

Why Repealing the 1991 and 2002 Iraq War Authorizations Is Sound Policy

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KEY TAKEAWAYS

The 1991 and 2002 AUMF Against Iraq Resolutions remain in force even though their purpose has been accomplished.

Repeal would not affect the 2001 AUMF, the primary domestic statutory authority for the war against al-Qaeda, the Taliban, ISIS, or associated forces.

Debating and repealing those war authorizations is a matter of congressional hygiene and gets the Congress back in the business of exercising its Article I muscles.

The Constitution's allocation of war powers between the legislative and executive branches is a classic example of the separation of powers.¹ The Congress has the power to declare war but cannot fight the war on its own. The President, as commander in chief of the Army and Navy, has (and has uniformly claimed) the authority to use military forces abroad in the absence of specific prior congressional approval.² This authority derives from his constitutional responsibility as commander in chief and chief executive for foreign and military affairs. Without money from Congress, however, the President has no ability to fight those conflicts, nor does he have the authority to appropriate funds to pay for those military conflicts on his own.

This tension between the legislative and executive branches was purposeful, as the Founders anticipated the grave significance of the country's going to war.

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The United States was born of war, and the Founders knew that in the likely event the country would have to engage in future wars, the decision to take the country to war should be allocated between two coequal branches of government.

Like many other provisions in the Constitution, the Declare War Clause is brief. It authorizes Congress “To declare War.”³ The Constitution does not dictate *how* Congress should declare war, just that it has the authority *to* declare war. It authorizes Congress to “raise and support Armies,”⁴ “provide and maintain a Navy,”⁵ and “make Rules for the Government and Regulation of the land and naval Forces”⁶ and provides “for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”⁷ The President, on the other hand, “shall be Commander in Chief of the Army and Navy of the United States.”⁸ There is one, and only one, commander in chief of the armed forces, and he enjoys capacious authority to defend the nation.⁹

According to advocates of presidential power, the Declare War Clause does not address the power to begin actual hostilities.¹⁰ It does not limit presidential war power.¹¹ Rather, they argue that it gives Congress the authority to alter legal relationships between subjects of warring nations and trigger certain rights, privileges, and protections under the laws of war.¹² Other scholars contend that the Declare War Clause limits presidential war power by giving the legislature the sole authority to begin an offensive war.¹³ One interpretation of the clause is that it requires Congress to issue a formal declaration of war before the United States may begin hostilities.¹⁴

Whatever one’s viewpoint on the matter may be, the Constitution is silent with respect to how wars are terminated and therefore leaves unanswered a host of important questions.

- Who has the authority to end an authorized war, be it a formal wartime declaration or a specific authorization for the use of military force?¹⁵
- If Congress repeals its own war authorization, does that act alone end the war, or must the President agree?
- What happens if Congress repeals its own war authorization and the President vetoes the legislation and the Congress cannot override his veto?
- What value is there, then, in Congress’s publicly debating war powers?

- What message does such a debate send to the American public?
- Does the absence of such a debate affect the American people and our warfighters and influence our allies or enemies?
- Does Congress have an obligation, if not legally at least morally, to debate war powers periodically when the country is at war?

Against this backdrop, Senators Tim Kaine (D–VA) and Todd Young (R–IN) have introduced a joint resolution to repeal two congressionally authorized war authorizations against the country of Iraq:¹⁶ the 1991 Authorization for Use of Military Force (AUMF) Against Iraq Resolution¹⁷ and the Authorization for Use of Military Force Against Iraq Resolution of 2002.¹⁸ They claim that the Iraq AUMFs make no sense, serve no operational purpose, run the risk of future abuse by a President, and help to keep the nation on a permanent war footing.¹⁹ They also claim that Congress has a vital role not only in declaring a war, but also in ending one.²⁰

The preamble to their resolution claims, among other things, that the repeal of both war authorizations would not affect ongoing military operations, which are conducted and authorized by the 2001 Authorization for Use of Military Force²¹ passed in the wake of the September 11, 2001, terrorist attacks, and would have no impact on the 2001 AUMF itself.

There are consequences to congressional inaction, whether it is failure to pass appropriations on time, delaying decisions on major infrastructure programs, failure to fund health insurance programs, or failure to reauthorize vital national security or defense programs on time. The consequences are real and have devastating effects. Congressional failure to authorize force against ISIS, for example, or refusal to repeal outdated war authorizations has consequences. It affects the relationship between the legislative branch and the executive branch, with the former ceding power to the latter. Congressional acquiescence seemingly relieves the legislative branch of the responsibility to decide whether to authorize war or repeal outdated authorizations at a time when the American people, the military, our allies, and enemies need to hear from Congress on the issue of war and peace.

There is great value in our democratic republic for Congress to debate war powers, and just as there is value in debating whether to authorize war, there is the concomitant value in debating the repeal of war authorizations passed years or decades ago, especially when the object and purpose of those war authorizations have been accomplished. Debating and then

repealing those vestigial war authorizations is a matter of congressional hygiene and gets the Congress back in the business of exercising its Article I muscles.

The 1991 Iraq Authorization for Use of Military Force

The 1991 Iraq AUMF remains in place to this day, despite the fact that the primary purpose of that war authorization was accomplished decades ago. It is a vestigial war authorization. Senator Kaine calls it a “zombie authorization.”²² The use of the word “zombie” is colorful but nonetheless apt, as the concern is that this war authorization could come back to life years or decades after its primary purpose has been met and used by a future Administration for a purpose entirely disconnected and unrelated to the original purpose of the statute.²³ Moreover, although the 1991 and 2002 Iraq AUMFs are stand-alone war authorizations, they are connected to each other in a way that the other 40-plus AUMFs and congressional declarations of war are not.

The 1991 Iraq AUMF, which remains in effect, references several United Nations Security Council Resolutions (UNSCRs) in the text of the statute and states that the “President is authorized...to use United States Armed Forces pursuant to United Nations Security Council Resolution 678 in order to achieve implementation” of 11 other U.N. Security Council Resolutions.²⁴ Understanding those UNSCRs is essential if one is to understand both why the purpose of the 1991 Iraq AUMF has been accomplished and its close relationship to the 2002 AUMF.

In late May of 1990, Iraqi President Saddam Hussein accused Kuwait and the United Arab Emirates of overproducing oil, threatening the economic viability of Iraqi oil exports. In July, Hussein accused Kuwait of stealing Iraq’s oil, and on August 2, 1990, he ordered an invasion of Kuwait. Approximately 140,000 Iraqi soldiers, supported by 850 tanks, entered and occupied Kuwait. Iraqi aircraft bombed Kuwait City and air bases in the country.²⁵ The invasion was condemned by Saudi Arabia and Egypt, as well as by the United States and other Western nations.

The day of the invasion, the United Nations Security Council passed UNSCR 660,²⁶ which determined that the invasion of Kuwait was a “breach of international peace and security,” condemned the invasion, and demanded an immediate withdrawal of all Iraqi forces. UNSCR 660 was the first of several Security Council resolutions that condemned Iraq’s unlawful invasion and demanded a complete withdrawal from Kuwait.

In response to the invasion, President George H.W. Bush ordered the U.S. Navy to deploy ships to the Persian Gulf on August 3, 1990. The next day, on

August 4, Saddam Hussein appointed Alaa Hussein Ali as Prime Minister of the Provisional Government of Free Kuwait, and Iraq declared that Kuwait was the 19th Governorate of Iraq.

On August 6, 1990, the Security Council passed UNSCR 661, which reaffirmed UNSCR 660 and expressed “deep concern” that it had not been implemented. The resolution expressed the council’s determination to bring the invasion and occupation of Kuwait by Iraq “to an end and to restore the sovereignty, independence and territorial integrity of Kuwait.”²⁷ The same day, United States Secretary of Defense Richard B. Cheney visited the King of Saudi Arabia to discuss sending U.S. troops to the region.

On August 7, 1990, the United States launched Operation Desert Shield and deployed approximately 15,000 troops, Navy ships, and military aircraft to the Kingdom of Saudi Arabia. The United States Air Force sent 48 F-15 fighters of the 1st Fighter Wing from Langley Air Force Base to Saudi Arabia, where they immediately began to patrol the Saudi–Kuwait–Iraq border areas.²⁸

On August 9, 1990, the Security Council passed UNSCR 662, which expressed alarm at Iraq’s declaration of a “comprehensive and eternal merger” with Kuwait and demanded that Iraq immediately withdraw, end its occupation, and “restore the authority of the legitimate Government of Kuwait.”²⁹ It also determined that the “annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void;” urged other states, organizations, and agencies not to recognize that annexation; and demanded that Iraq rescind its actions.³⁰ Also in August, the League of Arab States met in Cairo to condemn the invasion and called on Iraq to withdraw its troops.³¹

On August 18, 1990, the Security Council, upping the diplomatic pressure once more, passed UNSCR 664, which demanded that Iraq permit the immediate departure from Kuwait and Iraq of third-country nationals; grant immediate and continuing access of consular officials; demanded that Iraq take “no action to jeopardize the safety, security or health of such nationals;” and reaffirmed the previous Security Council resolutions.

Despite U.N. condemnation, Arab League pressure, and the growing presence of U.S. and other military forces in the region, however, Iraq continued to occupy Kuwait and conduct offensive military operations. On August 20, Iraq detained 3,000 Americans and 83 British citizens in Iraq and Kuwait. President Bush condemned the act and said the Americans and British being detained “are, in fact, hostages.”³²

What followed was a succession of Security Council resolutions, each of which is referenced in the 1991 Iraq AUMF and summarized below:

1. UNSCR 665, calling on those member states cooperating with Kuwait that are deploying maritime forces to halt all inward and outward maritime shipping in order to inspect and verify their cargoes.³³
2. UNSCR 666, noting (among other provisions) that it may be necessary to provide food to civilians in Iraq and Kuwait in order to “relieve human suffering” and that Iraq remains fully responsible under international humanitarian law, including the 4th Geneva Convention, to protect civilians.³⁴
3. UNSCR 667, which, after noting that Iraq is a party to the Vienna Convention on Diplomatic Relations of April 18, 1961, and the Vienna Convention on Consular Relations of April 24, 1963, condemned Iraq for ordering the closure of diplomatic and consular missions in Kuwait, as well as its decision to withdraw the privileges and immunities of those missions; condemned the acts of violence against diplomatic missions and their personnel in Kuwait; and demanded the immediate release of nationals and foreign nationals.³⁵
4. UNSCR 669, which reaffirmed UNSCR 661 and acknowledged the fact that “an increasing number of requests for assistance have been received under the provisions of Article 50 of the [United Nations] Charter.”³⁶
5. UNSCR 670, which reaffirmed UNSCRs 660, 661, 662, 665, 666, and 667; condemned continued occupation of Kuwait and Iraqi forces’ treatment of Kuwaiti nationals; confirmed that UNSCR 661 applied to all means of transport including aircraft; decided that all states shall deny permission to any aircraft destined to land in Iraq or Kuwait to overfly their territory except under certain conditions; and increased sanctions against Iraq.³⁷
6. UNSCR 674, which reaffirmed UNSCRs 660, 661, 662, 664, 665, 666, 667, and 670; stressed the urgent need for immediate and unconditional withdrawal of all Iraqi forces from Kuwait and restoration of Kuwait’s sovereignty, independence, and territorial integrity; condemned Iraqi authorities for taking third-country nationals hostage and for mistreating and oppressing Kuwaiti and third-country nationals; and other measures.³⁸

7. UNSCR 677, which expressed grave concern at the ongoing attempts by Iraq to alter the “demographic composition of Kuwait and to destroy the civil records maintained by the legitimate Government of Kuwait.”³⁹

By late fall of 1990, it was becoming increasingly clear that Saddam Hussein had no intention of complying with the United Nations resolutions and was convinced that the military buildup in the region was most likely a hollow threat by the West and its allies in the Gulf Region.

By October 30, 1990, President Bush had made the decision to push Iraq out of Kuwait by force if necessary.⁴⁰ The President increased the U.S. force presence in the region and petitioned the United Nations for authorization to use force.⁴¹ By the end of the year, approximately 350,000 U.S. forces had been deployed to the area.⁴²

On November 29, 1990, the Security Council adopted UNSCR 678, which gave Iraq until January 15, 1991, to implement UNSCR 660 fully.⁴³ In the absence of compliance by Iraq, paragraph 2 of UNSCR 678 authorized member states “to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.”⁴⁴

On January 8, 1991, in a letter to congressional leaders, President Bush requested a congressional resolution supporting the use of all necessary means to implement UNSCR 678. The President stated that he was “determined to do whatever is necessary to protect America’s security” and that he could “think of no better way than for Congress to express its support of the President at this critical time.”⁴⁵

On January 14, 1991, both houses of Congress passed the Authorization for Use of Military Force Against Iraq Resolution, or Public Law (P.L.) 102-1.⁴⁶ Subsection 2(a) authorized the President “to use United States Armed Forces pursuant to United Nations Security Council Resolution 678 (1990) in order to achieve implementation of Security Council Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677.” Subsection (b) required the President, before exercising the authority granted in Subsection (a), to use diplomatic and “other peaceful means to obtain compliance by Iraq” with the Security Council resolutions and make a determination that those “efforts have not been and would not be successful in obtaining such compliance.”⁴⁷

Upon signing P.L. 102-1, President Bush issued a signing statement wherein he stated that “my request for congressional support did not, and my signing [P.L. 102-1] does 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."⁴⁸

Iraq refused to withdraw from Kuwait before the January 15, 1991, deadline, and on January 16, 1991, President Bush made the determination required by P.L. 102-1 that diplomatic means had not compelled and would not compel Iraq to withdraw from Kuwait. On January 18, he reported to Congress "consistent with the War Powers Resolution"⁴⁹ that he had directed U.S. forces to commence combat operations on January 16, 1991.

Note that President Bush did not ask for "authorization" from Congress to use military force, but rather requested congressional "support" for his undertaking in the Persian Gulf.⁵⁰ He believed that he had all the legal authority he needed to go to war, based not only on his authority under Article II of the Constitution, but also on applicable Security Council Resolutions. Recall that UNSCR 678 authorized member states "to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area."

When asked at a press conference on January 9, 1991, whether he thought he needed P.L. 102-1 and whether, if it didn't pass, he would feel bound by Congress's decision, President Bush stated, "I don't think I need it.... I feel that I have the authority to fully implement the United Nations Resolutions" as well as "the constitutional authority—many attorneys having so advised me."⁵¹ President Bush's statement was consistent both with his earlier signing statement and with the position taken by other Presidents regarding their constitutional authority under Article II of the Constitution to protect and defend the United States and use the military to do so, even absent express congressional authorization.⁵²

Allied air forces commenced an attack on military targets in Iraq and Kuwait. Ground forces were introduced on February 23, 1991, and Iraq was expelled from Kuwait four days later.⁵³ Exactly 100 hours after ground operations began, President Bush suspended offensive combat operations⁵⁴ because the Iraqi Army was defeated and surrendering in droves.

The (Temporary) Cease-Fire. On April 3, 1991, the Security Council adopted UNSCR 687, which established conditions for a formal cease-fire suspending hostilities in the Persian Gulf.⁵⁵ The resolution "reaffirmed the need to be assured of Iraq's peaceful intentions" given Iraq's invasion of Kuwait, its use of chemical weapons and ballistic missiles in unprovoked attacks, and reports that it had attempted to acquire materials to build nuclear weapons.⁵⁶ Among the conditions for a formal cease-fire, the resolution specified that "Iraq shall unconditionally accept the destruction,

removal, or rendering harmless, under international supervision,” of “[a]ll chemical and biological weapons and all stocks of agents and all related subsystems and components and all research, development, support and manufacturing facilities related thereto” and “[a]ll ballistic missiles with a range greater than 150 kilometres, and related major parts and repair and production facilities.”⁵⁷

On April 6, 1991, Iraqi officials accepted the terms set forth in UNSCR 687, and a formal cease-fire went into effect between Iraq, Kuwait, and the U.N. member countries that had cooperated with Kuwait under UNSCR 678, including the United States.⁵⁸ Yoram Dinstein, a preeminent law of war scholar, stated that the “labelling of [Security Council] Resolution 687 as a permanent cease-fire is a contradiction in terms; a cease-fire, by definition, is a transition-period arrangement.”⁵⁹

It is important to note that Security Council Resolution 687 suspended but did not terminate the authority to use force under UNSCR 678.⁶⁰ The cease-fire established by UNSCR 687 is similar to an armistice: Unlike a peace treaty, it does not terminate the state of war, but merely “suspends military operations by mutual agreement between the belligerent parties.”⁶¹ A cease-fire allows a party to a conflict to resume hostilities under certain conditions.⁶²

It could be argued that Iraq’s expulsion from Kuwait in February 1991 by the United States and the allied nations fully implemented the UNSCRs listed in P.L. 102-1 and that the authorization in Subsection 2(a) for the use of U.S. armed forces has therefore expired,⁶³ but Iraq accepted the terms of the cease-fire agreement in name only, as it defied, eluded, and skirted the terms of agreement throughout the 1990s. As a result, the Administrations of Presidents William J. Clinton and George W. Bush maintained that P.L. 102-1 remained in effect.⁶⁴

The 2002 Iraq AUMF

In January 2002, four months after the September 11, 2001, attacks against the United States, President George W. Bush delivered the annual State of the Union Address.⁶⁵ During his address, he outlined the national security threats to America and, in particular, singled out Iraq, Iran, and North Korea, calling them an “axis of evil.”⁶⁶ They seek “weapons of mass destruction” and “pose a grave and growing danger” to the United States and our allies.⁶⁷

By the summer of 2002, less than a year after the September 11 terrorist attacks in the United States by al-Qaeda, the Bush Administration started to talk about the significant threat to U.S. interests posed by Iraq.⁶⁸ As the

war against al-Qaeda, the Taliban, and associated forces was being waged, President Bush met with congressional leadership on September 4, 2002, and stated that he would seek congressional support in the near future for action he deemed necessary to deal with the threat that Saddam Hussein's regime posed to the United States.⁶⁹ The President told congressional leaders that "Saddam Hussein is a serious threat. He is a significant problem. And it's something that this country must deal with."⁷⁰

On September 12, 2002, in a major speech to the U.N. General Assembly, President Bush outlined his concerns about Iraq's actions since the end of the Gulf War in 1991.⁷¹ He reminded the international audience about Iraq's numerous violations of U.N. Security Council resolutions since 1991, including those related to disarmament.⁷²

A week later, the White House proposed legislation to authorize the use of military force against Iraq. It was introduced as Senate Joint Resolution 45 on September 26 and debated by the Senate from October 3 to October 11. The Senate eventually passed House Joint Resolution 114, which was a slightly amended version of the Senate resolution, on October 11. President Bush signed the Authorization for Use of Military Force Against Iraq Resolution of 2002, also known as P.L. 107-243, into law on October 16, 2002.⁷³ The 2002 Iraq AUMF did not include any geographical or temporal limitations.

On November 8, 2002, the Security Council passed UNSCR 1441, which gave Iraq one "final opportunity to comply with its disarmament obligations."⁷⁴ Failure to comply would result in "serious consequences," which everyone understood to mean the use of military force.

The primary focus of the 2002 Iraq AUMF was the threat posed by Saddam Hussein and Iraq. Section (3) authorized the President to "use the Armed Forces of the United States as he determines to be necessary and appropriate 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."⁷⁵

Note, however, that unlike the 1991 Iraq AUMF, which authorized the President to enforce previously adopted and delineated Security Council resolutions (mentioned by number in the statute), the 2002 Iraq AUMF arguably gave the President broader authority because it included "all relevant" resolutions.⁷⁶ All relevant resolutions included the UNSCRs mentioned in the 1991 Iraq AUMF, thus tying the two Iraq AUMFs to each other.

It is also worth noting that the 2002 Iraq AUMF includes several paragraphs of findings before the operative text of the statute, each paragraph beginning with the word "whereas,"⁷⁷ and that two of these paragraphs are relevant to the Trump Administration's continued reliance on the statute.⁷⁸

The Bush and Obama Administrations relied on the 2002 Iraq AUMF to maintain the presence of U.S. armed forces and to conduct military operations in Iraq. The U.N. Security Council terminated the mandate of the U.S.-led multinational force in Iraq (MNF-I) as of December 31, 2008. President Barack Obama ordered all U.S. forces to withdraw at the end of December 2011, which they did.⁷⁹

President Obama's move to withdraw all troops from Iraq at the end of 2011 was controversial.⁸⁰ Many claim that by not leaving a standby or residual military presence, President Obama contributed to, and in fact created, the circumstances that led to the rise of the Islamic State (ISIS).⁸¹ Regardless of one's views on the issue, as a legal matter, the 2002 Iraq AUMF remained on the books after the pullout and the rise of ISIS, through the degradation of ISIS and al-Qaeda, and remains current law.⁸² Some question its continued effectiveness.⁸³

Suffice it to say that when ISIS became a dominant force in Iraq in the years from 2012–2014, the Obama Administration took military action against ISIS and relied on the 2001 AUMF and the 2002 Iraq AUMF as domestic statutory authority. In its first (and only) National Defense Authorization Act (NDAA) Section 1264 war powers report,⁸⁴ the Obama Administration stated that “as a matter of domestic law, the 2001 AUMF and the 2002 [Iraq] AUMF authorize the U.S. use of force against ISIL in Iraq.”⁸⁵ Similarly, the Obama Administration wrote that, with respect to Syria, “[t]he 2001 AUMF and, in certain circumstances, the 2002 AUMF authorize the use of force in Syria against al-Qa’ida in Syria and ISIL.”⁸⁶

Oddly enough, even while it was engaged in military action against ISIS, including bombing ISIS fighters, the Obama Administration was signaling that it wanted to repeal the 2002 AUMF. On September 14, 2014, during the height of offensive military operations against ISIS, a senior Obama Administration official emailed a *New York Times* reporter when speaking about the legal authorities for military airstrikes against ISIS:

The President may rely on the 2001 AUMF as statutory authority for the military airstrike operation he is directing against ISIL. As we have explained, the 2002 Iraq AUMF would serve as an alternative statutory authority basis on which the President may rely for military action in Iraq. Even so, our position on the 2002 Iraq AUMF hasn't changed and we'd like to see it repealed.⁸⁷

Two months before this email to *The New York Times*, Susan Rice, Assistant to the President for National Security Affairs,⁸⁸ sent a letter to Speaker of the House John Boehner urging “the repeal of the outdated 2002 Authorization for Use of Military Force in Iraq.”⁸⁹

The Trump Administration has also submitted one NDAA Section 1264 war powers report.⁹⁰ In the section entitled “The Domestic Law Bases for the Ongoing Use of U.S. Military Force,” the Administration acknowledges that the “primary focus of the 2002 AUMF” was “the threat posed by Saddam Hussein’s regime in Iraq.”⁹¹ However, the report states that the “express goals” have always been understood to authorize the use of force for the related dual purposes of helping to establish a stable, democratic Iraq and addressing terrorist threats emanating from Iraq.⁹² Finally, it adds that “the 2002 AUMF reinforces the authority for military operations against ISIS in Iraq and, to the extent necessary to achieve the purposes described above, in Syria and elsewhere.”⁹³

It is at best debatable whether the 2002 Iraq AUMF’s “express goals” have “always” been understood to include “helping establish a stable, democratic Iraq.” Nowhere in the statute does it say that the goal is to “establish a stable, democratic Iraq.” The closest the statute comes to that is where, in the findings preamble to the operative section of the statute, it references the Iraq Liberation Act of 1998, P.L. 105-338, which expressed the sense of Congress that it “should be the policy” of the United States to remove from power the “current Iraqi regime” and, according to the 2002 Iraq AUMF, “promote the emergence of a democratic government to replace the regime.”

Relying on a 1998 law that merely expresses the sense of Congress to promote the emergence of a democratic government in Iraq is odd indeed. A “sense of” provision is not legally binding because it is not presented to the President for his signature.⁹⁴ Even if a “sense of” provision is incorporated into a bill—such as the 2002 Iraq AUMF—that becomes law, such a provision merely expresses the opinion of Congress or the relevant chamber.⁹⁵ It has no formal effect on public policy and no force of law.⁹⁶

The fact that the findings include a sense of Congress to promote the emergence of a democratic Iraq back in 1998 is historically interesting, but it has no legal effect. The Trump Administration is at best overreaching when it relies on that finding to assert, as it does in its NDAA Section 1264 war powers report, that the dual purpose of the 2002 Iraq AUMF includes “establish[ing] a stable, democratic Iraq.”

The second part of the 2002 Iraq AUMF’s dual purpose as cited in the Trump Administration’s NDAA Section 1264 war powers report is to address terrorist threats emanating from Iraq. The findings do include several paragraphs that, arguably, remain just as factually true in the fall of 2019 as they were in 2002 when the statute was passed. Today, however, Iraq is a partner and hosts a small number of U.S. military and other government personnel

to ward off the terrorist threat. Fortunately, Iraq is no longer a threat to the United States as it was under the Saddam Hussein regime or when ISIS controlled large areas of Iraq.

Finally, it is worth highlighting the language used by the Obama and Trump Administrations in their war powers reports when referencing the 2002 Iraq AUMF. The primary war authorization relied upon by the Bush, Obama, and Trump Administrations to prosecute the war against al-Qaeda, the Taliban, ISIS, and associated forces has been and continues to be the 2001 AUMF. Each Administration has relied and continues to rely on that war authorization as the bedrock domestic legal authority for wartime operations.⁹⁷ It has no expiration date, no geographical limitation, and no sunset clause and applies to a discrete but ever-evolving group of terrorists with connections to the 9/11 attacks. Most important, it applies in Iraq.

Furthermore, repealing the 1991 and 2002 Iraq AUMFs would have no operational, legal, or prudential impact on the efficacy of the 2001 AUMF. The 2001 AUMF has been used by successive Administrations to go after evolving terrorist threats, including terrorist groups that did not even exist in 2001. Unless Congress decides to exercise the political courage to amend it to include ISIS and other associated forces, the 2001 AUMF will remain the bedrock domestic statutory authorization to fight terrorism.

In truth, however, the lack of political will to amend, repeal, or replace the 2001 AUMF has nothing to do with repealing two unrelated, outdated AUMFs.

The Obama Administration called the 2002 Iraq AUMF an “alternative statutory authority,” meaning, no doubt, that it was supplementary to or duplicative of the authority already existing in the 2001 AUMF. Similarly, the Trump Administration said the 2002 Iraq AUMF “reinforces” the authorities needed for military operations, suggesting without saying that the 2001 AUMF provides all the authority necessary for military operations against ISIS, al-Qaeda, or associated forces in Iraq.

There has been an open and vibrant debate about whether the 2001 AUMF covers ISIS, a terrorist organization that did not even exist when the 2001 statute was passed and has disavowed and formally broken away from al-Qaeda, the group that is covered by the 2001 AUMF,⁹⁸ Yet both the Obama and Trump Administrations claim that the 2001 AUMF covers ISIS and associated forces.⁹⁹ Efforts to amend that statute have failed, and that failure on the part of the Congress and the Obama Administration has infected the debate. As a result, Congress has shied away from the much-needed debate about whether to amend the 2001 AUMF to cover ISIS and associated forces.¹⁰⁰

Nevertheless, that failure to debate the all-encompassing 2001 AUMF should not blind Congress to the fact that the 2002 Iraq AUMF is no longer necessary and merely acts as a belt-and-suspender approach to war authorizations.

The Price of Inaction

Before addressing the issue of why it would be sound policy to repeal the two Iraq war authorizations, it is important to look back on the Framers' understanding of how wars were to end. As we have seen, the constitutional separation of power and allocation of war power is between the Congress and the President. This power is likewise a shared power of Congress and the President, but in a somewhat different sense than the allocation of warmaking powers discussed above.¹⁰¹

Debates at the Constitutional Convention reveal an understanding that Congress could not effectively end war simply by passing a resolution declaring a cessation of hostilities.¹⁰² The Framers believed that only a peace treaty signed by the President and ratified by two-thirds of the Senate could formally terminate a war and that the President's role as protector and representative of the nation prevented Congress from ending a war without his consent.¹⁰³ It is telling, as some scholars argue, that the Framers did not give Congress the sole power to terminate a war, just as they did not give it the sole power to begin one.¹⁰⁴

The Framers no doubt realized that politics, as an expression of the will of the people, would heavily influence decisions about whether to go to war and whether to terminate or end a war. Both decisions have potentially grave consequences that are borne by the very people who elected representatives to Congress in the first place.

Congress possesses the appropriations power and can employ such power to defund an authorized war.¹⁰⁵ For Congress to exercise that power and cut off funds for an authorized war would effectively terminate the war as an operational matter because the President would not have the money to prosecute it, but it arguably would not terminate the war as a legal matter, at least according to some scholars.¹⁰⁶

In practice, throughout our nation's history, all declared wars have ended in treaties,¹⁰⁷ and some war authorizations¹⁰⁸ have ended in a variety of ways.¹⁰⁹ For example, while President Dwight David Eisenhower's Formosa AUMF was repealed by Congress in 1974,¹¹⁰ his 1957 Middle East Force Resolution¹¹¹ has never been repealed.

For obvious reasons, the 1991 and 2002 Iraq AUMFs are not likely candidates for treaties. Unlike the five previous declarations of war, which were

against countries that we fought to victory in total war, the Iraq AUMFs were fought primarily against a country headed by a ruthless dictator who by his actions threatened the United States, its allies, and the world community with weapons of mass destruction. Saddam Hussein was captured in December 2003, was tried in an Iraqi court for crimes against humanity, and was hanged in December 2006. The current country of Iraq is an ally, and the United States and coalition partners work with the Iraqi leadership at their request to help safeguard their country from terrorist elements.

It therefore would not be practical to sign a peace treaty with Iraq. In fact, the object and purposes of the 1991 Iraq AUMF have been met, and the 2002 Iraq AUMF was directed, as a practical matter, at Saddam Hussein. A peace treaty is not in the offing, nor is one necessary. That leaves two options on the table: keep the Iraq AUMFs in place and risk the danger that some future Administration will try to rely on one or both of them to go back into Iraq or elsewhere, or repeal them and convince the President to sign the repeal bill.

Senators Kaine and Todd Young have been consistent and vocal proponents of repealing the two Iraq AUMFs. In their joint repeal resolution, there are several congressional findings of note. They point out that the 2002 Iraq AUMF only reinforces the 2001 AUMF; that repealing the Iraq AUMFs would “not effect ongoing United States Military operations;” that since 2014, the United States military forces have been operating in Iraq at the request of the government of Iraq for the sole purpose of supporting its efforts to combat ISIS; and that neither the 1991 nor the 2002 Iraq AUMF is being used as the sole legal basis for any detention of enemy combatants held by the United States.¹¹²

Those proposed congressional findings are hard to dispute.

In November 2016, Senator Kaine took to the Senate floor to outline why he thought the Senate should debate the applicability of the 2001 AUMF to ISIS. He made a number of points, each of which has merit, and set the stage for his later efforts to repeal the Iraq AUMFs.

First, he noted that in Congress, there is a “tacit agreement to avoid debating this one in the one place that it ought to be debated: in the halls of Congress.”¹¹³ He noted that 80 percent of the Members of Congress were not in Congress when the 2001 AUMF was debated and said that “80% of us that were not here in 2001 have never had a meaningful debate or vote upon this war against ISIL.”¹¹⁴ It is time, according to Senator Kaine, for “Congress to reassert its rightful place in this most important set of decisions. Of all the powers that we would have as a Congress, I can’t think of any that are more important than the power to declare war.”¹¹⁵

The same logic can and should be applied to the two Iraq AUMFs. Virtually no current Members of Congress were in office when the 1991 Iraq AUMF was voted on, and only a handful were in office for the 2002 Iraq AUMF. Congress has no stake in either war authorization.

There are consequences to congressional inaction on the 2001 AUMF, as Ben Wittes, cofounder of the influential Lawfareblog.com, has written.¹¹⁶ Congressional failure to engage constitutes a “meaningful congressional acquiescence in the President’s bold and relatively attenuated claim of authority to confront ISIS under the 2001 AUMF.”¹¹⁷ Again, the same logic applies to the Iraq AUMFs. Senator Young asserts that repealing the two Iraq AUMFs would act to “prevent the future misuse of the expired Gulf and Iraq War authorizations and strengthen Congressional oversight over war powers.”¹¹⁸

Conclusion

There is little doubt that taking up the Kaine–Young resolution and holding a public debate, perhaps with expert witnesses, would educate Members of Congress and the public about war powers in general and whether there is a need for these two outdated, vestigial war authorizations. Congress has not had the political will or institutional stomach to be frank with the American people about the outdated and stretched-to-the-legal-brink 2001 AUMF.

The Obama Administration, to its credit, sent out senior Administration officials to give a series of public speeches explaining the legal basis for a whole host of national security–related topics, from drone strikes to detention policy to war powers. The Trump Administration has failed to follow suit, but speeches or no speeches, each Administration relied and continues to rely on an almost two-decade-old 2001 war authorization against a terrorist group that did not exist on September 11, 2001, has disavowed its connection to the group that was responsible for 9/11, and has at best a tenuous connection to the small number of terrorists covered under the 2001 AUMF.

Debating the repeal of the two Iraq war authorizations would allow Congress to re-engage its constitutional muscles on a topic about which Members should be flexing their muscles on a regular basis and that is not kryptonite to their political futures.¹¹⁹ A robust, fulsome debate would engage senior U.S. military leadership, senior U.S. diplomats, and law-of-war scholars and historians. It would require the Administration either to defend the use of the Iraq AUMFs or to agree that their usefulness has expired.

Finally, such a debate would be an act of congressional hygiene. Clearing (or cleaning) out the legislative closet of war authorizations that have long since been used up would be a first step in restoring the balance of power between Congress and the President with respect to the warmaking power.¹²⁰

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Endnotes

1. Michael Stokes Paulsen, *The War Power*, 33 HARV. J.L. & PUB. POL'Y 113 (2010).
2. See *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations*, Dec. 2016 at 7. See also Caroline D. Krass, Principal Deputy Assistant Attorney General, O.L.C. Opinion of April 1, 2011, Authority to Use Military Force in Libya, at 6; See also Authority to Use United States Military Forces in Somalia, 16 U.S. Op. O.L.C. 6, 9 (1992), and Authority of the President Under Domestic and International Law to Use Military Force Against Iraq, 26 U.S. Op. O.L.C. 143, 6 (2002).
3. See U.S. CONST. art. I, § 8, cl. 11.
4. See U.S. CONST. art. I, § 8, cl. 12.
5. See U.S. CONST. art. I, § 8, cl. 13.
6. See U.S. CONST. art. I, § 8, cl. 14.
7. See U.S. CONST. art. I, § 8, cl. 15.
8. See U.S. CONST. art. II, § 2, cl. 1.
9. See John Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167 (1996).
10. See MATTHEW SPALDING & DAVID FORTE, *THE HERITAGE GUIDE TO THE CONSTITUTION* 165 (2d Ed. 2014).
11. See ROBERT F. TURNER, *REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY* 80–96 (1991) (arguing that the President has the authority to begin armed conflict in the absence of congressional authorization). See also Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833 (1972).
12. *Id.*
13. *Id.* See also Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by Declare War*, 93 CORNELL L. REV. 45 (2007).
14. *Id.*
15. A topic beyond the scope of this paper is the difference between a formal congressional declaration of war and a congressional authorization for the use of military force. That topic, not surprisingly, has been the subject of significant debate among scholars. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2057–2066 (2005). See also Harold Hongui Koh, *The Coase Theorem and the War Power: A Response*, 41 DUKE L.J. 122, 126 (1991).
16. See Senator Tim Kaine, *Kaine & Young Introduce Bill to Repeal 1991 & 2002 AUMFs, Formalizing End of Gulf & Iraq Wars*, Press Release, March 6, 2019, https://www.kaine.senate.gov/press-releases/kaine-and-young-introduce-bill-to-repeal-1991_2002-aumfs-formalizing-end-of-gulf--iraq-wars.
17. See Pub. L. No. 102-1, 105 Stat. 3, 50 U.S.C. 1541, enacted on January 4, 1991.
18. See Pub. L. No. 107-243, 116 Stat. 1498, 50 U.S.C. 1541, enacted on October 16, 2002.
19. See Kaine, *supra* note 16.
20. *Id.*
21. See Pub. L. No. 107-40, 115 Stat. 224, 50 U.S.C. 1541, enacted on September 18, 2001.
22. See Niels Lesniewski, *Tim Kaine and the War on Zombie Wars*, Roll Call, March 7, 2019. In the same article, Senator Todd Young, cosponsor of the 1991–2002 Iraq AUMF repeal bill, says that the failure of Congress to repeal the 1991 Iraq AUMF “illustrates the level of congressional failure to perform its constitutionally mandated oversight role.”
23. According to Webster’s Dictionary, zombies are dead humans who through some supernatural power come back to life yet are speechless and appear drugged. Movie zombies murder, maim, and decapitate living human beings. Many are cannibals. They are also very hard to kill, even after they are shot. Killing a zombie usually requires decapitation of the monster. A number of zombie movies have achieved cult classic status. See, e.g., *Dawn of the Dead* (1978); *Night of the Living Dead* (1968); *Zombie* (Lucio Fulci, 1979); and dozens of others. Zombie books are also popular, the most famous being *Frankenstein* by Mary Shelley.
24. The 1991 Iraq AUMF cites U.N. Security Council Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, 677, and 678. Each UNSCR is discussed briefly in the body of this paper.
25. For a thorough, day-by-day, year-by-year chronology of Operations Desert Shield and Desert Storm, see Lieutenant Colonel Joseph P. Englehardt, *Desert Shield and Desert Storm: A Chronology and Troop List for the 1990–1991 Persian Gulf Crisis*, Strategic Studies Institute, U.S. Army War College, March 25, 1991, <https://apps.dtic.mil/dtic/tr/fulltext/u2/a234743.pdf>.
26. See S.C. Res. 660 (1990), <http://unscr.com/en/resolutions/660>.
27. See S.C. Res. 661 (1990), <http://unscr.com/en/resolutions/661>.
28. See Jim Garamone, *Marking 20 Years Since Operation Desert Shield*, American Forces Press Service, Aug. 7, 2010, <https://archive.defense.gov/news/newsarticle.aspx?id=103010>.

29. See S.C. Res. 662 (1990), <http://unscr.com/en/resolutions/662>.
30. *Id.*
31. The League of Arab States, established in 1945, is a loose confederation of 22 Arab nations, including Palestine, whose broad mission is to improve coordination among its members on matters of common interest. See Jonathan Master and Mohammed Aly Sergie, *The Arab League*, Council on Foreign Relations, October 21, 2014, <https://www.cfr.org/backgrounder/arab-league>. See also William Drozdiak, *Arab Nations Break Silence, Condemn Iraq*, WASH. POST, Aug. 4, 1990, and John Kifner, *Confrontation in the Gulf Arab Vote to Send Troops to Help Saudis; Boycott of Iraqi Oil Is Reported Near 100%; Baghdad Isolated*, N.Y. TIMES, Aug. 11, 1990.
32. See James Gerstenzang, *Bush Says 3,000 Americans Are Hostages and Warns Iraq: Gulf Crisis: "America Will Not Be Intimidated," He Declares. Hussein Is Held Responsible for the Safety of U.S. Citizens. Baghdad Gives Kuwait Embassies 5 Days to Close*, L.A. Times, Aug. 21, 1990.
33. See S.C. Res. 665 (1990), September 25, 1990, <http://unscr.com/en/resolutions/665>.
34. See S.C. Res. 666 (1990), September 13, 1990, <http://unscr.com/en/resolutions/666>.
35. See S.C. Res. 667 (1990), September 16, 1990, <http://unscr.com/en/resolutions/667>.
36. See S.C. Res. 669 (1990), September 24, 1990, <http://unscr.com/en/resolutions/669>.
37. See S.C. Res. 670 (1990), September 25, 1990, <http://unscr.com/en/resolutions/670>.
38. See S.C. Res. 674 (1990), October 29, 1990, <http://unscr.com/en/resolutions/674>.
39. See S.C. Res. 677 (1990), November 28, 1990, <http://unscr.com/en/resolutions/677>.
40. See Office of the Historian, *The Gulf War*, 1991, U.S. Department of State, <https://history.state.gov/milestones/1989-1992/gulf-war>.
41. *Id.*
42. See Jennifer K. Elsea and Mathew C. Weed, *Declaration of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications*, Congressional Research Service, Apr. 18, 2014, at 12.
43. See Jay Bybee, 26 U.S. Op. Off. Legal Counsel 143, 2 (O.L.C.) (2002).
44. *Id.*
45. See Elsea and Weed, *supra* note 42, at 12–13.
46. See Pub. L. No. 102-1, January 14, 1991.
47. *Id.*
48. See Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq, 1 Pub. Papers of George Bush 40 (1991).
49. 50 U.S.C.A. Section 1541. See also Elsea and Weed, *supra* note 42, at 26. The War Powers Resolution was enacted over President Richard Nixon's veto in 1973 purportedly to restore a congressional role in authorizing the use of force that was thought by many to have been lost in the Cold War and the Vietnam War. It mandates that the President consult with Congress "in every possible instance" before introducing U.S. armed forces into hostilities and regularly afterwards. See also Bybee, *supra* note 43, at 11–12: "Every President has taken the position that the War Powers Resolution is an unconstitutional infringement by the Congress on the President's authority as Commander-in-Chief."
50. See Statement, *supra* note 48.
51. See The President's News Conference on the Persian Gulf Crisis of January 9, 1991, 1 Pub. Papers of George Bush 20 (1991). See also Elsea and Weed, *supra* note 42, at 13.
52. For a review of the legal issues from a military lawyer's perspective, including but not limited to operational law challenges in the Persian Gulf War, see W. Hays Parks, *The Gulf War: A Practitioner's View*, 10 DICK. J. INT'L L. 393 (1992). Hays Parks was also one of the primary authors of the updated and newly issued Department of Defense Law of War Manual (June 2015), which was updated in December 2016, <https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190>.
53. See Englehardt, *supra* note 25, at 5–10. The armed forces in the coalition totaled about 737,000, to include 190 ships and 1,700 aircraft. Thirty-five countries, in addition to the United States, made up the international coalition.
54. *Id.* See also Address to the Nation on the Suspension of Allied Offensive Combat Operations in the Persian Gulf, 1 Pub. Papers of George Bush 187 (1991).
55. *Id.*
56. *Id.*
57. See S.C. Res. 687 (1991), April 3, 1991, <http://unscr.com/en/resolutions/687>. See also S.C. Res. 688 (1991), April 5, 1991, <http://unscr.com/en/resolutions/688>, which concerned the repression of the Iraqi civilian population and access by international organizations and demanded that Iraq cooperate with the U.N. Secretary-General to effect the cease-fire.
58. See Bybee, *supra* note 43, at 2.
59. See Yoram Dinstein, *WAR, AGGRESSION AND SELF-DEFENCE* 50 (3d ed. 2001).

60. See Lord Goldsmith (U.K. Attorney General) answer to House of Lords Question of March 17, 2003, <https://publications.parliament.uk/pa/cm200203/cmselect/cmffaff/405/3030407.htm>.
61. See Bybee, *supra* note 43, at 20. See also Regulations annexed to the Hague Convention on the Law and Customs of War on Land, October 18, 1907, art. 36, 36 Stat. 2277, 2305 (Hague Regulations). See also *Ludecke v. Watkins*, 335 U.S. 160, 167 (1948), and *Commercial Cable Co. v. Burluson*, 255 F. 99, 104–05 (S.D.N.Y.) (L. Hand, J.), rev'd and vacated as moot, 250 U.S. 188 (1919) (“An armistice effects nothing but a suspension of hostilities; the war still continues.”).
62. See Bybee, *supra* note 43, at 20. As this O.L.C. opinion notes, under Hague Regulations, “any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.”
63. *Id.* at 9.
64. *Id.* As stated in the O.L.C. opinion: “Subsequent congressional legislation demonstrates, however, that the authorization in Public Law 102-1 remains in effect. First, the same Congress that enacted Public Law 102-1 twice expressed its ‘sense’ that Public Law 102-1 continued to authorize the use of force even after Iraq’s withdrawal from Kuwait. Enacted on December 5, 1991, section 1095 of the National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, 105 Stat. 1290, 1488 (‘1992-1993 Defense Authorization Act’), contains a congressional finding that Iraq is violating UNSCR 687’s requirements relating to its WMD program and expresses Congress’s sense that ‘the Congress supports the use of all necessary means to achieve the goals of Security Council Resolution 687 as being consistent with the Authorization for Use of Military Force Against Iraq Resolution (Public Law 102-1).’ And section 1096 of the 1992–1993 Defense Authorization Act expresses the same Congress’s ‘sense’ that ‘Iraq’s noncompliance with United Nations Security Council Resolution 688 constitutes a continuing threat to the peace, security, and stability of the Persian Gulf region...and [that] the Congress supports the use of all necessary means to achieve the goals of United Nations Security Council Resolution 688,’ which condemns the repression of the Iraqi civilian population, ‘consistent with all relevant United Nations Security Council Resolutions and...Public Law 102-1.’ 105 Stat. at 1489. Second, in 1999, Congress amended Public Law 102-1 to extend the reporting requirements from every 60 days to every 90 days, thereby indicating that the law continues in effect. See Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, div. B, § 1000(a)(7), 113 Stat. 1501, 1536 (1999).”
65. See President George W. Bush, State of the Union Address, January 29, 2002, <https://georgewbush-whitehouse.archives.gov/news/releases/2002/01/20020129-11.html>.
66. *Id.*
67. *Id.*
68. See Elsea and Weed, *supra* note 42, at 16.
69. *Id.*
70. See Andrew Glass, *Bush Makes Case for War with Iraq*, Politico, September 4, 2002, <https://www.politico.com/story/2018/09/04/this-day-in-politics-sept-4-2002-805725>.
71. See Bybee, *supra* note 43. The O.L.C. opinion, dated October 23, 2002, concluded that the President possesses the constitutional authority to use military force against Iraq to protect United States national interests. That independent constitutional authority was supplemented by the 1991 Authorization for Use of Military Force Against Iraq Resolution and was consistent with international law because it was authorized by the United Nations Security Council or would be justified as anticipatory self-defense. The opinion also cited the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), passed a week after the September 11, 2001, terrorist attacks, as further legal authority to use military force against Iraq.
72. See Remarks by President in Address to the United Nations General Assembly, September 12, 2002, <https://georgewbush-whitehouse.archives.gov/news/releases/2002/09/20020912-1.html>. See also Elsea and Weed, *supra* note 42, at 16.
73. See Elsea and Weed, *supra* note 42, at 16–17. See also Pub. L. No. 107-243, 116 Stat. 1498.
74. See U.N. Sec. Res. 1441, <https://undocs.org/S/RES/1441> (2002).
75. See Pub. L. No. 107-243 (3)(a)(1–2).
76. See Elsea and Weed, *supra* note 42, at 17–18: “Thus, it appears to have incorporated resolutions concerning Iraq that were subsequently adopted by the Security Council at least up to the expiration of the UN mandate on December 31, 2008, as well as those resolutions adopted prior to the enactment of P.L. 107-243. The authority also appears to extend beyond compelling Iraq’s disarmament to implementing the full range of concerns expressed in those resolutions. Unlike P.L. 107-40, the President’s exercise of the authority granted is *not* dependent upon a finding that Iraq was associated in some direct way with the September 11, 2001, attacks on the United States. Moreover, the authority conferred can be used for the broad purpose of defending ‘the national security of the United States against the continuing threat posed by Iraq.’ Nevertheless, P.L. 107-243 is narrower than P.L. 107-40, as well as President Bush’s originally proposed authorization, in that it limits the authorization for the use of force to Iraq. It also requires as a predicate for the use of force that the President determine that peaceful means cannot suffice and that the use of force against Iraq is consistent with the battle against terrorism. P.L. 107-243 further limits the force used to that which the President determines is ‘necessary and appropriate.’ Finally, as with P.L. 107-40, the statutory authorization for use of force granted to the President in P.L. 107-243 is not dependent for its exercise upon prior authorization by the U.N. Security Council.” Emphasis in original. Internal footnote omitted.
77. See Pub. L. No. 107-243.

78. Courts are deeply divided over what role congressional findings should play in a court's standing inquiry. See, e.g., *Dellums v. Nuclear Regulatory Comm'n*, 863 F2d 968 (DC Cir. 1988); *United Transportation Union v. Interstate Commerce Comm'n*, 891 F2d 908 (DC Cir. 1989); *City of Los Angeles v. National Highway Traffic Safety Admin*, 912 F2d 478 (DC Cir. 1990). Interesting as those cases are, and as alive as the debate is in the courts today, the findings at issue here do not say what the Trump Administration says they do in its NDAA Section 1264 war powers report.
79. See Tim Arango and Michael S. Schmidt, *Last Convoy of American Troops Leaves Iraq*, N.Y. TIMES, December 18, 2011.
80. Why removing all U.S. troops from Iraq was controversial is beyond the scope of this paper. To read more about the topic, see James Phillips, *Obama Administration Gambles on U.S. Troop Strength in Iraq*, THE DAILY SIGNAL, September 8, 2011. See also James Phillips, *Politics Trumps Security in Obama's Bungled Troop Negotiations with Iraq*, THE DAILY SIGNAL, October 13, 2011; James Phillips, *Iraqi Government Balks in Negotiations over Extending U.S. Troop Presence*, THE DAILY SIGNAL, October 16, 2011; James Phillips, *Abrupt End of the U.S. Military Mission Boosts Security Risks in Iraq*, THE DAILY SIGNAL, December 16, 2011; James Phillips, *Iraq Plunges into Chaos as Obama Administration Celebrates End of U.S. Military Presence*, THE DAILY SIGNAL, December 2011; and James Phillips, *Q & A: What You Need to Know About ISIS in Iraq*, THE DAILY SIGNAL, June 14, 2014.
81. See Ryan N. Mannina, *How the 2011 US Troop Withdrawal from Iraq Led to the Rise of ISIS*, Small Wars Journal, December 2018, <https://smallwarsjournal.com/jrn/art/how-2011-us-troop-withdrawal-iraq-led-rise-isis>. See also Kenneth M. Pollack, *The Fall and Rise and Fall of Iraq*, The Brookings Institution, Middle East Memo Number 29, July 2013, https://www.brookings.edu/wp-content/uploads/2016/06/Pollack_Iraq.pdf, and Luke Coffey, James Jay Carafano, Thomas Spoehr, & Walter Lohman, *Now Is Not the Time to Repeat Obama's Iraq Mistake in Afghanistan*, THE DAILY SIGNAL, December 26, 2018, <https://www.heritage.org/middle-east/commentary/now-not-the-time-repeat-obamas-iraq-mistake-afghanistan>.
82. President Trump has claimed that ISIS has been defeated. See Charles Lister, *Trump Says ISIS Is Defeated. Reality Says Otherwise*, Politico, March 18, 2019. After U.S. special operations personnel killed ISIS leader Abu al-Baghdadi in October 2019, Trump again claimed that ISIS was 100 percent defeated, only to back off the claim days later, saying that the number was closer to 70 percent defeated. See John T. Bennett, *Trump Walks Back Claim of Defeating 100% of the ISIS Caliphate*, ROLL CALL, October 28, 2019, <https://www.rollcall.com/news/whitehouse/in-another-reversal-trump-walks-back-claim-of-defeating-100-of-the-isis-caliphate>.
83. See Robert Chesney, *A Response to Bruce Ackerman: Whether the 2001 and 2002 AUMFs Are Exhausted*, Lawfareblog, September 8, 2011, <https://www.lawfareblog.com/response-bruce-ackerman-whether-2001-and-2002-aumfs-are-exhausted>.
84. Section 1264 of the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91 (2017), required the Administration to provide the legal, factual, and policy bases for the United States' use of military force and related national security operations every year. The Obama Administration submitted one Section 1264 report, commonly referred to as the "war powers report." In its December 2016 report, it referred to ISIS as ISIL, which stands for the Islamic State of Iraq and the Levant, <https://www.documentcloud.org/documents/3232529-Framework-Report-Final.html#document/p1>.
85. See Trump Administration, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations*, undated, <https://assets.documentcloud.org/documents/4411804/3-18-War-Powers-Transparency-Report.pdf>, at 15.
86. *Id.* at 16.
87. See email by Senior Obama Administration official to N.Y. Times, undated, provided via email to the N.Y. Times on September 12, 2014, <https://www.documentcloud.org/documents/1301198-is-war-powers-theory-background-statement.html>.
88. Otherwise known as the National Security Advisor to the President.
89. See letter from Susan Rice to John Boehner, July 25, 2014, https://www.scribd.com/fullscreen/235109249?access_key=key-iGB8BlgK4cxNeXtuFT41&allow_share=true&escape=false&view_mode=scroll.
90. See Trump Administration, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations*, undated.
91. *Id.* at 3.
92. *Id.*
93. *Id.*
94. See Christopher M. Davis, "Sense Of" Resolutions and Provisions, Congressional Research Service, October 16, 2019, at 1, <https://fas.org/sgp/crs/misc/98-825.pdf>.
95. *Id.*
96. *Id.*
97. See Trump Administration report, *supra* note 85. For the Obama Administration's war powers report, see *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations*, December 2016, <https://www.documentcloud.org/documents/3232529-Framework-Report-Final.html#document/p1>. See also Oona Hathaway, Samuel Adelsberg, Spencer Amdur, Phillip Levitz, Freya Pitts, and Sirine Shebaya, *The Power to Detain: Detention of Terrorism Suspects After 9/11*, 38 YALE J. INT'L L. 123 (2013); Speech by Jennifer O'Connor, Department of Defense General Counsel, *Applying the Law of Targeting to the Modern Battlefield*, November 28, 2016, given at New York University School of Law, <https://dod.defense.gov/Portals/1/Documents/pubs/Applying-the-Law-of-Targeting-to-the-Modern-Battlefield.pdf>; and Speech by Jeh Johnson at Yale Law School, *National Security Law, Lawyers and Lawyering in the Obama Administration*, February 22, 2012, <https://www.lawfareblog.com/jeh-johnson-speech-yale-law-school>.

98. See *The Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for Use of Military Force*, hearing before the Senate Armed Services Committee, May 16, 2013, <https://www.armed-services.senate.gov/hearings/oversight-the-law-of-armed-conflict-the-use-of-military-force-and-the-2001-authorization-for-use-of-military-force>. See also Jack Goldsmith, testimony before United States Senate, Committee on Armed Services, May 16, 2013, https://www.armed-services.senate.gov/imo/media/doc/Goldsmith_05-16-13.pdf; Charles Stimson, testimony before United States Senate, Committee on Armed Services, May 16, 2013, https://www.armed-services.senate.gov/imo/media/doc/Stimson_05-16-13.pdf; and Scott R. Anderson, *A Primer on Sen. Merkley's Proposal to Replace the AUMF*, Lawfareblog.com, May 25, 2018, <https://www.lawfareblog.com/primer-sen-merkleys-proposal-replace-aumf>.
99. See Charles D. Stimson and Hugh Danilack, *The Case Law Concerning the 2001 Authorization for Use of Military Force and Its Application to ISIS*, HERITAGE FOUND. LEGAL MEMORANDUM No. 203, April 17, 2017, <https://www.heritage.org/defense/report/the-case-law-concerning-the-2001-authorization-use-military-force-and-its>.
100. On October 30, 2017, the United States Senate Committee on Foreign Relations held a hearing on *The Authorizations for the Use of Military Force: Administration Perspective*. The two witnesses were The Honorable Rex Tillerson, Secretary of State, and The Honorable James Mattis, Secretary of Defense. See https://www.foreign.senate.gov/hearings/the-authorizations-for-the-use-of-military-force-administration-perspective_103017.
101. See Paulsen, *supra* note 1, at 128.
102. See Yoo, *supra* note 9, at 265.
103. *Id.*
104. *Id.*
105. See Paulsen, *supra* note 1, at 131. See also Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 99–108 (1991).
106. See Paulsen, *supra* note 1, at 131. See also Mark W. Mosier, *The Power to Declare Peace Unilaterally*, 70 U.Chi.L.Rev. 1609 (2003).
107. The five declared wars were the War of 1812, ended by the Treaty of Ghent; Mexican–American War, ended by the Treaty of Guadalupe Hidalgo; Spanish–American War, ended by the Treaty of Paris; World War I, ended by the Treaties of Berlin, U.S. Austrian Peace Treaty, and Hungarian Peace Treaty; and World War II, ended by the Japanese Instrument of Surrender, Treaty of San Francisco, German Instrument of Surrender, Treaty on the Final Settlement with Respect to Germany, and Treaty of Vienna with Austria.
108. See Elsea and Weed, *supra* note 42, at 5–19.
109. The question of when the war powers that arose from the declarations of war terminated was addressed by the Supreme Court in two cases. See *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948), and *Commercial Trust Co. v. Miller*, 262 U.S. 51 (1923). The war powers end not when the peace treaty is signed or the President declares that hostilities are over but when Congress concludes that the need for the power no longer exists. See also David A. Simon, *Ending Perpetual War? Constitutional War Termination Powers and the Conflict Against al Qaeda*, 41 Pepp.L.Rev. 685 (2014) (arguing that terminating war without meaningful cooperation between the President and Congress generates tension with the principle of separation of powers that underpins the U.S. constitutional system, with the Framers' division of treaty-making authority, and with the values they enshrine).
110. See Pub. L. No. 93-475, Section 3, 88 Stat 1439, October 26, 1974. *But see* Matthew Waxman, *Remember Eisenhower's Formosa AUMF*, Lawfareblog, January 29, 2019. See also Elsea and Weed, *supra* note 42, at 8.
111. See Joint Resolution of May 9, 1957, Pub. L. No. 87-5, 71 Stat. 5. See also Matthew Waxman, *Remembering Eisenhower's Middle East Force Resolution*, Lawfareblog, March 9, 2019.
112. See S.J. Res. (116th Congress, 1st Session), Joint Resolution to Repeal the Authorizations for Use of Military Force Against Iraq and for Other Purposes, Senators Tim Kaine and Todd Young, <https://www.scribd.com/document/401216220/Kaine-Young-Introduce-Bill-to-Repeal-1991-2002-AUMFs-Formalizing-End-of-Gulf-Iraq-Wars>.
113. See Senator Tim Kaine, Speech on the floor of the United States Senate, November 30, 2016, <https://www.kaine.senate.gov/press-releases/kaine-renews-call-for-congress-to-vote-on-war-against-isil-encourages-new-debate-on-changing-security-challenges>.
114. *Id.*
115. *Id.*
116. See Benjamin Wittes, *The Consequences of Congressional Inaction on the AUMF*, Lawfareblog.com, April 8, 2015.
117. *Id.*
118. See Senator Todd Young, Press Statement, March 6, 2019, <https://www.young.senate.gov/newsroom/press-releases/young-and-kaine-introduce-bill-to-repeal-1991-and-2002-aumfs-formalizing-end-of-gulf-and-iraq-wars>.
119. Kryptonite is a fictional alien mineral that has the property of depriving Superman of his powers. It came from the comic book series *Superman*, first released in June 1938.
120. While Congress is at it, Members might also consider repealing the 1957 Middle East Force Resolution.