



US President

How much would the repeal of the 1991 & 2002 AUMFs really limit the Commander-in-Chief?

What's the story?

On 29th March 2023, the Senate voted 66-30 to pass a bipartisan bill that repeals two authorisations for the use of military force (AUMF) granted by Congress in 1991 and 2002 to approve military operations in Iraq. The Bill will now be taken up by the House of Representatives, which passed its own AUMF repeal bill in 2021, under the previous 117th Congress. The likely repeal of the two AUMFs, decades after they were approved under the 1973 War Powers Resolution, has renewed the debate over whether Congress needs to go further in reasserting its constitutional responsibility for declaring war.

What is the War Powers Resolution (1973)?

The War Powers Resolution was passed in 1973 in an attempt to place stronger, statutory limits on the president's ability to order military operations. The law specifies that the president can initiate military action in three established circumstances: 1) if Congress declares war; 2) if Congress passes a statute authorising military intervention; 3) if there is a national emergency, created by an attack upon the U.S, its territories or possessions, or its armed forces. Importantly, to preserve the president's ability to respond to an emergency, the law states that the president can authorise the military to take action for any reason, without approval, for a limited 60-day period. If Congress then denies approval for these emergency actions, the law gives the president 30 days to withdraw the troops. Therefore, under the Act, the president can effectively order military action for 90 days without any congressional approval.

What did the 1991 and 2002 AUMFs authorise?

On 2nd August 1990, Iraq, under President Saddam Hussein, invaded the neighbouring state of Kuwait. In response, the United Nations Security Council (UNSC) passed a series of resolutions that demanded that Iraq immediately withdraw from Kuwait, and established a number of embargos and sanctions on Iraq. On 14th January 1991, Congress then passed an AUMF that gave President George H.W. Bush the authority "to use United States Armed Forces... to achieve implementation" of 11 U.N. Security Council Resolutions. While Iraq was expelled from Kuwait in February 1991, Presidents Bill Clinton and George W. Bush argued that, as the Iraqi government had defied the terms of the cease-fire agreement, the UN resolutions that led to the 1991 AUMF remained in effect, and so must Congress's authorisation.

In January 2002, four months after the 9/11 terrorist attack in New York, President George W. Bush delivered the State of the Union Address, in which he argued that America's biggest national security threat was posed by Iraq, Iran and North Korea. He argued that this "axis of evil" sought "weapons of mass destruction" that posed a "grave and growing danger" to the US. On 12th September 2002, Bush delivered a speech to the UN General Assembly, in which he highlighted Iraq's violations of UN Resolutions, including disarmament requirements. The next week, the White House proposed a new AUMF, and Congress, which had been warned that Iraq had hidden stockpiles of weapons of mass destruction, quickly passed it. The 2002 AUMF gave the president the authority to "use the Armed Forces of the United States as he determines to be necessary and appropriate" in order to "(1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq." The Iraq War began on 20th March 2003, and Saddam Hussein was quickly overthrown. No weapons of mass destruction were found.

Despite how long has passed since the end of the Iraq War, presidents have continued to cite the 2002 AUMF as legal authorisation for a range of military interventions. In 2014, the Obama administration cited the AUMF as an additional statutory basis for its military campaign against the terrorist group Islamic State (also known as ISIS) in Iraq. In 2020, the Trump administration argued that the AUMF authorised its assassination of Iranian general Qassem Soleimani at Bagdad International Airport.



How does this fit into your exams?

US Presidency – Does the US have an 'imperial president'?

The likely repeal of the 1991 and 2002 AUMFs raises a number of interesting points, that are useful when discussing the powers of the presidency, the checks imposed by the legislature, and the extent to which the checks and balances established by the US Constitution still work as the Founders intended.

1) Repealing the two AUMFs would demonstrate Congress's power to check the president.

Just as Congress hoped, the 1973 War Powers Resolution led presidents in 1991 and 2002 to request statutory authorisation for their military plans. However, few likely anticipated that presidents would still be citing these AUMFs over two decades later. Only eight of the 77 Senators who voted for the 2002 AUMF even remain in the chamber – a ninth, President Joe Biden, has now signalled his support for its repeal. Democratic Senator Tammy Duckworth, an Iraq War veteran, has argued that, by leaving the 2002 AUMF in place for so long, "Congress has shirked its responsibility to our troops". She argues that the executive has "stretched and skewed" the AUMFs from their original intent, and that if the military is to be deployed today, Congress must "debate and vote to do so based on current conditions". The last time that Congress repealed an AUMF was in 1974, and a number of remarkably old AUMFs remain in effect, the oldest being one enacted in 1798 to authorise military action against French ships. Given the concerns that have been raised in recent years over the continued use of these AUMFs, it is possible that, in future, Congress will ensure that authorisations are more narrowly written, and time-limited.

2) However, Congress has shown limited support for the repeal of a far more expansive AUMF.

Importantly, the Bill recently passed by the Senate does not repeal the 2001 Authorisation for Use of Military Force Act, passed three days after the 9/11 attacks. This AUMF authorised the president to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001..." The 2001 AUMF was ground-breaking because it authorised attacks against terrorist groups, rather than states. Representative Barbara Lee, the only member of Congress to vote against the AUMF, explained that she feared Congress was giving the president "a blank check to carry out global war in perpetuity", and "use all 'necessary and appropriate force' against virtually anyone, anywhere, at any time". As Lee feared, the 2001 AUMF continues to be regularly cited. A 2021 research paper found that it had been used to justify a range of military operations in 22 different countries. Presidents Bush, Obama, Trump and Biden all cited the 2001 AUMF when ordering airstrikes in Afghanistan, Djibouti, Iraq, Libya, Pakistan, Somalia, Syria and Yemen, all without any fresh authorisation from Congress.

3) Presidents have also maintained that they have an inherent power to act without an AUMF.

For decades, Democrat and Republican presidents alike have argued that they have a number of inherent and implied powers as commander-in-chief, including a power to order limited military actions that they deem necessary to US national security. Notably, when passing the War Powers Resolution of 1973, Congress had to override the veto of President Nixon, who considered it an unconstitutional constraint on his authority as Commander-in-Chief. Likewise, while President George H.W. Bush requested and signed the 1991 AUMF, he also issued a signing statement in which he maintained that his request for congressional support did not "constitute any change in the longstanding positions of the executive branch on...the President's constitutional authority to use the Armed Forces to defend vital U.S. interests." In 2019, the New York Times asked then-presidential candidate Joe Biden whether he agreed that the president has an inherent power to order military intervention, if they determine "that this would be anticipatory self-defence or otherwise serve the interests of the United States". Like Nixon and Bush, Biden agreed that the president could act without authorisation when "operations serve important U.S. interests and are of a limited nature, scope, and duration." Biden demonstrated this view in February 2021, after a rocket attack on an Iraqi air base that hosted US personnel, which injured several US service members. Biden responded by ordering air strikes on an Iran-backed militia in Syria. The National Security Council did not cite an AUMF, but instead said that the President had taken the action "pursuant to his Article II authority to defend U.S. personnel". As such, it is possible that even the total repeal of existing AUMFs would be insufficient to stop the commander-in-chief from acting alone.



Analysing the use of war powers in the UK and US

Structural theory:

The structural approach focuses on how the institutions and processes used within different political systems can explain their similarities and differences. On the surface, the US Constitution appears to establish a much clearer separation of war powers than the UK's uncodified constitution. Article II of the US Constitution states that the President "shall be Commander in Chief of the Army and Navy of the United States", but Article I gives Congress the power to declare war. In contrast, under the UK Constitution, the UK monarch is the Head of the British Armed Forces, but declaring war and ordering military intervention are prerogative powers that are, in practice, used by the Prime Minister. However, in reality, the checks established by the US constitution can be more limited, and the restrictions established by the UK constitution can be more significant, than they might first appear. This is because US presidents have long argued that they have an inherent constitutional power as commander-in-chief, to authorise limited military operations that are essential to US national security. Meanwhile, as recognised in the 2011 Cabinet Manual, UK prime ministers have begun to accept that there is now a constitutional convention that, before troops are committed, the House of Commons should have the opportunity to debate the matter. However, much like US presidents, UK prime ministers have argued that the limits imposed by this constitutional convention do not extend to emergencies.

Rational theory:

The rational approach emphasises the role of individuals taking rational steps to advance themselves or their cause. In this case, the use of war powers, and the extent to which they are checked, can depend greatly on the individual judgement of the UK prime minister and US president. The heads of the UK and US governments are in the unusual position of having access to sensitive information about national security threats that the legislature, and even few in the executive, are authorised to see. UK and US leaders often have to individually decide whether a national security matter is a crisis that demands an immediate response, without any authorisation from the legislature, or whether there is enough time, or enough of a political incentive, to put the matter to a debate and vote. If presidents and prime ministers fear that they would likely lose a vote in the legislature, then they may feel incentivised to act unilaterally, and explain their decision later. If heads of government feel confident that they can gain authorisation, then they may feel incentivised to hold a vote, to gain a mandate and share political responsibility for the intervention. In 2013, President Obama unsuccessfully sought an AUMF against the Syrian government, in response to claims that it had crossed a clear 'red line' he had set in 2012, by using chemical weapons against civilians. However, with the UK Parliament having already voted to oppose PM David Cameron's plans to intervene, and with US polls showing a strong majority opposed intervention, some speculated that Obama was really seeking a political way out of his own 'red line'.

Cultural theory:

The cultural approach considers the different histories, values and beliefs of the US and UK. In this case, it is arguable that the protracted, decades-long interventions in Afghanistan and Iraq, and the disproven claims, made by US President George W. Bush and UK Prime Minister Tony Blair, that Iraq had weapons of mass destruction, had similar effects on the political landscapes of the UK and US. In the last two decades, bipartisan majorities in both the UK Parliament and US Congress have refused to grant some requests for authorisation – when Parliament voted against intervention in Syria in 2013, it was the first government defeat on military intervention since 1855. In the US, the Republican Party moved from the more hawkish George W. Bush to President Donald Trump, who campaigned heavily on his promise to end "the era of endless wars". In the UK, the Labour Party followed Tony Blair and Gordon Brown with Ed Miliband (2010-15), who led his party in opposition to intervention in Syria, and Jeremy Corbyn (2015-20), a life-long anti-war activist, and a senior figure in the Stop the War Coalition, which was founded in September 2001 to oppose the impending war in Afghanistan.