



A Looming Collision: Donald Trump and Presidential War Powers*

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The first few weeks of President Donald Trump's first term have been newsworthy, to say the least. But the same inauguration that ushered him into the White House was also symbolic for another reason. He became the 45th president of the United States and was subsequently fully initiated as the third consecutive commander-in-chief to direct the United States military in the "War on Terror." This is a point that has been sorely underreported. Donald Trump inherited a borderless war that has raged for a decade and a half, and he faces off against arguably the most successful and popular terrorist organization the world has ever seen. The more chilling realization is that President Trump's predecessors [passed on to him](#) a combination of the most potent, technologically advanced military on the planet and broad, indeterminate authorizations and precedents for using military force unilaterally.

[War powers](#)—the authority to declare or conduct war—has long been a contentious point between the executive and legislative branches. Debate over these powers has waxed and waned throughout the last few decades, but discourse on this subject will most assuredly pick up steam in the first years of the Trump presidency. Congress has long held that it should be consulted when the president commits the armed services to a conflict, but years of unilateral use of force, combined with the unpredictability of the new administration, will surely prompt members of Congress to reassess the standing arrangements regarding authorizing and conducting war.

A History of Presidential War Powers

In order to understand how Trump inherited such power—and why it is important to address it—it is appropriate to understand the basis and evolution of war powers throughout US history. First and foremost, the Constitution of the United States establishes a [bipartite system](#) for entering the United States into armed conflict or full-scale war. [Article I, Section 8](#) of the Constitution states that Congress has the ability to declare war and, with the "power of the purse," it also decides whether to provide the funds for conducting war. In addition, Congress approves treaties, so it is effectively responsible for declaring and ending conflicts or war. The president, as spelled out in [Article II, Section 2](#), has the constitutional authority to conduct war, hence the title "commander-in-chief." Although it is not explicitly written in the Constitution, in general there is consensus that "conducting" war also allows the president to direct military forces at times of attack or imminent threats (i.e., in self-defense). Thus, if Congress is responsible for declaring the start and finish of armed conflict, the president is expected to effectively manage the conflict once authorized.

Since World War II, the executive branch has gradually consolidated war powers—through executive directives and legal precedent—to act more unilaterally in terms of waging war or committing forces to hostilities. In 1950, President Truman [introduced](#) US forces to the conflict brewing on the Korean Peninsula in an effort to support South Korea’s fight against North Korean communists. While the Truman Administration described the US efforts as “police action,” it is inarguable that Truman introduced troops into a hot war without a specific declaration from the nation’s legislators. After the Korean War, Congress and the American public were wary about the president’s ability to use the armed services without expressed consent. Despite these concerns, the United States was soon entrenched in another anti-communist war in Southeast Asia.

The Vietnam War began in 1954, but the United States played mostly an advisory role in the conflict for the first decade. However, in the summer of 1964 the US Warship *Maddox* reported—falsely, the military would later determine—being fired at by North Vietnamese torpedo boats in the [Gulf of Tonkin](#). President Lyndon B. Johnson already had detailed plans for using military force in Vietnam, so in response to the Gulf of Tonkin incident, Congress authorized President Johnson to use whatever force necessary to retaliate against the perpetrators of the reported attacks and to further maintain peace. In the next few years, Johnson authorized full-scale operations, including the deployment of combat troops in the Vietnamese countryside. By the time Richard Nixon inherited the war, US legislators and the public had grown disillusioned with the nation’s role in the war and many looked for ways to recall the troops from the fighting. Nonetheless, Nixon continued to introduce soldiers and even expanded the United States’ bombing and combat campaigns to Laos and Cambodia, sparking insurrections in those neighboring countries. By 1971, Congress revoked the Gulf of Tonkin Resolution, but President Nixon continued authorizing military strikes until a ceasefire was secured in 1973 and he withdrew the remaining US soldiers from Vietnam.

War Powers Resolution

After the Vietnam War, Congress intended to ensure that the legislative body would be consulted, and its approval explicitly obtained, prior to any interjection into a conflict or potential hostilities. To that end, Congress, in 1973, overwhelmingly adopted a joint resolution known as the [War Powers Resolution](#) (informally referred to as the War Powers Act; Public Law 93-148) over then-President Nixon’s veto. This established a number of mechanisms that would, ideally, facilitate more cooperation in decision making between the executive and legislative branches. Primarily, the joint-resolution states that the president may not introduce the US military into conflict unless he or she has a specific declaration or authorization from Congress or the nation is facing an imminent attack. The next sections of the law require the president, in every possible instance, to consult Congress before deploying US forces in imminent hostilities, and should forces be deployed, the president must report such a move to Congress. The reports

must detail the necessity and legislative authority for introducing the armed forces into a conflict and estimate the scope and duration of the military's involvement in the specific conflict (Section 4(a)(1)). Reports must be delivered to Congress within 48 hours of the military's deployment and, should Congress not formally authorize the action, the president must withdraw the armed forces in 60 days. However, the president is afforded some flexibility in that he or she can extend those 60 days by an additional 30 days if a case for "military necessity" can be demonstrated to extend the deployment.

Since the law was adopted, there have been a few examples of Congress invoking the War Powers Act. In 1983, President Ronald Reagan deployed US Marines to Beirut, Lebanon as part of an international peacekeeping force. By the end of that year, 257 US servicemen had lost their lives in the effort. In September 1983, Congress asserted its constitutional authority and struck a bargain with Reagan, authorizing the president to keep the Marine units in Lebanon for 18 months, or until April 1985. [S.J.Res.159](#) was adopted in October 1983 and it was based on the congressional desire to limit Reagan's use of US armed forces in Lebanon and to assert its legislative authority under the 1973 War Powers Act. However, the resolution was never tested, as a terrorist bombing later that month killed 241 servicemen in their barracks. As a result, Reagan was forced to withdraw the US forces from Lebanon.

The War Powers Act appears to be an important check on the executive branch, giving Congress an ability to harness the president sufficiently if he or she erred in judgment or rationale for pursuing involvement in a conflict. However, one only has to look to the implementation of the act in the majority of cases over the last four decades since its adoption to understand that it has not been as successful as Congress would have preferred. Since President Nixon, every president has argued that the statute is unconstitutional as it infringes on the president's constitutional authority to conduct war. Generally speaking, every succeeding president since has maintained that he had the authority to act unilaterally in certain situations relevant to conflicts across the globe. Much to the displeasure of Congress, the courts have refused, in subsequent lawsuits, to hear cases attempting to enforce the resolution, citing it as a political question the legislative and executive branches must resolve.

Evolution of Presidential War Powers Post-9/11

September 11, 2001 ushered in a new era of war powers. Shortly after the attacks, President George W. Bush declared a "War on Terror," vowing to hunt down every individual responsible for the attacks, barring no geographic barrier. To facilitate this task, Congress adopted an [Authorization for Use of Military Force](#) (AUMF), granting Bush blanket authority to use the armed forces to combat the individuals and organizations responsible for planning or facilitating the attacks, as well as harboring or training the terrorists. This AUMF serves as the "statutory authorization" cited in Section 2(c) of the War Powers Act, ostensibly allowing the president to

direct the armed forces at his discretion. In addition, the AUMF was remarkable because, for the first time, Congress authorized the president to use military force against non-state actors (i.e., al-Qaeda). If there were many individuals concerned with the blanket authority afforded to the Bush Administration, few spoke up at the time (the AUMF received just one “no” vote in the Senate). The familiar concerns about the executive branch’s unilateral decisions regarding the use of the military quietly faded away and Bush initiated an era characterized by counterterrorism measures and operations.

In October 2002, Congress again [authorized the use of military force](#). This time the AUMF focused on Iraq—giving legal authority for the invasion months later—and called for protecting the nation from the perceived threats Iraq posed. There are two aspects of the AUMF that are relevant to understanding the authority a modern president might have in the War on Terror. First, the operative language of the authorization was rather vague, particularly so because it established no geographical restraints. It stipulated that the president can address continuing threats from the country of Iraq—not the government, military, or leaders—and it made no mention of whether such threats must be *in* Iraq. Second, it is important to note that Section 3(b) (2) reaffirmed the authority of the president to use force against the non-state actors adopted in the 2001 AUMF.

The 2001 and 2002 authorizations for use of military force are critical to understanding modern war powers because they presented the Bush Administration with a framework—and quite literally the authority specified in the War Powers Resolution—for carrying out an unconventional war against state and non-state actors alike. President Bush would go on to endow the military, Central Intelligence Agency (CIA), and other agencies with more lenient rules of engagement and the power to employ suspect means for carrying out missions. President Bush, Vice President Dick Cheney, and other officials of the administration would oversee the secret development of enhanced interrogation techniques, mass surveillance, targeted killing campaigns, and a number of other methods for conducting global war. While many of these practices were uncovered and scrutinized—some even resulting in court cases and/or the adoption of legislation—they were employed because the administration believed it was vested with the authority to sign off on the measures in order to protect the country’s national security.

Barack Obama’s War Machine

President Bush may have declared the War on Terror and Congress legalized the use of force, but President Obama and his administration undoubtedly did more to institutionalize unconventional war powers and [establish legal precedents](#) than anyone. Barack Obama, in an attempt to fulfill campaign promises, relied less on the military, steadfastly refusing to introduce troops in large numbers on the ground in hostile environments. However, throughout his two

terms, the White House redefined what the office's war powers entailed and how to use the previous authorizations sanctioned by Congress.

While controversy required the National Security Agency (NSA) to rein in its mass surveillance programs and the CIA was barred from operating black sites and using enhanced interrogation, Obama exceedingly relied on one previous Bush mechanism: [targeted drone strikes](#). Drones—or unmanned aerial vehicles (UAVs)—are inarguably a use of force, whether operated by the CIA or the armed forces, and the Obama Administration was heavy-handed with the use of the technology. Obama's reliance on drones was an attempt to reconcile his stance against using troops in hostile arenas with the need to continue addressing potential security threats. In this context, war powers evolved from the deployment of soldiers, vehicles, and hand operated weapons, to the utilization of UAVs equipped with missiles in the battlefield. The mere perception of the “battlefield” shifted considerably under Obama. While the lines and borders demarcating war zones were blurred by the AUMFs, the War on Terror under Obama effectively resulted in ubiquitous battlefields, particularly in North and East Africa, the Middle East, and South Asia.

It would be insufficient to suggest that there were not concerns about Barack Obama's use of drone warfare and “kill lists” to combat the threat of terrorism. To be sure, some legislators have been calling for repeal of the 2001 and 2002 authorizations, the issuance of new and narrower authorizations, and a stricter adherence to the War Powers Resolution. Drone, missile, and air strikes in Somalia, Yemen, Libya, and Syria especially raised eyebrows for the seeming lack of authority to operate outside the traditional battlefields of Afghanistan, Iraq, and Pakistan (an al-Qaeda safe haven). Some UAV strikes have even yielded [lawsuits](#) by families of those targeted in order to limit the use of such technology. However, even when the White House [acknowledged](#) the desire for a new AUMF, the administration simply relied on its perceived constitutional authority, the existing authorizations, and legal precedent to justify its campaign.

Does Donald Trump Warrant More Urgency?

While some members of Congress have certainly called for reevaluations of the president's ability to use the military and its technology, the majority of legislators have not been so eager to debate the necessity. During the Bush Administration, the fervor around national security was too great for any elected official to be perceived as hindering the president's ability to retaliate for 9/11. Throughout the Obama Administration, national security concerns lingered, particularly with the rise of the Islamic State, and many lawmakers believed their constituents wanted the president to [have the means](#) for fighting terrorists. In addition, members of Congress did not feel as pressed to rein in the president's use of military force because it overwhelmingly came through the use of drones. For many individuals, as long as extremists were taken care of and American soldiers were safe, there was little reason to rock the boat.

The United States faces a rather novel environment after the inauguration of Donald Trump. President Trump has shown a marked departure, intellectually, from most presidents before him. He is rash, sporadic, and generally forgoes the careful consideration one might expect from a leader tasked with deciding whether or not to take another human's life. In fact, the last president who most closely resembled Donald Trump in these characteristics—Richard Nixon—directly preceded Congress's push for and adoption of limits on war powers. Many would agree that President Trump is the first president since the beginning of the United States' War on Terror who would seemingly abuse the leeway granted by previous Congresses. Based on current operating standards and precedents, there is very little to prevent President Trump from authorizing risky operations in areas outside even the expanded definition of the battlefield. For example, President Trump and Secretary of Defense James Mattis have already explored the idea of [loosening restrictions](#) for the rules of engagement regarding air strikes, meaning a higher number of collateral civilian casualties could be deemed "acceptable." In addition, the president's [first authorized military operation](#) reportedly lacked thorough consultation and preparation and resulted in the loss of one US soldier, dozens of civilians, including women and children, and a \$70 million helicopter. These examples will likely drive more and more members of Congress to call for greater constraints on the White House's use of force.

So, if this Congress is able to usher in efficient constraints on the president's use of war powers, what exactly would it entail? Even on this basic issue there seems to be a lot of uncertainty. The reliably hawkish members of Congress most likely would want to expand the president's authority, so as to not "tie the hands" of the president, as majority leader [Mitch McConnell \(R-Kentucky\)](#) stated. The dovish members of each caucus would most certainly want to narrow the scope and clarify boundaries of any authorization, as well as establish a sunset provision to ensure an AUMF is not used for another decade and a half. A sunset provision is simply a specification that the authorization would expire after some time, unless it was explicitly extended (e.g., Obama proposed a [three-year](#) sunset clause). However the members hope to adjust the president's powers, a real discussion will need to take place about *how* to usher in those changes. For any future authorization, the previous two AUMFs should be completely discarded. They are too broad and vague and so much precedent is tied up in them that if they were to stay on the books, it would be easy for any legal advisors to find a way to further manipulate the language in order to deviate from Congress's wishes.

After repealing the 2001 and 2002 authorizations, the legislators should fashion another joint resolution authorizing the use of military force for specific purposes. Those purposes would most likely still include provisions for the [use of force](#) against non-state actors, but they should deliberately spell out which organizations are involved. In addition, it would make little sense to establish such limitations without an accompanying provision establishing geographic boundaries. While there will be much debate over which countries to include and exclude, failure

to establish a clear demarcation of where military force can be used—and/or opportunities to consult Congress on expanding such boundaries—would ultimately allow for the current administration to expand the “battlefield” as it sees fit. Finally, like many prior proposals, any new AUMF should include the sunset provision. President Obama’s proposed AUMF established such a clause and there are presumably a number of legislators who support such a move.

In many aspects, a new era has begun under President Trump, but the old questions about war powers will remain, if not grow. The United States is facing a [prolonged war](#) against non-state actors and the country is now governed by an inexperienced and unpredictable administration. If there were any time to clarify the legislative and executive roles in authorizing the use of military force, this appears to be it. While the War Powers Resolution may not give Congress the teeth it needs to truly dictate the use of the armed services, issuance of a new AUMF would undoubtedly pressure the White House to make sound decisions that do not deviate from the expectations set forth by the nation’s lawmakers. A new AUMF is critical to holding the president responsible for his decisions to use military force, but it could also be beneficial for the fledgling administration, clarifying the guidelines for carrying out military operations.

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