

Divergence of Congressional War Authority from the Founders' Intent

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Abstract

The US has committed military force to two significant operations since the withdrawal from Iraq—the 2011 intervention in Libya and the 2014 intervention against ISIS. In both of these cases, the President has broadly interpreted Article II of the US Constitution and the 2001 AUMF to justify his actions. Meanwhile, Congress has not challenged these expansions of presidential war authority, leading to a divergence from the constitutional design of the US government. Congress should use the opportunity of a new session and a fresh presidential administration to repeal the outdated 2001 and 2002 AUMFs and replace them with an AUMF focused on defeating ISIS. This will restore Congress' role as the branch with constitutional responsibility to authorize the use of military force.

Divergence of Congressional War Authority from the Founders' Intent

The founders intentionally separated war powers across the legislative and executive branches. Article I, Section 8 of the US Constitution assigns Congress the authority to declare war;¹ and Article II, Section I assigns the President the authority of Commander in Chief.² Part of the motivation for this division was to constrain the size of the military and limit the use of military power.³ Yet, since the 9-11 terrorist attacks, for over fifteen years, the United States military has been in a state of continuous warfare with Violent Extremist Organizations (VEOs). This continuous employment of military force is a divergence from the intended “peaceable bias” that the founders designed into our system of government.⁴ Many observers have voiced concern that the US has overly concentrated war powers in the executive branch.

This paper assesses the constitutional basis for the employment of US military force against the Gadhafi regime in Libya in 2011 and the Islamic State of Iraq and Syria (ISIS) starting in 2014. These two cases highlight a concentration of war authority in the executive branch based on a broad interpretation of authority derived from Article II of the Constitution and from the 2001 Authorization for the Use of Military Force (AUMF). I will argue that the divergence from the founders' intent of divided war powers illustrates how the 1973 War Powers Resolution has been ineffective in reining in broad interpretations of presidential war authority, and I will conclude that Congress must rescind the 2001 and 2002 AUMFs and replace them with a current AUMF to counter ISIS. This combination of rescind and replace would clarify the current threat to the US, focus strategy and resourcing on this threat, and restore the war authority balance between the President and Congress. It would also set a precedent that AUMFs should

be updated as the circumstances of the original authorization evolve to the point where there is a new situation requiring congressional authorization to use force.

I focus on Congress' disengagement rather than presidential overreach, because, counterintuitively, Congress' disengagement is the greater concern. The founders were concerned about the "threat that strong executive power poses to democracy."⁵ Consequently, they designed the Constitution so that Congress would check executive ambition.⁶ Current congressional disengagement means that the counterweight to executive power is absent from the equation, leading to an erosion of congressional power and risking the health of American democratic institutions. I do not deny that Congress continues to influence foreign policy and war decisions through a myriad of ways such as budgetary policy, public statements or committee hearings. Nor do I deny that the Constitution grants the Commander in Chief limited authority to repel direct attacks without congressional approval.⁷ I do, however, argue that Congress has backed away from its constitutional responsibility to decide when the nation will go to war.

The Founders' Intent: Balanced War Powers

This first section will investigate the founders' intent regarding the distribution of war powers across the executive and legislative branches of government. It summarizes *The Federalist Papers* and reviews the actions of the first presidents under the new Constitution. It will also introduce the 1973 War Powers Resolution, an attempt by Congress to restore congressional war authority in response to presidential overreach during the Cold War. It will conclude with an examination of President Clinton's unauthorized use of force in Haiti, to show that the War Powers Resolution was ineffective in curbing presidential overreach prior to 9-11.

The Federalist Papers were intended to be direct communication from the framers of the new Constitution to the American public. Alexander Hamilton, James Madison, and John Jay, all participants in Constitutional Convention, wrote them to explain and defend some of the provisions they knew would be controversial⁸ such as separation of powers, the scope of congressional powers, and the functions of the President.⁹ They were first published in New York newspapers because a majority of voters in that state seemed to lean against ratification. They were designed to satisfy pro-ratification voters while turning opponents or neutral voters to the ratification cause¹⁰

Review of *The Federalist Papers* provides the founders' perspective on the distribution of war powers within the proposed federal government. In *Federalist 4*, John Jay addressed early citizens' concerns about monarchies when he wrote, "absolute monarchs will often make war when their nations are to get nothing by it...these and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people."¹¹

Alexander Hamilton published *Federalist 69* to show how the founders designed the new government to prevent war without consent of the governed. The founders designated the President as Commander and Chief, but delegated authority to declare war, and raise and regulate the armed forces to Congress. Hamilton wrote, "The President is to be commander-in-chief of the army and navy of the United States...It would amount to nothing more than the supreme command and direction of the military and naval forces...DECLARING of war and to the RAISING and REGULATING of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature."¹² This division of authority between the executive and legislature was the

founders' check and balance on war—one branch declared the war, the other branch fought the war. War powers were assigned based on the intended characteristics of each branch.¹³

Hamilton defined the characteristics of the proposed executive and legislative branches in *Federalist 70*. Qualities of the executive branch include energy, decision, activity, secrecy, and speed; while legislative branch qualities include deliberation, wisdom, and representation of the people, their privileges and their interests.¹⁴ The founders designed the new government to be deliberate in its decision to commit itself to war by placing the power to declare war in this branch. As the U.S. Army War College's Dr. Marybeth Ulrich writes, "the founders were attempting to create a body wherein lengthy deliberations could take place, one that was subject to the influence of the press, and one which was close to and remained accountable to the public."¹⁵ Once Congress authorized war, the President would be expected to act with energy, secrecy, and speed.

The Federalist Papers show that early citizens were concerned about the concentration of power, and government decisions without the consent of the governed. The founders designed the new Constitution to create a government in which branches of government balanced each other. Examination of the early years of the republic, the period in which the founders served as presidents, offers further insight by their actions as they attempted to live up to the ideals they espoused in the Constitution.

The Early Presidents and War Authority

The founders' actions as presidents illustrate how war powers were designed to work. George Washington set the precedent when he required congressional authorization prior to using military force against Native American tribes.¹⁶ He also

deferred to Congress as the new nation came to grips with the developing threat from the Barbary pirates.¹⁷ Thomas Jefferson also exhibited a narrow interpretation of presidential war authority. In his first annual message to Congress on December 8, 1801, while reporting on an American naval clash with a Tripolitan ship, he noted that the Constitution did not grant the President the authority to use force offensively without congressional sanction, even if war had been declared against the United States.¹⁸

President James Madison continued the tradition of narrow interpretation of presidential war authority in the case of the 1810 annexation of West Florida, in which he secured congressional authorization prior to occupying a portion of Spanish territory.¹⁹ President Monroe continued the narrow interpretation of presidential war authority. In the case of Colombia's 1820 request for arms sales to expand the Latin American revolt from Spain, Monroe concluded that the President had no authority to sell arms to combatants in a struggle in which the US professed to be neutral, without congressional authorization. Such an action, he felt, would be taking sides and could be considered an act of war. This would provide the other side just cause for declaring war on the US.²⁰

The founders made their intent clear in *The Federalist Papers* and through their actions as early presidents. They understood that war powers are divided between the legislative and executive branches. Congress has authority to declare war, while the President has authority to lead the military to execute the decision to commit US military force. However, starting with the Korean War, presidents have routinely committed US military force without congressional approval.²¹ In response to President Nixon's

overreach in the conduct of the Vietnam War, Congress overwhelmingly passed the War Powers Resolution in 1973.

The War Powers Resolution

The War Powers Resolution is an example of the tension between broad presidential war making authority and congressional war declaration authority. Presidents have consistently argued that the resolution is unconstitutional. In fact, Congress passed it over a presidential veto, and disagreement over this resolution continues to the present. The War Powers Resolution contains several key points.

First, it recognizes that the President may only introduce military forces into hostilities or imminent hostilities in three situations: a declaration of war, specific statutory authorization, or a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”²²

Second, it requires that “the President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.”²³ The phrase “every possible instance” recognizes that there are times when the President must introduce military forces into hostilities when Congress is in recess.²⁴ In this case, the War Powers Resolution requires that the President removes forces from combat within 60 days, if Congress does not approve the continued deployment.²⁵ This does not apply to non-crisis deployments—the President does not have authority to commit forces for 60 days in non-emergency situations or while Congress is in session, forcing Congress’s hand to authorize.²⁶

Haiti Intervention

President Clinton rejected the War Power Resolution's authority when he considered military intervention in Haiti in 1994. The intervention was planned as an invasion until last minute negotiations resulted in an invitation from the Haitian President. Clinton insisted that the Constitution did not require him to have congressional authorization to send the military into Haiti.²⁷ Meanwhile, a broad array of constitutional scholars agreed that in non-emergency situations, the President must seek and gain congressional approval prior to committing military forces to hostilities.²⁸ President Clinton's position is stated in a letter to congressional leaders from Walter Dellinger, Assistant Attorney General for the Office of Legal Counsel. In this letter, Dellinger argued that the President did not require congressional authorization because the military was not to be used in a forceful manner, and that the Haitian President had invited the US military into Haiti.²⁹

This account by the Clinton administration is not completely accurate, because the Haiti intervention was originally planned as 20,000-member force with supporting aircraft and ships to counter armed resistance. The Clinton administration was planning an invasion of Haiti, which is an act of war. Even if he was using the threat of war as bargaining leverage, he needed congressional approval to actually use force, which he did not have. Regarding the Clinton claim that congressional authorization wasn't required because forces were deploying by invitation of a legitimate sovereign foreign government—such an invitation doesn't replace the requirement to gain congressional authorization.³⁰

The 1973 War Powers Resolution was a bi-partisan attempt by Congress to restore war powers to Congress; the Haiti case is a pre-9/11 example of its

ineffectiveness. The Haiti case also raises important issues such as threatening force without a congressional AUMF, and introducing military force at the invitation of a host nation without congressional authority.

Having established that the constitutional separation of war authority has eroded in modern times, I will turn to the 2011 intervention in Libya and the 2014 intervention against ISIS, to show that the current state of war powers is different than the founders' intent. Congressional disengagement has allowed war powers to concentrate in the executive branch as presidents have increasingly claimed broad power under Article II of the Constitution and the 2001 AUMF.

The 2011 Libyan Intervention

The United States' 2011 military intervention in Libya is an example of Congress acquiescing to the President's use of military force without seeking Congressional authorization. On 17 Mar 2011, the United Nations (UN) Security Council authorized a no-fly zone over Libya to protect civilians from Gadhafi's military forces. President Barack Obama committed the military to enforce the UN no-fly zone, but he did not seek congressional authorization. The President's perspective was that he did not need congressional approval because he already had UN Security Council authorization, constitutional authority under Article II, and was acting within historical precedent.³¹ He skirted War Powers Resolution requirements by arguing that the situation did not qualify as a "hostility," which would have required congressional authorization.³² Obama "argued that since the operation did not entail the presence of American ground forces, and that there was no active exchange of fire between Libya and US forces, this action did not meet the standard set forth in the War Powers Resolution."³³ However, there was significant disagreement over this perspective within the executive branch, since

both the Departments of Defense and Justice considered the US to be involved in hostilities.³⁴

There are sound counter-arguments to the President's assertions. First, UN authorization does not substitute for congressional approval. Section 6 of the UN Participation Act of 1945 states that Congress must approve the use of force prior to use in support of UN Security Council Resolutions.³⁵ In addition, it is difficult to conceptualize US military involvement in Libya as anything other than hostilities. The President himself said, "We struck regime forces, troops, air defenses, tanks...military assets, and we cut off...their source of supply."³⁶ US forces were involved for seven months of operations, totaling 7000 sorties, 400 airstrikes, and 145 drone strikes.³⁷ It is troubling that Congress would allow the President's characterization of the Libya campaign to stand. The President avoided War Power Resolution requirements by choosing his own definition of hostilities, and Congress acquiesced.

This is the kind of executive overreach that John Jay warned about in Federalist 4, and that the founders designed the Constitution to protect against. The Constitution assigned Congress the authority to decide to go to war, and assigned the President the authority to command those forces. Libya is an example of the President assuming both roles—decision-maker and commander. According to Ryan Hendrickson, writing in the journal *Global Change, Peace & Security*, Congress' deferment to the President is remarkable in this case because congressional leaders actively subdued internal challenges to presidential action.³⁸ Senators John McCain, John Kerry, Carl Levin, Harry Reid and Speaker John Boehner supported the President's actions and did not question the constitutionality of his military operation in Libya.³⁹ These senior members

also spoke publicly, but more importantly, they controlled the agendas in both chambers, and introduced measures of their own that drained support from the opposition. As a result, there was no serious floor or committee debate in advance of Libyan operations.⁴⁰ Unable to mount opposition through floor debate, dissenters voiced their opposition through the means their positions allowed—letters, media engagements, resolutions, and court appeals.⁴¹ Through the actions of senior legislators, “the United States Senate and House of Representatives managed to avoid legal and constitutional responsibility for this military action.”⁴²

Countering the Rise of ISIS (2014)

Presidential overreach and congressional disengagement continued as the nation attempted to address the rise of ISIS in Iraq and Syria. President Obama first committed the military against ISIS in Iraq in August 2014. When he announced the operation and explained his position, Obama stated that he had a mandate because the Iraqi government requested assistance, and because the US had unique capabilities to “help avert a massacre.”⁴³ Further, the military would execute dual missions of providing force protection for US military personnel who were advising Iraqi forces and for US civilians serving in the Erbil consulate, and providing humanitarian assistance for Iraqi religious minorities under attack from ISIS.⁴⁴ Finally, Obama seemed to frame the use of military force against ISIS as a limited military action that did not trigger the War Powers Resolution requirement to gain congressional approval: “as Commander-in-Chief, I will not allow the United States to be dragged into fighting another war in Iraq. And so even as we support Iraqis as they take the fight to these terrorists, American combat troops will not be returning to fight in Iraq, because there’s no American military solution to the larger crisis in Iraq.”⁴⁵

This is another example of the War Powers Resolution not fulfilling its intended role of constraining executive use of force without Congressional authorization. The President engaged the enemy with military forces, but defined it as support of an ally, or as a humanitarian mission rather than war; and Congress condoned it. Congress could have checked executive action through the War Powers Resolution—or the Constitution—but did not. There is a saying that “silence is consent,” and judging by Congress’ inaction, this is the current state of congressional war authority. It has reduced the constitutionally-mandated requirement to declare war, to providing an “Authorization for the Use of Military Force,” to simple silence. While the institution did not act, individual legislators raised objections. One of the most vocal opponents to Obama's decision was Representative Barbara Lee, who was also the lone dissent in the 2001 AUMF.⁴⁶ While the opponents generally supported the humanitarian and force protection missions, they were concerned over mission creep and questioned the President’s authority to act without congressional authorization.⁴⁷

In addition to evading War Power requirements, Obama claimed that he already had authority to intervene against ISIS. He initially relied on the 2001 and 2002 AUMFs as justification.⁴⁸ The 2001 AUMF is Congress’ authorization to use force against parties involved in the 9/11 attacks.⁴⁹ The 2002 AUMF is Congress’ authorization to use force to counter the threat Iraq posed for failing to comply with UN Security Council Resolutions regarding its weapons of mass destruction program.⁵⁰ The Obama administration argued that ISIS was an affiliate and now a successor of Al Qaeda, one of the organizations originally targeted in the 2001 AUMF.⁵¹ This is an assertion that many still debate today.⁵²

Avoiding War Powers Resolution requirements and claiming authority based on constitutionally-questionable grounds is troubling because it has tones that are similar to the fears that John Jay addressed in *Federalist 4*. In the mind of President Obama, the 2001 and 2002 AUMFs provide authority to employ military force against ISIS. Unfortunately, Congress has not challenged the President's interpretation. This is a breakdown of recent Congresses, not of constitutional design as described in *Federalist 69*. To ensure that US military force is used in the best interests of the country, the decision to use force must come from Congress, the branch of government that represents the people, and whose deliberations are open to public scrutiny. As *Federalist 70* states, decisions to go to war should be made in Congress through open deliberation. Decisions on how to apply military force should be made by the President, with secrecy and speed.

Why has Congress not approved an AUMF since 2002? There seem to be two lines of thinking related to this question. One is practical, the other is political. First, the practical—in February 2015, President Obama proposed a new AUMF related to the fight against ISIS. The draft AUMF drew popular criticism because it appeared to tie the hands of President Obama's successor with language that prohibited the employment of "enduring offensive ground combat operations" and included a sunset clause of three years.⁵³

House Armed Services Committee (HASC) testimony revealed a different view regarding Obama's proposed AUMF. It revealed that in reality, the new AUMF only appeared to constrain executive action.⁵⁴ As shown earlier, the President already claimed broad authority under Article II and the 2001 AUMF. This new AUMF did not

address these claims.⁵⁵ It was in fact additive to the President's perceived authority in the fight against ISIS.⁵⁶ The President had already interpreted Article II of the Constitution and the 2001 AUMF to allow the use of military force. Therefore, the sunset clause only applied to "enduring offensive ground combat," a phrase described in HASC testimony as sufficiently "elastic" as to not constrain future military decisions.⁵⁷ HASC testimony indicates that the proposed AUMF was merely "optics," and not a proper solution to the question of constitutional authority for the war against ISIS.⁵⁸ In total, three witnesses provided testimony to the HASC regarding the new AUMF: retired Army General Jack Keane, former Army vice chief of staff; Robert Chesney, associate dean for academic affairs and professor in law at the University of Texas; and Benjamin Wittes, senior fellow for governance studies at the Brookings Institution.⁵⁹ All three concluded that the proposed AUMF was not an acceptable document; there were no witnesses called to provide testimony supporting Obama's proposed AUMF.

Several observers have commented on the political explanation of why Congress has not acted to authorize military force against ISIS. Congress has had many opportunities to consider new AUMF legislation. In 2014 alone, there were 13 bills to authorize the use of military force against ISIS, but none were debated or voted on.⁶⁰ According to Amber Phillips of the *Washington Post*, "lawmakers have little to gain and plenty to lose by voting on whether to authorize military force that is already underway."⁶¹

There are two parts to this argument, electoral politics and imminent threat. Recently, legislators have been politically hurt by past AUMF votes. Hillary Clinton was plagued by her vote in favor of the 2003 invasion of Iraq, which may have cost her the

2008 Democratic nomination.⁶² The other part is that there is no imminent threat. Military force is already being used. The President has repeatedly said that he doesn't require an additional AUMF, that the 2001 AUMF provides legal justification for him. Legislators perceived the 2014 request as a ploy to damage them politically.⁶³

Douglas Kriner, writing in the *Boston University Law Review*, substantiates this notion of electoral politics overriding constitutional responsibility, and adds that presidents have political benefits for requesting an AUMF, even though they perceive they are not constitutionally required to do so. Congressional approval grants political legitimacy in the eyes of the public, and prevents congressional attacks later.⁶⁴ In addition, members of both parties prefer for the President to take all the political risk for military intervention. Opposition-party members attack later if a window of opportunity opens, while members of the President's party either ride coattails or distance themselves as the situation develops.⁶⁵ Therefore, Congressional input is influenced by calculations of political gain rather than substantial deliberation on foreign policy or war powers.⁶⁶ This is a troubling trend because it seems to indicate that elected representatives are prioritizing career survivability over their institutional responsibility.

If elected representatives avoid voting on the record to authorize the use of military force due to their re-election fears, a central tenet of the checks and balances is violated. The federal government was intentionally designed with checks on power between the branches. As one branch attempted to gain more power, the other two would act to counter-balance it, and bring it back in line with its constitutional limitations. However, if Congress fails to hold the executive branch to constitutional requirements out of fear for their individual political careers, then the constitutional safeguard against

a concentration of power in the executive will have failed, leaving American democracy open to a course that the founders did not intend. Section three of this paper will address how Congress can recover its lost war powers authority, ultimately protecting our democracy.

Rescind and Replace the 2001 and 2002 AUMFs

America's democracy has proven to be resilient—a strength of American democracy is that members of the public have the opportunity to voice their opinion about the direction of the nation by electing their President and representatives. Perhaps with the recent changes in the Presidency and Congress, there is an opportunity for a fresh attempt to gain congressional authorization to use military force against ISIS. President Trump has identified the defeat of ISIS as one of his top priorities and directed a 30-day review of policy and strategy to defeat it.⁶⁷ As President Trump crafts his strategy, he should consider asking Congress to repeal the 2001 and 2002 AUMFs and replace them with an AUMF designed specifically to focus the US military effort against ISIS. An immediate advantage is that this would place his administration on firm legal ground as it carries the long war against VEOs into its sixteenth year. In addition, a new AUMF, paired with rescindment of the 2001 and 2002 AUMFs would clarify the current threat to the US, focus strategy and resourcing, restore the war authority balance between the President and Congress, and set the example for future US military action against VEOs.

Benjamin Wittes, Robert Chesney, Jack Goldsmith, and Matthew Waxman proposed a draft version of an ISIS AUMF in November 2014 in their blog, *Lawfare*.⁶⁸ Their draft addresses the constitutionally-questionable presidential interpretation of the 2001 AUMF and Congress' disengagement from war authorization. It also eliminates

the need to incorrectly claim Article II authority to commit the military against a threat that is neither urgent nor existential. It includes a provision to continue the fight against Al Qaeda and the Afghan Taliban.⁶⁹ This is what allows for the rescindment of the 2001 AUMF. It is very specific in this regard—it names these two threats specifically, whereas the 2001 AUMF authorized “force against those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”⁷⁰ This is the phrase from the 2001 AUMF that President Obama cited to justify his intervention against ISIS. In addition, the draft includes a sunset provision.⁷¹ This forces Congress to maintain oversight and reconsider the authorization after a specified period of time. Finally, the draft contains specific reporting requirements to satisfy congressional oversight and War Powers Resolution requirements.⁷²

The fact that the US needs an updated AUMF while the threat from VEOs continues, reflects the post 9/11 reality that VEOs have emerged as a different kind of threat. It also shows that VEOs, such as Al Qaeda and ISIS, morph over time. As President Trump declared in his January 28th Presidential Memorandum Plan to Defeat the Islamic State of Iraq and Syria, ISIS is not the only VEO that threatens US interests.⁷³ A new ISIS AUMF would set a precedent for future congressional authorizations against other VEOs that may emerge to threaten US interests. Chairman of the Joint Chiefs of Staff, General Joseph Dunford, identified VEOs as a strategic challenge to the US in his comments during a Senate Armed Services Committee budget hearing in March of 2016.⁷⁴ He described VEOs as “investing in military capabilities” and “engaged with the US in a competition with military dimensions that

falls short of traditional armed conflict and the threshold for traditional military response.”⁷⁵ This type of conflict, which some label as “Grey Zone” conflict, is a type of wicked problem that the US military struggles to solve. An updated AUMF to address ISIS could help focus resources on the problem because it would signal a joint commitment from the President and Congress.

Conclusion

In sum, the US has committed military force to two significant operations since the withdrawal from Iraq—the 2011 intervention in Libya and the 2014 intervention against ISIS. In both of these cases, the President has broadly interpreted Article II of the US Constitution and the 2001 AUMF to justify his actions. Meanwhile, Congress has not challenged these expansions of presidential war authority, leading to a divergence from the constitutional design of the US government. Congress should use the opportunity of a new session and a fresh presidential administration to rescind the outdated 2001 and 2002 AUMFs and replace them with an AUMF focused on defeating ISIS. This will restore Congress’ role as the branch with constitutional responsibility to authorize the use of military force.

Congressional disengagement and concentration of war authority in the executive branch may spell trouble for the institutions of representative government. If the President can unilaterally commit the US military into pre-emptive or offensive combat—rather than purely defensive combat in response to attacks or immediate threats against the US, then what is the difference between the US military, and the military force of an absolute monarch—a fear addressed by John Jay in *Federalist 4*?

Senator Tim Kaine addressed Congress’ solemn duty to represent the interests of the American people when he wrote in 2014, “we—Congress—could hardly commit a

more immoral public act than requiring a volunteer military force to risk their lives in battle without a clear political consensus supporting their mission.”⁷⁶ There is significant potential damage to the American democratic process as laid out in the Constitution, if the President can use force without political consensus in the form of congressional approval. The potential damage is that the US could exist in a constant state of warfare without the restraining effect of democratic input.

Even in the times of Thucydides, moral decay of a civilization due to prolonged warfare was a concern. We should not consider ourselves different or able to avoid the same fate of the Athenians after years of constant warfare. The big difference is that all of society fought in the Greek wars. This “all in” effort had a wider impact on society than the “warrior caste” approach today. Maybe that is part of the problem.⁷⁷ As Kaine writes: the US has been at war since 2001, many in the US do not know a time when the US was at peace, yet only a fraction of the population has had to sacrifice. Public debate is important to connect the population with those who bear the brunt of the sacrifice.⁷⁸

The United States’ system of representative government is designed to connect the population with those who sacrifice in war. If elected representatives are disengaged from their constitutionally assigned war authority responsibility, representative democracy is at risk. It is not just the President that bears the blame. The variance between constitutional intent and modern practice is not just about executive overreach. Congressional disengagement hurts the public by depriving it of the opportunity to witness, learn from, and respond to meaningful congressional debate about whether proposed military action is in the national interest.⁷⁹

Congressional disengagement and presidential unilateralism, coupled with public disengagement as a consequence of the All-Volunteer Force, damages American democratic institutions because it could lead to wars that its citizens did not sanction through their elected representatives. Returning to the founders' intent is possible. The first step involves Congress replacing the outdated 2001 and 2002 AUMFs with a new AUMF that makes provisions for continuing the fight against Al Qaeda and the Afghan Taliban, while providing legal justification for military force against ISIS. This action, and the public debate it would initiate, would help restore Congress' role to the one that the founder's intended, as the branch that represents the public's interests, and the one that decides when the nation commits its military—its people and resources—to war.

Endnotes

¹ U.S. Constitution, art. 1, sec. 8

² U.S. Constitution, art. 2, sec. 1

³ Rachel Maddow, *Drift: The Unmooring of American Military Power* (New York: Broadway, 2012), 8.

⁴ *Ibid.*

⁵ Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* (New York: Little, 2007), 14.

⁶ *Ibid.*, 15.

⁷ *Ibid.*

⁸ Marybeth P. Ulrich, U.S. Army War College, Professor, interview by author, Carlisle, PA, January 13, 2017.

⁹ Dan T. Coenen, "A Rhetoric for Ratification: The Argument of *The Federalist* and Its Impact on Constitutional Interpretation," *Duke Law Journal* 56, no. 2 (2006): 471, in JSTOR (accessed January 13, 2017).

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