten by adequate interbranch and democratic deliberation.” Deliberation “is in service of a larger vision of separation of powers designed to ... [create] a democratic exchange with the people.” The “ultimate end” is “the creation of a cycle of accountability.” Using this standard, we can better “formulate constructive suggestions to improve the constitutional order” (Griffin 2013, 50). By reducing the deliberation and the capacity of the

<sup>5</sup>. Zeisberg mentions that their responsiveness to the electorate is important albeit of “limited theoretical value” (2013, 34). The value comes from recognizing that public opinion restrains almost all politicians in some way.

legislature to participate in the debate, the erosion calcifies, making it harder for the legislative branch to hold the executive accountable when operations go awry or grow larger in scope. This is exactly what occurred in the Iraq War and in the decisions around combatting ISIS in 2014.

Another branch of government with a different view of the matter and a different set of constitutional powers should test the substantive claims presented by the president. Decisions over military matters should receive a legitimate and clear examination—barring emergencies requiring quick action. This goes beyond ensuring that presidents receive authorization from Congress.

As Silverstein explains, legalizing the fight between the branches narrows the debate. As he says about Bush in particular, “thanks to the steady juridification of American politics in the years since World War II . . . the Bush administration did not even consider the need to make a political case for their actions” (Silverstein 2009, 229). By ignoring the politics of their actions and focusing on receiving a broad grant of power from Congress, they shifted the focus from the necessity of the military action to the necessity of a broad grant of power to ensure executive flexibility when addressing a novel threat. Equally significant, Congress did not push back against these assertions. By interacting in this manner, both branches erode the constitutional system that requires the two branches to collaborate and, most importantly, deliberate.

This remains true even when Congress has provided presidents with authorization to use force. As will be discussed below, starting with the Gulf of Tonkin Resolution, Congress has an incentive to provide the president with a broad grant of power without exercising their constitutional duty to deliberate about the merits of the operation or provide significant oversight during the war, allowing executives to operationalize poorly developed policy. As a consequence, there are very few examples of robust policy deliberations leading to the successful prosecution of a war in the last 70 years.

Moving from the theory to a more concrete standard, when assessing accountability in the realm of war, I specify the substantive constitutional role for Congress. Using these measures, we can determine whether they ensure—to the extent possible—that presidents do not engage in military operations without satisfying the following important criteria:

1. Are presidential actions sharply (not vaguely) connected with national security? This metric is often associated with what I call shirking language. When the executive branch makes claims about “imminent danger” and “national security,” and asserts exclusive authority over military affairs, these are frequently political claims made in an attempt to circumvent rigorous interbranch deliberation. In a similar vein, when members of Congress claim there is “no time to deliberate” accuse members who question the facts as serving the enemy, or present unwavering support as patriotic, they are likewise avoiding the deliberation needed to fulfill with their constitutional duties.
2. Is there an open debate about the merits of the war/military operation? In this instance, members of Congress query the reasons for using the military to solve a particular problem; they look at the necessity of the action; and the capacity of the operation to increase security at home as well as increasing stability in the region.
3. Have they had the opportunity to interrogate the evidence for the necessity of the war both in open sessions and in classified sessions?



4. Have they assessed whether the rules, material resources, and organizational resources of the military are suited for this operation or war? For example, at the beginning of the war in Afghanistan, many believed that an air war would quickly and effectively eliminate the Taliban threat as well as chase members of Al-Qaeda out of Afghanistan. As we see 20 years later, these assumptions were completely incorrect.
5. Have they assessed whether the objectives of the operation align with the resources deployed to achieve them?
6. Have they determined if there is clarity about what means the military will use to achieve the ends of the war?
7. Have they determined whether the local population will have a positive response to U.S. military intervention? Many American operations have accidentally created a negative backlash due to a failure to determine that there is a genuine and widespread desire for U.S. assistance, and this should be aggressively confronted prior to military operations.
8. Is there clarity about who the enemy is (and therefore who the enemy is not), and has it been clearly discussed? In the complicated world of combating nonstate actors, determining these facts has become increasingly difficult, which has led to vague language in congressional authorizations, ambiguity when operationalizing policy, and far too frequently, American weapons in the hands of the enemy.
9. Have both branches examined the statutory language provided by Congress to determine the short- and long-term implications of the language? Have members of Congress ensured that there is some means of maintaining accountability in the authorization?
10. Once the war begins, is there a consistent effort to examine the role of soldiers in the war to ensure they are accountable for their actions?

These specific criteria relate to the capacity of the legislative branch to hold the president accountable in the area of military engagements and tangentially America's role in the global sphere. When looking at the AUMFs created by Congress since the 1960s, it is clear that even when they achieve the level of legally sanctioning presidential actions—thus on a legal level fulfilling their obligation as the authorizing branch—they fall well short of any substantive standard when it comes to their constitutional duty. Part I of the article will address the problematic language associated with these Authorizations for the Use of Military Force (AUMF). Part II of the article will demonstrate how the imbalance allows for inadequate policy development in the executive branch, which in turn leads to poorly executed military operations. In particular, the decision-making process leading to the Iraq War and the decision-making process leading to the military operation against the Islamic State in Iraq and Syria (ISIS) demonstrate how a lack of deliberation in Congress can allow poorly developed policy to be operationalized. Besides the significance of both military operations, these two cases have added importance. In both instances, Congress either provided an AUMF or allowed a president to use an AUMF. In both instances, therefore, it is possible to say that the president consulted. In both instances, authorization did not compel deliberation.

## Part I: Authorizations for the Use of Military Force

Starting with the Gulf of Tonkin Resolution, AUMFs have had less restrictive language than the war declarations of previous eras, creating legal authorization without the

substantive accountability that facilitates positive results. In the resolution, Congress only “approves and supports” what the president has already determined when it comes to taking “all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression” (Pub. L. 88-408). This provides a rhetorical opening for the president to control what kind of military operation to use rather than being “authorized and directed” by Congress as they were by the Declarations of War prior to the start of operations in World Wars I and II.<sup>6</sup> Furthermore, there is not a clear point of termination for any “necessary measures.” The second section discusses the importance of “world peace” to “national interest” and provides the president with the power “to take all necessary steps, including the use of armed forces, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty” if they request the “assistance in defense of its freedom” (Pub. L. 88-408). As Zeisberg notes, this is Congress participating in the creation of a new security order that expanded the scope of U.S. military power to achieve a global reach (2013, 124–26).

Importantly, the limitations on what the president can do are based on what another country requests (or the president said they requested) rather than a standard determined by Congress that would hold the president accountable if he surpasses it. The only real effort in the document to create some restrictions on presidential freedom of action is the capacity of Congress to “terminat[e]” the authorization “by concurrent resolution of Congress.”<sup>7</sup> This still means there was ambiguity around the termination point and Congress had to act in order to initiate the close of the war rather than failing to act if they had created a sunset clause. Furthermore, this is only one of the two ways the document expires. The other method is when “the President shall determine that the peace and security of the area is reasonably assured” (Pub. L. 88-408). Congress gave the president freedom to determine when and if the military action ceases rather than maintaining the power to hold him accountable.

In other words, Congress failed to provide a clear standard for victory or clarify what a point of termination required that they could use to hold the president accountable. This is in part due to the ambiguity of the operation in contrast to the world wars. In those instances, there was a clear aggressor and a much clearer means of determining what the successful conclusion of an operation would involve. In contrast, what did success look like in the case of Vietnam? As Griffin notes, prior to receiving the resolution, the Johnson administration had determined that victory meant “forcing the North Vietnamese government to accept U.S. terms for ceasing its aggression.” Achieving that goal required a huge military force backed by “substantial funding,” but he wanted to achieve that end by fighting a limited war and treating the operation as “another policy within the structure of U.S. foreign affairs.” If Congress had forced him to deliberate about the relationship between his aims and how he sought to achieve them, the administration would have had more clarity about the gulf between the two and both branches would have had more accountability if they decided to proceed despite the problematic

<sup>6</sup> The World War I declaration against Germany and World War II declarations against Japan, Germany, and Italy all use this language (Pub. L. 65-1, S.J. Res. 116, S.J. Res. 119, and S.J. Res. 120).

<sup>7</sup> They exercised this power in January 1971.

strategy (Griffin 2013, 128–29). This lack of accountability is present in the subsequent AUMFs as well.

Despite the lessons of Vietnam, neither branch significantly altered the novel method of collaborating when it came to future authorizations. Presidents further solidified this altered relationship by increasingly looking to executive branch lawyers rather than Congress for authority in smaller scale operations. Their attorneys produced a broad interpretation of their Article II powers mirroring the warped version of the Constitution produced by Robert Jackson for Franklin Roosevelt (Burns 2019, 147; Fisher 2013, 156–73). They did so to meet the new demands of unilateralism as well as a desire to avoid the congressional constraints that would inevitably come if both branches seriously engaged in deliberation over the merits of many military actions post-Vietnam. As Griffin explains, “the new doctrine asserted that presidents could commit U.S. armed forces to combat without seeking congressional authorization.” By the late Cold War, even when presidents did obtain authorization from Congress, “the view of the executive branch was that such support was not required by the Constitution” (Griffin 2013, 32, 33).

Importantly, these new powers asserted by the presidency do not come in the absence of congressional authorization, only an abdication of Congress’s broader constitutional responsibility to assert coequal powers when it comes to the development of policy and the successful execution of military operations. They retain a role in the decision over the initiation of hostilities in major operations without being responsible for the operation as a coequal branch. As Griffin notes, “most consequential, successful, and appalling military conflicts” were authorized—with the exception of the Korean War (2013, 45). Problematically, presidents can frequently count on support from Congress and the people for poorly developed and poorly executed operations. This is arguably how presidents after George H. W. Bush were capable of claiming that the 1991 AUMF remained in effect, setting the precedent for Obama’s actions in 2014.

### The 1991 AUMF

After moving over 100,000 troops into the Middle East and creating a broad coalition of international partners, George H. W. Bush reluctantly sought authorization from Congress prior to the initiation of military operations on January 17, 1991, for the first Gulf War. In response to his request, the legislature engaged in a substantive discussion about the merits of the war despite the fact that it was a *fait accompli*. As he later quipped, “I didn’t have to get permission from some old goat in Congress to kick Saddam Hussein out of Kuwait” (as quoted in Taylor 2002).

The United States had already assembled a broad coalition, put a large military force in place, helped pass a UN Security Council (UNSC) resolution permitting the use of “all necessary means” to expel the Iraqi forces from Kuwait, and given Saddam Hussein a clear threat of action if he did not comply by January 15, 1991 (UNSCR 678 (1990)). Without authorization from Congress, Bush could have claimed the UN resolution and the international coalition provided sufficient authorization for his actions (as many presidents have). Furthermore, he claimed the necessity of ensuring the credibility of a U.S.

threat on the international stage. As we can see from his actions prior to getting authorization, he had the ability to move over 100,000 troops into Saudi Arabia; he negotiated with Saudi leaders. He did not need congressional authorization to develop a broad coalition; he negotiated directly with foreign leaders, and members of Congress did not force him back to the legislature for authorization prior to these actions.

The congressional authorization he received mirrored the UNSC resolution in many ways, “authoriz[ing] the use of the United States Armed Forces” to enforce UNSC 678, which, like the AUMF, allowed the use of “all necessary means” after January 15, 1991, to “restore international peace and security in the region” (cf. Pub. L. 102-1 with UNSCR 678 (1990)). Despite the substantive discussion in Congress prior to passing the authorization, we see an abdication of responsibility in the vague language of the authorization. It references the government of Iraq rather than mentioning the specific title of the government like the Imperial Government of Japan. That allows *any* government run by any individual to be a target of the United States when it failed to adhere to the relevant UNSC resolutions.

They did still attempt to create some restrictions. The president had to prove to Congress that the use of military force was necessary “in order to achieve implementation of Security Council Resolutions” and without military force, the president could not achieve the objective (Pub. L. 102-1). Bush dismissed their restrictions, however, in his signing statement, saying the authorization “provides unmistakable support for the international community’s determination that” Iraq must leave Kuwait, but his request for authorization “did not ... constitute any change in the long-standing positions of the executive branch on ... the President’s constitutional authority to use the Armed Forces to defend vital U.S. interests” (Bush 1991).

While George H. W. Bush stayed within the confines of the authorization during the first Gulf War as an indication of the problematic ambiguity of the current security threat, the active conflict in Iraq did not completely end when the coalition forces drove Hussein out of Kuwait. Unlike the Gulf of Tonkin Resolution, there was no clause specifying a point of conclusion when the AUMF would no longer be operational. UNSC Resolution 687 formally established a cease-fire in the hostilities in the Persian Gulf, not Congress. Furthermore, due to ongoing concerns about Iraq’s stockpile of weapons and continued efforts to procure nuclear materials, the cease-fire implied permission from the UN to use military force in the future if Iraq failed to allow weapons inspectors in or provided support to terrorist organizations. A cease-fire is a temporary cessation of hostilities based on each side adhering to specific criteria, unlike a peace treaty that formally changes the relationship between belligerent nations back to a peace footing (Wren 1998). Even in the language of UNSCR 687, we see that the Council “decides to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the region” (UNSCR 687 (1991)). Congress did not act to constrain Bush or future presidents from taking action unilaterally to address concerns about Iraqi weapons.

The language of the AUMF demonstrated that members of Congress echoed the concerns of the UN when they discussed the “grave threat to world peace” posed by “Iraq’s conventional, chemical, biological, and nuclear weapons and ballistic missile

programs” and the “willingness to use weapons of mass destruction” (Pub. L. 102-1). Without the addition of text that would sunset the 1991 AUMF or supplemental documents that would formally require presidents to seek new congressional authorization for any actions that would fulfill the continuing elements of UNSCR 687, President Bill Clinton was relatively free to make the claim that he had all the authority he needed to repeatedly bomb Iraqi targets in order to address the ongoing threat from the creation of weapons in that state.

Even members of the Security Council were powerless in the face of presidential actions. Some disagreed with Clinton’s reading of UNSCR 687 as justification for bombing Iraq. In a sustained bombing campaign in 1998, one member claimed, “Iraq’s refusal to cooperate would allow the United States to infer that the gulf war is not over” (Wren 1998). Undeterred by international or domestic objections, Clinton claimed he acted “consistent with ... numerous U.N. Security Council resolutions ... to use ‘all necessary means’ to implement the Security Council resolutions and to restore peace and security in the region.” Clinton’s letter mentions the 1991 AUMF, demonstrating his view that it continued to provide authority (Clinton 1998). As Fisher notes, by this reading he must “conclude that Congress, in passing P.L. 102-1, had placed its constitutional authority with the Security Council, and that the future magnitude of U.S. military action in Iraq would be decided by UN resolution, not congressional statutes” (2013, 193). His letter to Congress and his discussion of the act with Congress do not rise above providing them with a legal justification for his action. He demonstrates that he had the power needed to decide how to use the military without congressional input due, in part, to the previous authorization that did not have any sunset clause. Congress’s failure to pass another authorization, sunset the 1991 AUMF, or demonstrate its capacity to restrain or hold presidents accountable provided a clear enough signal: presidents need only provide a perfunctory legal justification to continue controlling when and where they would use the military when it came to policing Iraq. After 9/11, however, Congress gave the president even broader powers and demonstrated a total abdication of their constitutional responsibilities.

### The 2001 AUMF

Like the Declaration of War against Japan in World War II, the 2001 AUMF was a response to a state of war created by another party through a direct attack on American soil. For this reason, the language used in the 2001 AUMF can speak to the measures authorized by Congress to address the assault, including what the president can use and what constitutes a satisfactory endpoint to the military portion of the operation. The important difference, however, between the attack by the Japanese and the attack by Al-Qaeda altered the nature of the response. Where Congress can clearly outline who the United States fought in WWII, the statelessness of international terrorism combined with the asymmetry between how the United States would respond militarily compared with what the terrorists may do to defend themselves left members of Congress with a difficult choice: constrain the president who is faced with a novel threat (of unknown size)

or provide a broad grant of power that reflects the uncertainty of the moment. Members of Congress also faced time constraints, wanting to produce an authorization with all due haste to demonstrate that “Congress and the American people stand united behind the President” (*Cong. Rec.* H5638 (2001)).

As Bessette notes, in the executive branch, “the need for quick decisions may limit the range of opinions and views that come to bear on the decision or may result in actions whose consequences have not been well thought through” (1997, 32). Bush definitely pushed for Congress to provide a notably broad grant of power that would include preventative war.<sup>8</sup> That they denied him anything can be construed as an effort to constrain presidential adventurism, which is an element of their constitutional duty. While the fog of war did not cause Congress to provide the breadth of power Bush requested, it did produce an authorization that was light on restrictions and heavy on ambiguity.

The document starts by acknowledging the right to self-defense and the “unusual and extraordinary threat” posed to “national security and foreign policy” by international terrorism. It continues by stating the “authority” vested in the president by the Constitution “to take action to deter and prevent acts of international terrorism.” Here we see the legislature producing a broad reading of the president’s Article II powers akin to the one typically presented by presidents. He has the formal power to eliminate threats prior to any attack, implying that he does not need authorization from Congress for these actions. When it comes to the grant of power from Congress, they err on the side of breadth, saying:

The President is authorized to use all necessary and appropriate force against those nations, organizations, and persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or person, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

This grant of power very clearly reaches beyond the specifics of the attack on 9/11. What constitutes aiding the attacks? What constitutes harboring organizations or persons, especially in countries where there are porous borders and limited state capacity to police them? Finally, Congress returns to the language of prevention, providing the president with a grant of power to use “all necessary and appropriate force” to stop “future acts” of terrorism by any of these “nations, organizations, or persons.” By a certain reading, this grant of power implies the president has the ability to engage in preventative war by failing to explicitly prevent it.

Furthermore, unlike previous authorizations, this document provides no means of determining what a successful conclusion would require, no means of curtailing presidential action, and no way to assess how effectively he has diminished the threat to the United States and its people. The authorization is explicitly referred to as “specific statutory authorization” to signal that the president has legal sanction from Congress to

<sup>8</sup> While it is beyond the scope of this article, he demonstrated that the 2001 AUMF did not restrict his perspective on preventative war. He stated his determination to use preventative wars to address developing threats in the 2002 National Security Strategy of the United States (Bush 2002).

overcome the 60-day clock associated with the War Powers Resolution. It does not, however, “superced[e] any requirements of the War Powers Resolution,” implying that there are elements of the WPR that continue to hold presidents accountable. This can only occur through the reporting requirement. Based on this requirement, presidents have to tell Congress about the activities of the military periodically and the period cannot exceed 6 months. The document, therefore, does not even provide the constraints on presidential discretion seen in the 1991 AUMF, which arguably requires the president to draw down forces once Iraq is expelled from Kuwait. It does not specifically state that Congress retains the ability to end this authorization as it did in the Gulf of Tonkin Resolution, let alone provide clarity about what the conclusion of a successful operation would entail that would allow the authorization to sunset. For these reasons, Congress clearly demonstrated that the president had remarkably broad constitutional powers and they were merely supplementing those powers with something akin to *carte blanche* when it came to how, where, and for how long to prosecute the War on Terror.

The grant of power was not broad enough, however, for an administration determined to use this moment to expand executive power (Kleinerman 2015). In his signing statement, Bush expressed his appreciation for Congress “expeditiously passing this historic joint resolution,” noting that it acknowledges “the authority of the President under the Constitution to take action to deter and prevent acts of terrorism” and does not change the “longstanding position of the executive branch regarding the President’s constitutional authority to use force” (Bush 2001).

### The 2002 AUMF

The period following 9/11 marked a time of uncertainty and a heightened sense of threat. In these moments, the fog of war tends to cloud judgment. Compounding the circumstantial limitations on deliberation, Saddam Hussein had repeatedly overstepped the boundaries imposed by the United Nations after the 1991 Gulf War, providing good reason to fear that he may exploit the moment to rebuild his weapons cache. Hussein was such a known danger that even in Gallup polls over the course of the 1990s, a majority of Americans considered removing him from power as an important foreign policy goal (Jones 2002). Regardless of these facts, according to U.S. intelligence over the course of the 1990s and early 2000s, Iraq was not a major player in the realm of terrorism. The regime did not appear in the *Patterns of Global Terrorism* published yearly by the Department of State, nor had Hussein’s limited sponsorship of terrorism risen to the level where it could be a real threat to the United States or its allies. For that reason, as Michele Flournoy explained during a subcommittee meeting on the global reach of Al-Qaeda, while “regime change in Iraq should definitely be a U.S. foreign policy objective ... it is a question of timing and sequence.... I fear that we would lose many of the key members of the coalition that are critical to our success against al-Qaeda” if we pursue overthrowing Hussein rather than “finish the job against al-Qaeda” (*Cong. Rec. The Global Reach of Al-Qaeda*, 2001, 107-390, 25).

Despite concerns like Flournoy's, George W. Bush's administration proceeded to make the case for an AUMF that addressed the continued threat from Iraq. Congress responded by providing a document with very broad language, which is in part why it is open for continuous use. It starts with the justification for providing the authorization. It cites "Iraq's war of aggression and illegal occupation of Kuwait" as well as the litany of UNSC resolutions passed to constrain the "nuclear, biological, and chemical weapons" programs and the repeated violations of those resolutions. It also references a 1998 law passed by Congress stating that "Iraq's continuing weapons of mass destruction programs threatened vital United States interests and international peace and security" which *urged* the president "to take appropriate action ... to bring Iraq into compliance with its international obligations." It moves on to discuss the "current Iraqi regime" and its willingness to harm its own people and people outside their borders using weapons of mass destruction; its continued hostility toward the United States as evidenced by firing on the U.S. military attempting to enforce UNSC resolutions; and its willingness to house members of Al-Qaeda and other international terrorist organizations.

The authorization mentions the Iraq Liberation Act of 1998, which openly supports U.S. efforts to "remove from power the current Iraqi regime" and the continuing efforts to prosecute the War on Terror in the broad terms of the 2001 AUMF. Finally, it reiterates that the president enjoys the Article II powers to act "in order to deter and prevent acts of international terrorism," which arguably moves beyond a plain reading of the constitutional text. Congress authorized the president to "use the Armed Forces of the United States as he determines to be necessary and appropriate in order to ... defend the national security of the United States against the continuing threat posed by Iraq" and enforce the UNSC resolutions.

Much like the 2001 AUMF, there are limited ways that Congress imposes accountability on the president. It does not contain an assessment of what would constitute a successful operation or how to provide evidence of a successful conclusion. Furthermore, the ambiguous use of the term Iraq and the Iraqi regime opened the door to exactly what happened: well after the regime had fallen and a new one installed, U.S. presidents could continue to use the authorization for a variety of operations.

## Part II: Military Action in Iraq

By March 2003, there was nothing members of Congress could do to impede President Bush from using the authorization they had provided to initiate a war in Iraq. It was a legally legitimate military operation by any measure of the term. Using the 10 criteria discussed above, Congress had fallen short of satisfying its constitutional duty to deliberate about the operation and compel sufficient accountability from the executive branch.

(1) Prior to giving Bush the authorization, they failed to determine that a military operation was sharply related to national security in so far as they did not have any concrete evidence that weapons of mass destruction (WMDs) existed in Iraq. There was some



discussion about Al-Qaeda attempting to get chemical weapons and other WMDs.<sup>9</sup> There was an acknowledgment of Saddam Hussein's past actions lending credibility to the possibility that he would attempt to obtain and use WMDs<sup>10</sup> or provide weapons to Al-Qaeda.<sup>11</sup> But those who were against the war, chief among them Dennis Kucinich, Robert Byrd, Ron Paul, and Dick Durbin, did not sway members to ask more probing questions to ensure the connection the administration drew between a war in Iraq and U.S. national security merited a military operation.<sup>12</sup> As Ron Paul notes in February 2002, Congress just passes "fuzzy resolutions" that the "president can use as his justification" (*Cong. Rec.* S1899 (2003)). It was clear to many that any military action in Iraq would amount to a preventative war (one where an imminent threat does *not* exist), but even acknowledging this truth does not stop many from supporting regime change in Iraq.<sup>13</sup>

(2) Deliberations about the merits of authorizing a military operation in Iraq were always colored by the assumption that the president would start an operation regardless of whether they provided an authorization.<sup>14</sup> There was a shockingly limited focus on whether the military could or should solve the security problem posed by Hussein's control of Iraq. The administration implied that as long as Hussein remained in power, there was a threat to the United States (Bybee 2002, 194–95), and this was an accepted standard among many in Congress who supported the president.<sup>15</sup> Where presidents like

<sup>9</sup>. While there is a broad discussion of Al-Qaeda and Hussein acquiring weapons of mass destruction over the course of 2002, on May 23, Senator Bill Frist noted that terrorists, "including al-Qaida, are intent on using biological weapons against us. We know more than a dozen nations—including Iraq, North Korea, Libya, Syria—have the capability to produce chemical and biological weapons, and many have stockpiled such biological weapons in the past" (*Cong. Rec.* S8790, 2002).

<sup>10</sup>. Senators like Joseph Lieberman and Tom McInnis called back to the multiple times Saddam Hussein had to be sanctioned by the UN for his acquisition of WMDs and the necessity of the United States enforcing a no-fly zone with Iraqis attempting to shoot down American planes (*Cong. Rec.*, McInnis S16369-16375, Lieberman S16769-770).

<sup>11</sup>. Representatives Peter A. DeFazio and Jeff Duncan mention people talking about this connection but do not mention people by name (*Cong. Rec.* H7432-8475 (2002)). It was a very common belief at the time, and it was regularly mentioned as part of the broader concern associated with Iraq.

<sup>12</sup>. These members repeatedly attempted to call attention to the lack of evidence of WMDs in Iraq, the lack of credible links between terrorists and Hussein (*Cong. Rec.* H17006 (2002)), and the relationship between the AUMF and the upcoming election (*Cong. Rec.* S17764 (2002)). Diane Feinstein had a particularly moving speech about the seriousness of their vote and the importance of avoiding "a rush to judgment before it has had ample opportunity to answer the many questions that still remain regarding why a war ... should be fought at this time against Iraq" (*Cong. Rec.* S17793 (2002)). These members showed that members *could* ask difficult questions, but they failed to force the administration to answer them and they failed to stop "this needless ... war" (*Cong. Rec.* S16994 (2002)).

<sup>13</sup>. As Senator Jon Kyl says, "the only way you will end the weapons of mass destruction program in Iraq is by removing Saddam from power.... Preemption," that is, going to war before there is an imminent threat, "only applies to certain situations—like Iraq." He goes on to say, "it is senseless to require a smoking gun" (*Cong. Rec.* S19217-8 (2002)).

<sup>14</sup>. For example, Representative Dennis Kucinich said, "The American people are being prepared for war with Iraq with little or no discussion in this House" (*Cong. Rec.* H10601). Senator Arlen Specter said: "It seems that congress is not trying to counter the president, but just get ahead of him so it can seem constitutional" (*Cong. Rec.* S13536 (2002)).

<sup>15</sup>. As Senator John Edwards noted, Iraq has consistently violated UN restrictions and developed WMDs. For that reason, "the time has come for decisive action. With our allies, we must do whatever is necessary to guard against the threat posed by an Iraq armed with weapons of mass destruction and under the thumb of Saddam Hussein" (*Cong. Rec.* S16708 (2002)).

Woodrow Wilson and Franklin Roosevelt had to prove they only went to war as a last resort, in this instance, Congress neither requested nor received any evidence to show Bush had attempted every other means of addressing the problem created by Hussein. In regard to the existence of WMDs, for example, the weapons inspectors had yet to provide clear evidence of their presence, although they had been thwarted a few times (Agresto 2007).<sup>16</sup> Considering the multiple avenues the United Nations has used to reduce proliferation in the past (Joyner 2009), a full-scale war is not the last resort after all other avenues have been exhausted, as Bush suggested in his speech announcing the initiation of the Iraq War (Bush 2003). Furthermore, due to the lack of clarity regarding the nature of the threat, they did not adequately clarify what problem the military would address. While it is obviously true that eliminating Hussein's access to WMDs and cutting off that potential supply line to terrorists would make the United States and her allies safer, there was no discussion about *how* the military would achieve that goal.

While some viewed congressional authorization as a means to sanction coercive diplomacy and avoid war,<sup>17</sup> by failing to specify the need for further authorization prior to any military operation, Congress failed on this measure of deliberation. Even if they thought they only sanctioned coercive diplomacy, they completely failed to evaluate the necessity of the military operation while simultaneously providing legal legitimacy to any size military operation the administration may determine "necessary and appropriate" (Pub. L. 107-243).

(3) There is a widely acknowledged intelligence failure among many institutions in the lead-up to the Iraq War (Betts 2007; Cordesman and Burke 2003; Kessler 2019). In Congress, members regularly mentioned the problem of secrecy in the administration and a lack of clear evidence supporting Bush's claim that Iraq posed any of the threats discussed above.<sup>18</sup> Despite this consistent refrain from many members, they failed to achieve access to the evidence, let alone assess it.

(4) There was a remarkable failure to assess the rules, material resources, and organizational resources of the military prior to, and during, the initial stages of the war among

<sup>16</sup>. On September 26, Senator Bingham suggested a middle way that involves threatening or using constrained force that would push Hussein to negotiate but would not upset other regional actors. Senator Patrick Leahy suggested allowing the UN inspectors to do their job prior to any threat of force from Congress (*Cong. Rec.* S18176 (2002)).

<sup>17</sup>. On October 8, Representative Gary Ackerman said, "I believe that authorizing the President to use force, if necessary, is the best way to avoid war" (*Cong. Rec.* H19538 (2002)). This was also a well-established talking point among many Democrats, including Hillary Clinton, to justify their vote (Zenko 2013).

<sup>18</sup>. On June 17, Senator Bob Smith stated his belief that though the only information they had about weapons of mass destruction came from the press, he saw no reason to think it untrue (*Cong. Rec.* S10312 (2002)). Representative Sheila Jackson-Lee went even further, arguing that she believed that the "US has no evidence that Iraq had anything to do with 9/11" (*Cong. Rec.* H10513-4 (2002)). Several months later, Senator Harry Reid was still echoing this concern, arguing that though he was "standing by with an open mind, looking forward to whatever the President and his people bring forward," they had yet to bring forth any conclusive evidence of weapons of mass destruction (*Cong. Rec.* S16279 (2002)). Dick Durbin, a member of the Senate Intelligence Committee, went further, arguing that the intelligence community "has not completed the most basic document which is asked of them before the United States makes such a critical life-or-death decision" (*Cong. Rec.* S16473 (2002)). Senator Robert Byrd, putting it more strongly, said, "I have no brief for Iraq, but I am not going to be silenced. I will not give the benefit of the doubt to the President ... [even though] I do not defend the Iraqi regime" (*Cong. Rec.* S17764 (2002)).

both branches. As Burns discusses, the military “maintained a deep-seated aversion to the personnel-heavy counterinsurgency operation performed decades earlier, it suffered a poor chain-of-command structure at the Pentagon, and it lacked a well-planned rehabilitation plan for Iraq after the overthrow of the regime. Altogether, the US military was ill equipped and disinclined to do the kind of fighting ultimately required in Iraq” (2019, 210).

Members of Congress did not address these systemic problems in the military prior to the invasion. When discussing the problems of winning the peace after the initial operation, members of Congress acknowledged what Burns discussed: the administration had not provided them with evidence that they had developed a plan to rebuild the country if the invasion occurred. In an early example, in February 2002, then Senator Joe Biden asked members of the administration testifying before the Senate Foreign Relations Committee to “indicate why Saddam is such a bad deal” and “what is [the president’s] vision for Iraq?” (S. Hrg., 2002, 107–299). Other members articulated the difficulty of regime change.<sup>19</sup> Given the breadth of what members of Congress could discuss in this regard, there is a remarkable dearth of discussion. When members voice concerns, it is the same members sounding an alarm that goes unheeded.

(5) In so far as there was confusion regarding the objective of the operation, there was insufficient discussion about what resources they would have to deploy to achieve the ambiguous goals of eliminating the threat posed by Hussein, his regime, his connection to terrorists, or his possession of WMDs.

(6) If the objective of the military operation was to arrive in Baghdad in record time, there would have been a perfect relationship between the means and the ends of the war. Unfortunately, there was no interrogation of how the military would hold the capital after arriving or what it would do to quell the chaos and violence that ensued. As Bakich notes, “on the eve of the Iraq War, the United States possessed a military strategy that had been extensively scrutinized and reworked ... but with a postwar office that had been in existence for only a matter of weeks” (2014, 193). As will be discussed below, a vocal minority reflected on the danger associated with a lack of planning. Once again, this minority did not succeed in convincing members to force information out of the administration prior to the passage of the AUMF.

(7) Starting with Vice President Dick Cheney’s claim that the United States would be greeted as liberators, there were limited efforts to ensure that the local population would welcome U.S. military intervention and limited efforts to interrogate the decision to eliminate all the Ba’athists from the government. Members of Congress did discuss this problem. Many expressed the concern that they did not have enough information from the administration, and this included how they planned to rebuild the state. Despite seeing clearly that the United States was about to initiate hostilities without a clear plan

<sup>19</sup> As then Senator Chuck Hagel notes, there is a lot of work to do on the “diplomatic track. Not just for military operations against Iraq ... but for the day after when the interests and intrigues of outside powers could undermine the fragility of an Iraqi government in transition.” If an invasion occurs, it “could require a commitment in Iraq that could last for years” (*Cong. Rec.* S15665). Senator Frank Muskowski, echoed by Arlen Specter and Diane Feinstein, asked whether there is a serious expectation that they can create a democracy out of a “nation consumed by tribal factionalism” (*Cong. Rec.* S16162).

regarding how to achieve peace after the military operation, members of Congress did not hold the administration accountable before or after the invasion of Iraq. When coupled with the limited discussion about how Hussein's violent rule had kept sectarian animosity from erupting, the failure to assess how locals would react to an American military presence remains one of the biggest oversights of the war among the political leaders (Agresto 2007; Bakich 2014; Burns 2015; Ricks 2014).<sup>20</sup>

(8) As discussed above, while there was clarity about Hussein being the enemy of the United States, *why* he was an enemy remained unclear prior to the invasion. After the invasion, in an early move that had significant consequences, the administration created the controversial de-ba'athification policy. Anyone in the Ba'athist party had to leave all government posts. Despite the issues posed by this decision, there was limited discussion in Congress (*Cong. Rec.* S19066, S18451 (2003)). They mostly focused on the cost of the rebuilding efforts. The failure to engage with the operationalization of winning the peace allowed Representative Michael Burgess to claim in September 2003 that "normal life" had returned to Iraq (*Cong. Rec.* 21849 (2003)). As the security situation grew more unstable in Iraq, there was further confusion due to the increased terrorist activity when Al-Qaeda infiltrated Iraq (Echevarria 2014).

(9) The discussion about the authorization does not provide clarity about short- or long-term implications. It does, however, demonstrate the problem of emphasizing legality rather than a more substantive standard for performing a constitutional duty. As Senator Barbara Boxer notes in her discussion of the AUMF, a senior administration official does not want "to be in the legal position of asking Congress to authorize the use of force when the President already has the full authority." They do not want to "concede that it was constitutionally necessary" (*Cong. Rec.* S19038 (2002)). As Rudalevige explains, the administration wanted to use the 1991 AUMF paired with the commander in chief powers, and the 2001 AUMF to make the claim they did not need congressional input (2006, 219). As discussed above, members of Congress failed on a remarkable number of measures when it came to analyzing the necessity of the operation or the capacity of the operation to increase security. Instead, Congress provided the administration with a battle over legal questions. Many claimed Congress has the constitutional authority to declare war. For that reason, the president could not engage in a military operation without their authorization. The administration fired back with justifications produced by the Office of Legal Counsel, tellingly named "Authority of the President under Domestic and

<sup>20</sup>. There was some acknowledgment of this fact after the invasion as the security situation deteriorated. Representative Michael Burgess noted, "The disorder and political uncertainty we are witnessing in postwar Iraq, while at one level unsettling, is to some extent a reflection of how completely Saddam Hussein's Ba'athist regime dominated and dictated Iraqi life" (*Cong. Rec.* H18175 (2003)). In a particularly telling example, Biden said the Iraqi people saw the United States defeat "a guy they thought was invincible" in "roughly 4 weeks." Subsequently, when "remnants of the Ba'athist party" interfere with U.S. efforts to repair infrastructure, it looks as if the United States "does not want to" provide "amenities . . . because if we did, we could snap our fingers." The administration had also failed to achieve assurances from other NATO members that they would help with the transition, making the United States look more like "occupiers" than they would if there was "a genuine multinational force" in the country. Congress had failed to really assess these issues prior to providing the authorization, and Biden was only promoting a "sense of Congress" bill rather than legislation that would hold the administration accountable for their efforts to "win the peace" (*Cong. Rec.* S17644, S17645 (2003)).

International Law to Use Military Force against Iraq” (Bybee 2002). Many in Congress focused on their Article I, Section 8 powers<sup>21</sup> rather than using those powers collectively as a branch to force the administration to seriously engage with substantive questions about the necessity and merits of a military operation in Iraq. Considering the outcome, this lends a great deal of credence to the need to go beyond the legal authorization and examine the substance of the deliberation in Congress.

(10) There was a serious disconnect between what the soldiers had to do during the push to Baghdad and the transition to urban fighting and then regime building. Over the course of the first few years of the Iraq War, Congress did not effectively interrogate the leaders of the military operation to determine how effectively they were switching tasks and managing the power vacuum that comes with regime change (Barnett 2010).

### The Rise of ISIS and the Continued Application of the 2001 and 2002 AUMFs

Like many security threats, the rise of ISIS compelled action from Obama but did not have the same influence on members of Congress. When looking at the precedent for military strikes set by Clinton in the 1990s, it is not particularly surprising that Obama failed to actively court Congress when he launched a military campaign against the Islamic State in the summer of 2014. The sustained nature of the threat, however, put him in a different position. For several months, he relied on his Article II powers, sending multiple letters to Congress explaining his actions to address the growing threat from ISIS. As Jack Goldsmith explains, his decision to send several letters acts as a confirmation “that the administration is issuing piecemeal letters in an effort to argue later that ‘hostilities’ under the WPR are mission-specific and that the WPR clock expires when the discrete in-country mission expires” (Goldsmith 2014). This provides Obama with a means to engage in continuous hostilities while avoiding the start of the WPR clock, which caused him difficulties in the Libyan intervention in 2011 (Ackerman 2011). Using the 10 measures discussed above, the decision-making process and the deliberation in Congress fell short of the needed level to fulfill the constitutional duty of those in Congress to assess the possibility of achieving a successful military operation.

(1) There was a sharp connection between the necessity of action and national security. Members of Congress consistently advocated for some kind of action to address the clear national security threat from ISIS. As Senator John McCain noted, “ISIS is a terrorist army. ISIS has the largest” amount of “wealth, of military equipment”; it has more “capability than of any terrorist organization in history, and they spread in an area larger than the size of the State of Indiana” (*Cong. Rec.* S14544 (2014)). As Representative Alcee L. Hastings noted by mid-September, “the situation in Iraq on a political, humanitarian and military level is increasingly dire” (*Cong. Rec.* H14693 (2014)). Due to the “deep scars left by America’s war in Iraq” (Obama 2014b) and the broader interests in the region, the president had to engage militarily.

<sup>21</sup>. Robert Byrd is particularly focused on the constitutional powers of Congress to declare war. Dennis Kucinich and Ron Paul also mention it quite consistently.

(2) While the administration clarified the necessity of action, what actions it would take and how those would achieve the ultimate objective of destroying ISIS did not come to the fore. Despite this fact, members of Congress displayed limited interest in assessing the nature of the operation, the capacity of the operation to increase stability in the region, and security at home. There was a great deal of discussion in the Senate of a resolution to protect the religious minorities from persecution by ISIS, and there was a discussion about the *need* for a strategy to combat ISIS. Senator Ted Cruz used the opportunity to discuss security at the southern border as a means to combat ISIS due to rumors about their activity in Mexico. He also suggested removing the U.S. citizenship of anyone who joins ISIS. Finally, he mentioned the necessity of a “coordinated and overwhelming air campaign that has the clear military objective of destroying the capacity of ISIS to carry out terror attacks on the United States” without expecting that U.S. actions would lead to a conclusion in the Syrian civil war and claimed we should not be too quick to befriend countries like Iran that currently share our objectives. He concluded by referencing the power of Congress to declare war if Obama intended action to last a long time (*Cong. Rec.* S5376 (2014)).

Senator Jim Inhofe expressed concern that Obama had publicly stated that he did not have a strategy (*Cong. Rec.* S5378 (2014)). Senator John Cornyn criticized Obama for failing to maintain troops in Iraq, which may have prevented the rise of ISIS in the first place, but praised Obama for vowing to “destroy” ISIS rather than treating them as a “threat that can be managed” (*Cong. Rec.* S5403 (2014)). There is a consistent thread of waiting for the president to provide his policy. As Senator Dick Durbin mentioned, “What the President is trying to do is find effective ways to stop ... this new round of terrorism in the Middle East, this group called Islamic State” (*Cong. Rec.* S5405 (2014)).<sup>22</sup> Despite the varying critiques of the president, there was limited discussion in a session about operationalizing security for the United States beyond those discussing the various AUMFs in the fall.<sup>23</sup>

Much like the earlier actions in Afghanistan and Iraq, the military operations against ISIS did not receive an adequate assessment from the legislative branch, nor did the executive branch provide needed clarity about important elements of the military operations. This may be due, in part, to the timing of the strikes right before the mid-term election. Harry Reid decided to delay votes until after the midterms, providing democratic members with a reprieve from taking a difficult vote. Tim Kaine provided the only vocal dissent, claiming: “The president shouldn’t be doing this without Congress. Congress shouldn’t be allowing it to happen without Congress” (McCants 2014).

(3) Due to the threat from ISIS and their brutal tactics, there was clear evidence regarding the necessity of action.

(4) Despite ample time and inclination, there was not a significant discussion about the relationship between the rules, material resources, or organizational resources that

<sup>22</sup>. Bob Corker reiterated the view that he was anticipating a decision from the White House (Staff Writer 2014).

<sup>23</sup>. The Senate Foreign Relations Committee held hearings to inquire about the military operations in December 2014 but not prior to the launch of military operations.

*should be* used to combat the threat due to several limiting factors. It was clear that no one wanted “boots on the ground,” including the American public (Jones and Newport 2014). For this reason, even if Obama had a desire to engage in a large-scale action, it is unlikely he could sell it to the voters. Finally, when developing a strategy, the administration did not want to “own” the problem of ISIS. Developing an effective strategy that maintained a light footprint while simultaneously addressing a threat that “had no regard for borders” within a region full of allies and enemies was the task ahead of them (Chollet 2016, 149–51).<sup>24</sup>

They did receive permission from the Iraqi government to operate in their airspace but could not get the same permission from Assad in Syria (Chollet 2016, 153). The decision about what tools to use, therefore, was developed for the administration by the circumstances rather than being developed by the administration to properly address the threat. The most they could do was provide Congress with a rationale for the tools they could use rather than attempting to convince Congress to allow them to use the right tools for the problem.

Congress echoed this mindset. Members of Congress regularly discussed supporting the arming of Syrian rebels and other moderate groups to address the problem without getting too involved. Some explicitly stated that supporting arming rebels did *not* amount to support for a long-term engagement. Members of Congress saw clearly that this strategy would not achieve the ultimate objective of destroying ISIS, however. As Senator Roger Wicker notes, “it will take more than limited airstrikes and the modest deployment of military advisers to curb the rapid spread of ISIS across northern Iraq and Syria” (*Cong. Rec.* S14592 (2014)). Many members implied they supported this strategy because it limited the threat to American lives.<sup>25</sup>

(5) This also meant that the objectives of the operation—destroying ISIS—did not match the tools deployed to do so. Members regularly made statements about the need to “degrade and ultimately destroy ISIS” (*Cong. Rec.* H14889 (2014)). They did not, however, follow these statements with the kind of deliberation about tools that would demonstrate a serious effort to understand what they needed to invest in order to achieve that objective. As we know from the continued existence of ISIS 8 years later in Africa, “IS has proven time and again that it is a highly opportunistic organization ... [p]orous borders, high levels of corruption and a raft of other governance challenges advantage jihadists” (Staff Writer 2021). The disconnect between the stated objectives of the military operation and the tools available to the armed forces made it impossible to realistically achieve the desired end.

(6) There was a lack of clarity about what means the military would use to achieve the stated objectives. Members of Congress recognized this problem and determined they

<sup>24</sup>. There is a good deal of discussion regarding funding the Kurdish Peshmerga. This shows at least there is clarity in Congress regarding their competency as a fighting force and their desire to destroy ISIS (*Cong. Rec.* H13377, S14195, S14436, H14583, H14761 (2014)).

<sup>25</sup>. Representatives Mark Meadows, Buck McKeon, Adam Smith, Hal Rogers, Jim Moran, David Jolly, and Gerry Connolly all concurred in the need to arm Syrian rebels. David Jolly and Gerry Connolly stated they did not want this support to be construed as support for a long-term military engagement (*Cong. Rec.* H14761-14872).

should continue to defer to the president on policy development and implementation rather than assessing his strategy (Burns 2019, 233–35).

(7) In a similar vein, determining how locals would react to the U.S. military went relatively unaddressed in Congress due to their deference to the executive branch when it came to developing policy on combating ISIS. With the exception of a broad acceptance for increased funding for the Kurdish Peshmerga (*Cong. Rec.* H14583 (2014)), there were only limited discussions about how Sunni, Shia, and Kurdish (among other) populations in various countries would react to a reintroduction of the U.S. military.<sup>26</sup> Obama did have good evidence that the Iraqi people, broadly understood, desired American intervention, but there were limited means of determining how the Syrian people viewed the intervention of the Americans (Landler 2014).

(8) While there was a mutual enemy—ISIS—differentiating between the Assad forces attempting to attack the rebel forces, the rebel forces that were not allied with any known terrorist group, and the forces from other countries openly moving between borders made clarity about the enemy next to impossible (Gerges 2017). Furthermore, the changing nature of regional power and the interests of powerful allies created more confusion. Iran had become much more involved in Iraqi affairs after the United States pulled out in 2011 (Gerges 2017). The Iranian government was also closely allied with Assad in Syria. For these reasons, the Quds forces were heavily deployed in both states to address the threat from ISIS. By the fall of 2015, Russia had also gotten involved in Syria to combat ISIS and aid Assad. These factors further compounded the difficulty of determining how to address the threat from ISIS from an American perspective due to the increased threat of accidentally harming Russians, Iranians, or Assad's forces.

(9) Members of Congress had the usual difficulty passing any legislation that addressed the ongoing threat posed by the rise of ISIS and their swift occupation of land in Iraq and Syria. One authorization provided broad authority to address the “countries, organizations, or persons” that support terrorist groups, naming several but also providing the power “to eliminate all such terrorist groups and prevent any future acts of international terrorism” (HR 5415). The act makes no effort to hold the president accountable to Congress, only mentioning consultation with international allies. Others sought to create more serious restrictions on executive action as well as attempting to craft language that would ensure congressional oversight. Some addressed the possibility of sunseting the 2001 and 2002 AUMFs. Almost all provide few limits on scope, but some bills do not even specify who is authorized to determine the scope of the operation. S.J. Res. 44 does provide more clarity on that issue. The language, however, about protecting U.S. “interests” broadens the scope beyond “U.S. national security.” Importantly, the proposals consistently mention the goal of eliminating the threat of terrorism without specifying what that would necessitate, repeating the problem created by the 2001 AUMF: a never-ending war on terror. While many mentioned multilateralism and one discussed UN

<sup>26</sup> In one discussion, Representative Adam Smith expressed concern that citizens in Syria may see the U.S. focus on terrorist groups as tacit support of the Assad regime. It would also drive Sunnis and anti-regime forces into the arms of those groups. Representative Marcy Kaptur contended that the Shia government's exclusion of Iraq's Sunni population made it harder for the United States to fight ISIS (*Cong. Rec.* H14761).



Security Council resolutions, none required an international coalition or sanction from either the UN or NATO as a condition of authorization for the use of force. Limitations are few and far between. While some discuss precluding the deployment of ground forces in some respect, there was not a restriction on the number of forces. This opens up the possibility of a sizable force for a variety of other activities like “military assistance and training, protection or rescue of U.S. Armed Forces or citizens, and ‘limited operations against high value targets’” (CRS, R43760 (2014), 9). There are two elements, however, that demonstrate members of Congress have attempted to rectify past mistakes. Some mention a geographic limitation to restrict action to Iraq and Syria. While this would diminish the flexibility of presidents when addressing ISIS forces in neighboring countries, it does address the problematically broad grant of power to pursue terrorists across the globe. Finally, five mention a sunset clause, although these vary in length and four repeal the 2002 AUMF and two also repeal the 2001 AUMF.

The importance of sunseting the 2001 and 2002 AUMFs became more salient by the end of September when Obama switched from using his Article II powers to claiming the 2001 and 2002 AUMFs provided him with authorization to continue attempting to degrade ISIS in Iraq and Syria. It also moved Obama out of the ambiguous realm of the War Powers Resolution’s clock. By these authorizations with the expectation that Congress would accept his interpretation of the AUMFs “whether or not a new IS AUMF is enacted ... there would be existing congressional authorization for his actions” (CRS, R43760 (2014), 11). Meanwhile, the administration turned away from unilateralism and demonstrated the lasting problems caused by Congress shirking its substantive constitutional duty to provide authorizations that direct and constrain presidential action.

As Obama explained in a September 23 letter to Congress, he was working with allies and Congress to create “a new comprehensive and sustained counterterrorism strategy to degrade, and ultimately defeat, ISIL.” Besides “a systematic campaign of airstrikes,” he planned to provide “training, communications support, intelligence support, and other support” to parts of the “Iraqi security forces” (the very forces that folded in the face of ISIS at the Mosul Dam), as well as the “Kurdish Peshmerga forces.” He did stress the impossibility of knowing the duration of the operations, but only mentioned that it would continue as long as necessary “to protect and secure U.S. citizens and our interests against the threat posed by ISIL.” He then made the crucial pivot to using the 2001 and 2002 AUMFs as legal justification, saying: “I have directed these actions ... pursuant to my constitutional and statutory authority as Commander in Chief (including the authority to carry out Public Law 107-40 and Public Law 107-243) and as Chief Executive, as well as my constitutional and statutory authority to conduct the foreign relations of the United States” (Obama 2014a).

While conversations in Congress continued over the course of the fall, culminating in a discussion on the Senate Foreign Relations Committee in December where the various new AUMFs were discussed, Congress had only managed to pass a package providing aid to train and arm the Syrian rebels by adding it to a bill to keep the government funded past September 30 (Weisman and Peters 2014). In failing to pass any legislation providing clarity about their position, it once again remained in the president’s hands to determine how he would conduct the attack against ISIS. More importantly, there was a

great deal of focus on the *legality* of his actions after he decided to cite the AUMFs rather than focusing on his actions.

Most members of the leadership signaled their disinclination to pass legislation by claiming the president had the authority to launch military strikes against ISIS (Sherman and Bresnahan 2014). When Obama shifted gears, however, and started to claim he could use the old AUMFs to continue the military action he had already initiated (and members of Congress had openly sanctioned through inaction), legislators became more outspoken about the need for a new authorization. Representative Jerry Nadler claimed they were “on nonexistent legal ground”; Senator Tim Kaine said to claim “ISIL [is] a perpetrator of 9/11 is to basically torture the English language” (as quoted in LoGiurato and Walker 2014). Senator Rand Paul went so far as to claim the war against ISIS was “illegal until Congress acts pursuant to the Constitution and authorizes it” (as quoted in Matishak and Wong 2014). Many commentaries from the media similarly focused on the legality of Obama’s decision to use the old AUMFs demonstrating the systemic issue: too much discussion about the law and not enough discussion about the merits of the operation (Bellinger 2014; DeYoung 2014; Lederman 2014; The Editorial Board 2014). In these instances, the sustained focus on legality causes a lack of engagement with the most important questions of the operation. The question about how the Obama and Trump administrations addressed ISIS, along with the lasting impact of their campaigns on the nations, citizens, and the region, remains comparatively unexamined by the legislative branch.

(10) The role of the military in the actual fight against ISIS only received limited analysis from Congress over the course of 6 years of operations. Furthermore, as ISIS continues to spread despite the efforts of many countries, the possibility that it may develop another caliphate that requires another U.S. military campaign appears likely. Presidents can easily make these actions appear legally legitimate. Whether they can succeed in operations of this kind against this type of enemy has yet to be seen or adequately assessed in the legislative branch.

## Conclusion

The institutional logic compelling certain actions from the president and Congress leads to very different incentives around wartime decision making. Presidential responsibility and political necessity typically weigh as heavily on presidents as their constitutional duties. Or, more precisely, the logic of presidential responsibility in the constitutional order forces the hand of the executive: he must react to international events, be it through action or justifications for inaction.

Conversely, Congress has come to see shirking their constitutional responsibilities in the realm of foreign policy as more politically advantageous. When the necessity and success of an operation lack clarity, Congress has a political advantage in remaining hands-off. They can praise or blame the president depending on the context of the operation—including how their constituents feel about the operation. Once again, this

puts presidents in the uncomfortable position of either expending precious political capital to court the legislature—without any guarantee of success—or engaging in the operation unilaterally. Due to the necessity of reacting, in the last 70 years, presidents have increased their reliance on legal acrobatics to alter the meaning of the constitutional text in order to suit their political needs. Presidential lawyers have helped create a legal precedent for claiming that the president’s formal power over military operations extends to the decision about whether or not to initiate them. Presidents facing a Congress of the opposite party have an added incentive to avoid courting their good opinion (Brody 1992; Carter and Scott 2009; Currie and Powell 2003; Howell and Pevehouse 2011; Kriner 2010).

The focus in the scholarship on these legally dubious claims has shifted the debate away from questions associated with the positive ends of constitutional grants of power. By refocusing on substantive questions associated with the merits and execution of military operations, it is possible to see that even when Congress provides authorization, they fail to perform their constitutional duties.

Members of Congress have consistently shirked this aspect of their duty for decades, leading to the creation and execution of poorly formulated policy. By creating a metric for congressional deliberation and applying it to the discussion in Congress in 2002 and 2014, we can better evaluate their performance. A better understanding of what Congress has failed to do even when it has passed legislation provides us with a means of diagnosing the systemic problems associated with the warped separation of powers system in the United States.

## References

- Ackerman, Bruce. 2011. “Obama’s Illegal War in Libya.” *New York Times*, June 20. <http://www.nytimes.com/2011/06/21/opinion/21Ackerman.html>.
- Adler, David Gray. 2000. “‘The Law’: The Clinton Theory of the War Power.” *Presidential Studies Quarterly* 30 (1): 155–68.
- Agresto, John. 2007. *Mugged by Reality: The Liberation of Iraq and the Failure of Good Intentions*. New York: Encounter Books.
- Bakich, Spencer D. 2014. *Success and Failure in Limited War: Information and Strategy in the Korean, Vietnam, Persian Gulf, and Iraq Wars*. Chicago: University of Chicago Press.
- Barber, Sotirios A. 2003. *Welfare and the Constitution*. Princeton, NJ: Princeton University Press.
- Barnett, Thomas P. M. 2010. *Great Powers: America and the World After Bush*. New York: Berkley.
- Bellinger, John. 2014. “The Administration Should Explain Its International Legal Basis to Attack ISIL in Syria.” *Lawfare* (blog), September 13. <https://www.lawfareblog.com/administration-should-explain-its-international-legal-basis-attack-isil-syria>.
- Bessette, Joseph M. 1997. *The Mild Voice of Reason: Deliberative Democracy and American National Government*. 2nd ed. Chicago: University of Chicago Press.
- Betts, Richard K. 2007. “Two Faces of Intelligence Failure: September 11 and Iraq’s Missing WMD.” *Political Science Quarterly* 122 (4): 585–606.
- Brody, Richard. 1992. *Assessing the President: The Media, Elite Opinion, and Public Support*. Redwood City, CA: Stanford University Press.
- Burns, Sarah. 2015. “A New Model of Executive Power: A Montesquieuan Explanation of the Obama Presidency.” *Perspectives on Political Science* 44 (4): 247–56.

- Burns, Sarah. 2019. *The Politics of War Powers: The Theory and History of Presidential Unilateralism*. Lawrence: University Press of Kansas.
- Burns, Sarah, and Andrew J. Stravers. 2020. "Shifting the Blame on the Red Line: Audience Costs, Obama, and Congress." *Political Science Quarterly* 135 (1): 67–101.
- Bush, George H. W. 1991. "Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq." Public Papers of the Presidents. January 14. <http://www.presidency.ucsb.edu/ws/index.php?pid=19217>.
- Bush, George W. 2001. "President Signs Authorization for Use of Military Force Bill: Statement by the President." White House. <https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/text/20010918-10.html>.
- Bush, George W. 2002. "National Security Strategy." White House. <https://georgewbush-whitehouse.archives.gov/nsc/nss/2002/>.
- Bush, George W. 2003. "War Ultimatum Speech from the Cross Hall in the White House." *The Guardian*. <http://www.theguardian.com/world/2003/mar/18/usa.iraq>.
- Bybee, Jay S. 2002. "Authority of the President under Domestic and International Law to Use Military Force Against Iraq." In *Opinions of the Office of Legal Counsel*. Vol. 26. White House: Office of Legal Counsel of the Department of Justice, 143–98. <https://www.justice.gov/olc/opinion/authority-president-under-domestic-and-international-law-use-military-force-against-iraq#:~:text=Headnotes%3A,Military%20Force%20Against%20Iraq%20Resolution>.
- Carter, Ralph G., and James M. Scott. 2009. *Choosing to Lead: Understanding Congressional Foreign Policy Entrepreneurs*. Durham, NC: Duke University Press.
- Chafetz, Josh. 2017. *Congress's Constitution: Legislative Authority and the Separation of Powers*. 1st ed. New Haven, CT: Yale University Press.
- Chollet, Derek. 2016. *The Long Game: How Obama Defied Washington and Redefined America's Role in the World*. New York: PublicAffairs.
- Clinton, Bill. 1998. "Letter to Congressional Leaders on the Military Strikes Against Iraq." American Presidency Project. <https://www.presidency.ucsb.edu/documents/letter-congressional-leaders-the-military-strikes-against-iraq>.
- Cordesman, Anthony H., and Arleigh A. Burke. 2003. "Intelligence Failures in the Iraq War." *Center for Strategic and International Studies*, July, 54.
- Currie, David P., and H. Jefferson Powell. 2003. "Foreign Affairs: Presidential Initiative and Congressional Control." *Michigan Law Review* 101 (6): 1453–62.
- DeYoung, Karen. 2014. "With the Campaign against the Islamic State Comes a Thicket of Legal Questions. First: Is This War?" *Washington Post*, October 7. National Security. [https://www.washingtonpost.com/world/national-security/is-it-a-war-an-armed-conflict-why-words-matter-in-the-us-fight-vs-the-islamic-state/2014/10/06/f4528a6c-49a1-11e4-891d-713f052086a0\\_story.html](https://www.washingtonpost.com/world/national-security/is-it-a-war-an-armed-conflict-why-words-matter-in-the-us-fight-vs-the-islamic-state/2014/10/06/f4528a6c-49a1-11e4-891d-713f052086a0_story.html).
- Echevarria II, Antulio J. 2014. *Reconsidering the American Way of War: U.S. Military Practice from the Revolution to Afghanistan*. Washington, DC: Georgetown University Press.
- Edelson, Chris. 2013. *Emergency Presidential Power: From the Drafting of the Constitution to the War on Terror*. Madison: University of Wisconsin Press.
- Fisher, Louis. 2012. "The Law: Military Operations in Libya: No War? No Hostilities?" *Presidential Studies Quarterly* 42 (1): 176–89.
- Fisher, Louis. 2013. *Presidential War Power*. 3rd ed. Lawrence: University Press of Kansas.
- Gerges, Fawaz. 2017. *ISIS: A History*. Revised ed. Princeton, NJ: Princeton University Press.
- Glennon, Michael J. 2011. "The Cost of 'Empty Words': A Comment on the Justice Department's Libya Opinion." *SSRN ELibrary*, April. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1810922](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1810922).
- Goldsmith, Jack. 2014. "Yet Another Iraq War Powers Letter, and a Response to Lederman." *Lawfare* (blog), September 9. <https://www.lawfareblog.com/yet-another-iraq-war-powers-letter-and-response-lederman>.
- Griffin, Stephen M. 2013. *Long Wars and the Constitution*. 1st ed. Cambridge, MA: Harvard University Press.

- Hallett, Brien. 2012. *Declaring War: Congress, the President, and What the Constitution Does Not Say*. Cambridge, UK: Cambridge University Press.
- Hamilton, Alexander, James Madison, and John Jay. 2003. *The Federalist Papers*, eds. Clinton Rossiter and Charles R. Kesler. New York: Signet Classics.
- Hendrickson, Ryan C. 2015. *Obama at War: Congress and the Imperial Presidency*. Lexington: University Press of Kentucky.
- Howell, William G. 2003. *Power without Persuasion: The Politics of Direct Presidential Action*. Princeton, NJ: Princeton University Press.
- Howell, William G. 2015. *Thinking about the Presidency: The Primacy of Power*. Princeton, NJ: Princeton University Press.
- Howell, William G., and Jon C. Pevehouse. 2011. *While Dangers Gather: Congressional Checks on Presidential War Powers*. Princeton, NJ: Princeton University Press.
- Jones, Jeffrey M. 2002. "Removing Saddam Considered an Important Foreign Policy Goal." Gallup. Com. June 21. <https://news.gallup.com/poll/6253/Removing-Saddam-Considered-Important-Foreign-Policy-Goal.aspx>.
- Jones, Jeffrey M., and Frank Newport. 2014. "Slightly Fewer Back ISIS Military Action vs. Past Actions." Gallup.Com, September 23. <https://news.gallup.com/poll/177263/slightly-fewer-back-isis-military-action-past-actions.aspx>.
- Joyner, Daniel. 2009. *International Law and the Proliferation of Weapons of Mass Destruction*. New York: Oxford University Press.
- Kessler, Glenn. 2019. "Analysis | The Iraq War and WMDs: An Intelligence Failure or White House Spin?" *Washington Post*, March 22. <https://www.washingtonpost.com/politics/2019/03/22/iraq-war-wmds-an-intelligence-failure-or-white-house-spin/>.
- Kleinerman, Benjamin A. 2005. "Lincoln's Example: Executive Power and the Survival of Constitutionalism." *Perspectives on Politics* 3 (4): 801–16.
- Kleinerman, Benjamin A. 2015. "George W. Bush." In *The Presidents and the Constitution: A Living History*, ed. Ken Gormley. New York: New York University Press.
- Kriner, Douglas L. 2010. *After the Rubicon: Congress, Presidents, and the Politics of Waging War*. Chicago: University of Chicago Press.
- Landler, Mark. 2014. "Obama, in Speech on ISIS, Promises Sustained Effort to Rout Militants." *New York Times*, September 10. <https://www.nytimes.com/2014/09/11/world/middleeast/obama-speech-isis.html>.
- Lederman, Marty. 2014. "Tentative First Reactions to the 2001 AUMF Theory [Updated]." *Just Security* (blog), September 11. <https://www.justsecurity.org/14804/first-reactions-2001-aumf-theory/>.
- LoGiurato, Brett, and Hunter Walker. 2014. "CONGRESSMAN: Obama's Expansion of His ISIS Campaign Is 'Illegal.'" *Business Insider*, September 24. <https://www.businessinsider.com/obama-isis-legal-aumf-congress-2014-9>.
- Matishak, Martin, and Kristina Wong. 2014. "Overnight Defense: Rand Paul Proposes Declaration of War." *The Hill*, December 3. <https://thehill.com/policy/defense/overnights/225932-overnight-defense-rand-paul-proposes-declaration-of-war>.
- McCants, William. 2014. "2014 Midterms: ISIS and the Campaign Trail." *Brookings* (blog), October 30. <https://www.brookings.edu/blog/fixgov/2014/10/30/2014-midterms-isis-and-the-campaign-trail/>.
- Obama, Barack. 2014a. "Barack Obama: Letter to Congressional Leaders Reporting on the Commencement of United States Military Operations in Syria." White House. <http://www.presidentcy.ucsb.edu/ws/index.php?pid=107672>.
- Obama, Barack. 2014b. "Remarks by the President on the Situation in Iraq." White House. <https://obamawhitehouse.archives.gov/the-press-office/2014/06/19/remarks-president-situation-iraq>.
- Paul, Rand. 2011. "Obama's Unconstitutional Libyan War." *Washington Times*, June 15. <http://www.washingtontimes.com/news/2011/jun/15/obamas-unconstitutional-libyan-war/>.
- Pious, Richard M. 2011. "The Executive Unbound: After the Madisonian Republic—By Eric Posner and Adrian Vermeule." *Presidential Studies Quarterly* 41 (4): 864–66.

- Ricks, Thomas E. 2014. *Fiasco: The American Military Adventure in Iraq, 2003 to 2005*. New York: Penguin Books.
- Rowland, Kara. 2011. "Obama Dismisses 'Fuss' about Libya Battle." *Washington Times*, June 29. <http://www.washingtontimes.com/news/2011/jun/29/obama-dismisses-noise-about-libya-conflict/>.
- Rudalevige, Andrew. 2006. *The New Imperial Presidency: Renewing Presidential Power after Watergate*. Ann Arbor: University of Michigan Press.
- Savage, Charlie. 2011. "Obama Attacked for No Congressional Consent on Libya." *New York Times*, March 21. <http://www.nytimes.com/2011/03/22/world/africa/22powers.html>.
- Sherman, Jake, and John Bresnahan. 2014. "Hill Leaders Duck ISIL." *POLITICO*, September 9. <https://www.politico.com/story/2014/09/congress-isil-110727>.
- Silverstein, Gordon. 1996. *Imbalance of Powers: Constitutional Interpretation and the Making of American Foreign Policy*. New York: Oxford University Press.
- Silverstein, Gordon. 2009. *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics*. Cambridge, UK: Cambridge University Press.
- Starobin, Paul. 2011. "Harold Koh's Flip-Flop on the Libya Question." *New York Times*, August 6. <http://www.nytimes.com/2011/08/07/opinion/sunday/harold-kohs-flip-flop-on-the-libya-question.html>.
- Taylor, Jr., Stuart. 2002. "An Invasion of Iraq Requires the Approval of Congress." *The Atlantic*, September 1. <https://www.theatlantic.com/politics/archive/2002/09/an-invasion-of-iraq-requires-the-approval-of-congress/378094/>.
- The Editorial Board. 2014. "Opinion | Legal Authority for Fighting ISIS." *New York Times*, September 12. <https://www.nytimes.com/2014/09/12/opinion/legal-authority-for-fighting-isis.html>.
- Thomas, George. 2008. *The Madisonian Constitution*. Baltimore, MD: Johns Hopkins University Press.
- Thorpe, Rebecca U. 2014. *The American Warfare State: The Domestic Politics of Military Spending*. Chicago: University of Chicago Press.
- U.S. Congress. Senate. Subcommittee on International Operations and Terrorism. 2001. The Global Reach of Al-Qaeda: Hearings before the Subcommittee on International Operations and Terrorism. 107th Cong., 1st sess., December 18. <https://www.govinfo.gov/content/pkg/CHRG-107shrg77601/html/CHRG-107shrg77601.htm>.
- Weisman, Jonathan, and Jeremy W. Peters. 2014. "Congress Gives Final Approval to Aid Rebels in Fight With ISIS." *New York Times*, September 18. <https://www.nytimes.com/2014/09/19/world/middleeast/senate-approves-isis-bill-avoiding-bigger-war-debate.html>.
- Wren, Christopher S. 1998. "STANDOFF WITH IRAQ: THE LAW; U.N. Resolutions Allow Attack on the Likes of Iraq." *New York Times*, February 5. <https://www.nytimes.com/1998/02/05/world/standoff-with-iraq-the-law-un-resolutions-allow-attack-on-the-likes-of-iraq.html>.
- Writer, Staff. 2014. "Corker Doesn't See Combat Troops Taking on Islamic State." *Wbir.Com*, August 26. <https://www.wbir.com/article/news/corker-doesnt-see-combat-troops-taking-on-islamic-state/51-95133913>.
- Writer, Staff. 2021. "IntelBrief: Lethal Islamic State Affiliates in Africa Exacerbate Regional Insecurity." *The Soufan Center* (blog), February 11. <https://thesoufancenter.org/intelbrief-2021-february-11/>.
- Zeisberg, Mariah. 2013. *War Powers: The Politics of Constitutional Authority*. Princeton, NJ: Princeton University Press.
- Zenko, Micah. 2013. "Threat of Failure." *Foreign Policy* (blog), October 2. <https://foreignpolicy.com/2013/10/02/threat-of-failure/>.