

Will Congress Write the President a “Blank Check for War”?

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This coming Monday, April 23, the Senate Foreign Relations Committee is set to review a bill that would virtually give President Donald J. Trump a blank check to wage war anywhere in the world any time he pleases.

The Constitution places the power to declare war exclusively in the hands of the Congress. However, for the past 75 years, Congress has allowed that power to drift toward the executive branch.

The new bill, should it pass, would effectively make the transfer of the war power from Congress to the president complete. It is hard to imagine a worse time in American history for this to happen.

Why Only Congress Has the Power to Declare War

The framers of the Constitution were well aware of the dangers of placing the power to declare war in the hands of the president. Delegates to the 1787 Constitutional Convention overwhelmingly rejected South Carolina delegate Pierce Butler’s proposal that the president be given the power to start a war, according to James Madison’s notes on the congressional debates. George Mason said he was “against giving the power of war to the executive” because the president “is not safely to be trusted with it.”

The framers of the Constitution therefore specified in Article I that only Congress has the power to declare war. Article II states,

“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”

Those articles, taken together, mean the president commands the armed forces once Congress authorizes war.

In spite of its exclusive constitutional power, Congress has not declared war since 1942. After that time, starting with President Truman, a series of US presidents committed American troops to hostilities around the world without waiting for Congress to act. Following the debacle in Vietnam, Congress enacted the War Powers Resolution in an effort to reclaim its constitutional authority to decide when and where the nation would go to war.

The War Powers Resolution allows the president to introduce US Armed Forces into

hostilities or imminent hostilities only after Congress has declared war, or in “a national emergency created by attack upon the United States, its territories or possessions, or its armed forces,” or when there is “specific statutory authorization,” such as an Authorization for the Use of Military Force.

The 2001 and 2002 Authorizations for Use of Military Force

Congress enacted Authorizations for the Use of Military Force (AUMF) in 2001 and 2002, which were directed at al-Qaeda and Iraq, respectively. Although these authorizations were limited, George W. Bush, Barack Obama and Donald Trump have all used them to justify attacking or invading whatever country they wished.

In the 2001 AUMF, Congress authorized the president to use military force against individuals, groups and countries that were seen as having supported the 9/11 attacks. Congress rejected the Bush administration’s request for open-ended military authority “to deter and preempt any future acts of terrorism or aggression against the United States.”

Nevertheless, the 2001 AUMF has been used to justify at least 37 military operations in 14 countries, [according to the Congressional Research Service](#). Many of them were unrelated to the 9/11 attacks.

Bush utilized the 2001 AUMF to invade Afghanistan and initiate the longest war in US history, which continues unabated. Obama relied on that AUMF to lead a NATO force into Libya and forcibly change its regime, creating a vacuum that ISIS moved in to fill. Obama invoked the same AUMF to carry out targeted killings with drones and manned bombers, killing untold numbers of civilians. And Trump is relying on that AUMF as justification for his drone strikes, which have killed thousands of civilians.

Rep. Barbara Lee (D-California), the only member of Congress to vote against the 2001 AUMF, was prescient. In July 2017, Lee said,

“I knew then it would provide a blank check to wage war anywhere, anytime, for any length by any president.”

Lee [told Democracy Now!](#) in 2016 that she knew the 2001 AUMF “was setting the stage and the foundation for perpetual war. And that is exactly what it has done.”

Congress granted Bush the 2002 AUMF specifically to remove Saddam Hussein from power in Iraq. Once that was accomplished, that license ended. So, the 2002 AUMF does not provide an ongoing legal basis for US to engage in military action.

Senate Foreign Relations Committee member Ben Cardin (D-Maryland) stated at an October 2017 hearing that the 2001 and 2002 AUMFs have now become “mere authorities of convenience for presidents to conduct military activities anywhere in the world,” adding,

“They should not be used as the legal justification for military activities around the world.”

At that 2017 hearing, Defense Secretary James Mattis and then-Secretary of State Rex

Tillerson told the Senate Foreign Relations Committee that Trump had sufficient legal authority to kill people in any part of the world he desired. They cited the 2001 and 2002 AUMFs, as well as Article II of the Constitution. With an abundance of political caution, however, Mattis and Tillerson invited Congress to enact a new AUMF with no temporal or geographical limitations.

At his April 12 confirmation hearing, Mike Pompeo, Trump's nominee for Secretary of State, told Sen. Cory Booker that Trump had legal authority to bomb Syria without congressional approval. Pompeo [testified](#),

"I believe that he has the authority he needs to do that today. I don't believe we need a new AUMF for the president to engage in the activity you described."

The following day, the US, United Kingdom and France launched airstrikes in Syria. Like Trump's 2017 Syria bombing, they [violated](#) both US and international law. The Trump administration persists in its [refusal](#) to reveal the memo that purportedly explains its legal justification for the 2017 bombing of Syria.

Attempts in Congress to repeal and/or replace the 2001 and 2002 AUMFs have thus far been unsuccessful. But Mattis and Tillerson may now get their wish.

Authorization for the Use of Military Force of 2018

On April 16, 2018, a bipartisan group of senators [introduced](#) a new AUMF to replace the 2001 and 2002 AUMFs. Senate Foreign Relations Committee Chair Bob Corker (R-Tennessee) and Democratic committee member Tim Kaine (Virginia) sponsored the proposed legislation. Co-sponsors include Senators Jeff Flake (R-Arizona), Christopher Coons (D-Delaware), Todd Young (R-Indiana) and Bill Nelson (D-Florida).

The 2018 AUMF would authorize the president to use military force, with no limitations, in Iraq, Afghanistan, Syria, Yemen, Libya and Somalia. It would also allow the president to take military action against al-Qaeda, ISIS and the Taliban, as well as their "associated forces" in any geographical location.

If the president wants to add countries or groups to his hit list, he must report to Congress. However, he can withhold whatever information he says is classified, as Elizabeth Goitein, co-director of the Liberty & National Security Program at the NYU School of Law's Brennan Center for Justice, [has noted](#).

And although the president cannot add nation-states to the list of countries he wants to attack, he could circumvent that limitation by claiming that terrorists are [operating](#) in a new country, or say a particular country is a state sponsor of terrorism, and he needs to use military force to fight terrorism.

The president must notify Congress within 48 hours of expanding his military operations into countries beyond the six listed in the AUMF or "new designated associated forces." If Congress doesn't object within 60 days, the president's expansion will stand.

Alarmingly, the new bill contains a presumption that the president can decide when and

where to make war. It would require affirmative action by two-thirds of both houses of Congress to prevent military action.

The bill has no expiration date. Every four years, the president would be required to send Congress a proposal to modify, repeal or maintain the authorization. But if Congress does not respond in 60 days, the AUMF would remain in force. Once again, it places the burden on Congress to take action.

In light of Congress's failure to meaningfully object to presidential uses of military force, [including most recently in Syria](#), a president should have no concern about congressional pushback. He could continue to make war with impunity, cashing the blank check Congress has provided him.

The proposed AUMF would violate the United Nations Charter. The charter requires that countries settle their disputes peacefully, and forbids the use of military force except when conducted in self-defense or with the blessing of the Security Council. The new AUMF would allow the president to attack or invade another country with no requirement that the attack or invasion be conducted in self-defense or with the council's permission. It would thus violate the charter.

What's Next?

Corker has scheduled a committee hearing on the proposed legislation for Monday, April 23. But even if the bill passes out of committee, there is no guarantee it will get a hearing on the floor of the Senate or the House. Both Senate Majority Leader Mitch McConnell and Republican House Speaker Paul Ryan have shown little appetite for allowing discussion of a new AUMF.

The 2001 and 2002 AUMFs should be repealed, and Congress should not give the president a new one. As George Mason sagely said, a president "is not safely to be trusted" with the power of war.

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