

POLICY OF WAR:
AMERICAN ARMED CONFLICT AND BARON DE JOMINI

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Abstract

The legal justifications for 16 years of American armed conflict in Iraq, Afghanistan and other locations has been based on two Authorizations for the Use of Military Force (AUMF). Congress passed the first - Joint Resolution 23, *Authorization for the Use of Military Force (AUMF)* - in the days immediately following the terrorist attacks of September 11, 2001; the second - Joint Resolution 114 - *Authorization for the Use of Military Force in Iraq* - was passed almost a year later. Three presidential administrations have widely interpreted, and wielded, these resolutions over the years to grant the executive branch broad war-making powers. However, as enemies of, and threats against, the United States continue to evolve, 2001 and 2002 AUMFs have not. In examining these resolutions against the historical record using the nine “policies of war” conceived by 19th century military strategist Baron de Jomini, we find that the 2001 AUMF most closely resembles a modern day declaration of war, while the 2002 AUMF remains in line with previous AUMFs. From this revelation, we can assert that future American military activities - especially those targeting the Islamic State - would benefit from a refined congressional mandate, one that either declares those activities under a state of war, or one that builds a clear framework that both enables, and constrains, presidential war-making authorities.

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Preface

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Introduction

This thesis centers on the 2001 and 2002 Authorizations for the Use of Military Force (AUMF). These two pieces of legislation serve as the legal backbone for the ongoing American military activities in Iraq and Afghanistan. The resolutions have also brought about expanded presidential authorities, including advanced intelligence-gathering techniques, detention procedures, treatment of enemy combatants, and military activities in far flung regions of the world, including Syria, the Horn of Africa, Yemen, and others. As 16 years have passed since the resolutions were first enacted, some contend that they are outdated and no longer relevant. In order to make a determination about these AUMFs, we must first appreciate how they came to be, and then place them within a greater historical context to determine if they are anomalous, or align to a historical trend.

Chapter one of this thesis closely examines the 2001 and 2002 AUMF resolutions and their role in authorizing the president to engage in armed conflicts across the globe. The three most recent presidential administrations have widely interpreted these resolutions over the years to grant the executive branch broad war-making powers. However, as enemies of, and threats against, the United States continue to evolve, so too must interpretations and usage of the 2001 and 2002 AUMFs. Should these AUMFs remain in place as the United States confronts new terrorist groups, like the Islamic State, or should they be amended, adapted, or even repealed in order to allow for renewed debate over presidential powers and American armed conflict? The debate is varied, but adjustments or additions to the current pieces of legislation may help to better reflect America's involvement in contemporary conflicts, especially in the Middle East.

Chapter two seeks to place the AUMFs within the historical record, using the “policies of war” coined by 19th century military theorist Baron de Jomini as a metric with which to examine the record. The 2001 and 2002 AUMFs are compared against all previous AUMFs, as well as all of America’s past declarations of war. In so doing, we can distill significant the differences between an AUMF and a declaration of war in legal terms, and understand how these differences trend across American history.

Chapter three seeks to appreciate the executive branch perspective, and examines the presidential requests to Congress for all AUMFs and declarations of war, also against Jomini’s metric. As both AUMFs and declarations of war grant the president broad authorities, analyzing presidential requests helps us understand the mindset of the executive branch ahead of military actions, and the rhetoric used to justify such activities to Congress and the American people.

Through these three chapters we will be able to determine if the 2001 and 2002 AUMFs are truly unique pieces of legislation when compared against the historical record, and will also inform a recommendation of whether or not they should be repealed, amended or retained to address future conflicts and crises. When we consider the broader scope of American history, are the 2001 and 2002 AUMF’s so unusual? Are the justifications upon which they are based so different from ones that have come before?

Chapter One: 2001 and 2002 Authorizations for the Use of Military Force

Beginning in 2001, the executive branch has relied upon two very special pieces of legislation in order to engage in armed conflicts across the globe. Congress passed the first - Joint Resolution 23, *Authorization for the Use of Military Force (AUMF)* - in the days immediately following the terrorist attacks of September 11, 2001. The second - Joint Resolution 114, *Authorization for the Use of Military Force in Iraq* - was passed almost a year later. Recent administrations have widely interpreted, and wielded, these resolutions over the years to conduct military operations overseas. However, as enemies of, and threats against, the United States continue to evolve, so too must interpretations and use of the 2001 and 2002 AUMFs. How do these AUMFs stand up against current interpretations of executive and legislative powers? Are they flawed in their construct? Sixteen years later, as America continues to fight against the rising tide of terrorist activities, especially those directed by the Islamic State, should these resolutions be amended, adapted, or even repealed in order to allow for renewed debate over presidential powers and American armed conflict?¹ This will in turn frame the narrative of the 2001 and 2002 AUMFs, and help us determine if the statutes are typical, or not, when compared against the historical record in later chapters.

The Constitution and War Powers

To fully appreciate the implications of the 2001 and 2002 AUMFs on presidential authorities vis-à-vis Congress, we must first review the Constitution and war powers.

¹ Within this paper I will refer to the *Dawla Islamiya fi al-Iraq wa al-Sham* terrorist group as the Islamic State. However, authors quoted throughout this paper refer to the group by slightly different variations including the Islamic State in Iraq and the Levant (ISIL), the Islamic State in Iraq and Syria (ISIS), and *Da'ish* (the Arabic acronym for the group). All titles describe the same group.

There are two main schools of thought: the constitutional purists and the modernists. The first group - the purists - embrace a literal reading of the Constitution. Article I of the Constitution states “The Congress shall have Power ... To declare War, ... To raise and support Armies, ... To provide and maintain a Navy, ...[and] To provide for organizing, arming, and disciplining, the Militia.”² Article II of the Constitution reads, “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States.”³ Purists look to the Framers of the Constitution for further interpretation. Some contend that the Framers sought to make the process of war difficult, and thus divided authorities between the executive and legislative branches in order to ensure balance between the two. This was largely influenced by the Framers’ experience under the British monarch. The Framers observed that “absolute monarchs will often make war when their nations are to get nothing by it, but purposes and objects merely personal, such as a thirst for military glory revenge for personal affronts.”⁴ To avoid shaping the role of the American president as a king-like leader with unlimited power, the Framers sought to balance powers between the three branches of government. Of executive powers, *Federalist 69* adds,

It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the *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.⁵

² U.S. Constitution, Article I, Section 8. September 17, 1787. Available at: <https://www.archives.gov/founding-docs/constitution-transcript>.

³ U.S. Constitution, Article II, Section 2.

⁴ Jay, John. *Federalist #4*. As printed in Kesler, Charles R. ed. *The Federalist Papers*. New York: Penguin Group, 2003, 40.

⁵ Hamilton, Alexander. “Federalist 69, The Real Character of the Executive.” *New York Packet*. March 14, 1788. http://thomas.loc.gov/home/histdox/fed_69.html. Emphasis his.

In sum, Congress has the authority to declare war; the president has the authority to wage it. This system of checks and balances against the president's war-making powers ensures that the nation goes to war after a national consensus, and not due to the hubris or potential irrationality of a runaway president.

However, the second school of thought - the modernists - does not subscribe to such a literal reading of the Constitution. Some contend that the Framers' views are outdated, and contemporary interpretations of the Constitution should take issues like globalization and technology into account. Two hundred years ago the "international system allowed the United States to choose a war making system that placed a premium on consensus, time for deliberation, and the approval of multiple institutions."⁶ However, today "the magnitude of expected harm has risen dramatically, and military force unfortunately remains the most effective means for responding to those threats, then it makes little sense to commit our political system to a single method for making war."⁷ Via the executive departments, "the president's information advantage vis-à-vis Congress in the modern era cannot reasonably be denied even if that superiority is categorically no guarantee of good policy."⁸ With the latest and greatest intelligence and information at his fingertips, the president is enabled to learn of, and respond quickly to, threats to the homeland. Thus, the president should not have to wait on a congressional authorization or declaration to use to American military forces to protect the nation from rapidly-evolving threats.

⁶ Yoo, John. "Interview with John Yoo." *University of Chicago Press*. 2005. Available at: <http://www.press.uchicago.edu/Misc/Chicago/960315in.html>

⁷ Ibid.

⁸ Mervin, David. "Demise of the War Clause." *Presidential Studies Quarterly*, December 2000, Vol. 30, Issue 4.

However, this is not to say that Congress is without the ability to check presidential actions. Modernists in the second group readily admit that Congress has other mechanisms available to it, namely the power of the purse. Congress “can enact laws that dictate how long military campaigns may last, control the purse strings that determine how well they are funded, and dictate how appropriations may be spent.... Through [these mechanisms], members of Congress can substantially increase the political costs of military action--sometimes forcing presidents to withdraw sooner than they would like or even preventing any kind of military action whatsoever.”⁹ If Congress wants to curb presidential war-making powers, it can do so through the legislative and appropriations processes. The debate over Congress’ right to declare, or not declare war, is merely tangential to the other means Congress has at its disposal. The modernists assert that if Congress really wants to check presidential actions, especially those in the military and war-making realms, then it can do so via appropriations and funding, rather than issuing or repealing AUMFs.

With these two camps - the purists and the modernists - in mind, we can turn to the further implications of the 2001 and 2002 AUMFs.

AUMF Overview: September 11, 2001 to the Present

Americans’ sense of national and physical security was forever changed on September 11, 2001. In an effort to provide the president with the ability to react immediately to horrors of that day, Congress passed Senate Joint Resolution 23, *Authorization for the Use of Military Force*, on September 14, 2001, stating that,

⁹ Howell, William G., and Jon C. Pevehouse. “When Congress Stops Wars.” *Foreign Affairs*. September/October 2007, Vol. 86, Issue 5. Available at: <https://www.foreignaffairs.com/articles/iraq/2007-09-01/when-congress-stops-wars>

“...the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”¹⁰

Congress did not precisely identify who was behind the plot, as federal intelligence agencies were still scrambling to identify the attackers. Instead, lawmakers left it up to the president to implement “frameworks and procedures to determine which uses of force fall under the 2001 AUMF’s authority.”¹¹

In short order, President Bush named al-Qaeda as the perpetrator of the attacks, and identified the Afghan Taliban as providing safe haven to the terrorist planners. Yet, how was the United States to launch a counter-assault against al-Qaeda, a group with no clear geographical borders? In this way, the 2001 AUMF “represented a novel approach to modern-era military force authorizations, because it empowered the President to target non-state actors, even to the individual level, instead of only states.”¹² The Taliban and al-Qaeda were fluid organizations, comprised of amorphous networks spanning multiple countries and consisting of followers from an array of nationalities and ethnic backgrounds. Both were extremely difficult to target, especially as their members lived among and dressed like civilians. Applying traditional rules of war to these shapeless groups bent upon destroying the West became exceptionally problematic. With commander in chief authorities under Article II of the Constitution, the right to self-defense as enumerated under United Nations Article 51, and now congressional support

¹⁰ S.J. Res. 23, 107th Congress, 224 STAT. 115 (2001). <http://www.gpo.gov/fdsys/pkg/PLAW-107publ40/html/PLAW-107publ40.htm>

¹¹ Weed, Matthew C. "Issues Concerning the Continued Use of the 2001 AUMF." *Congressional Research Service: Report* (April 14, 2015). Available at: <https://fas.org/sgp/crs/natsec/R43983.pdf>, 4.

¹² Ibid, 3

under the 2001 AUMF, the president believed he had a clear mandate to wage war against the “nations, organizations, or persons” responsible for September 11, and quickly deployed troops to Afghanistan.¹³

Within the next year, intelligence pointing to the proliferation of weapons of mass destruction under Iraqi President Saddam Hussein led to the passage of 2002 Joint Resolution 114, *Authorization for the Use of Military Force in Iraq*, authorizing the president to “use the Armed Forces of the United States as he determines to be necessary and appropriate in order to ... defend the national security of the United States against the continuing threat posed by Iraq.”¹⁴ By 2003, the United States was fighting wars in two countries: Iraq and Afghanistan. President Bush expanded many of his executive powers under the 2001 and 2002 AUMFs, resulting in several controversial detention, interrogation, surveillance and counterterrorism programs.

In 2008, Obama was elected president on a campaign that promised to end many of these programs, as well as the wars in Iraq and Afghanistan, and to increase transparency within the executive branch. However, within the first years of his presidency, President Obama continued and even strengthened President Bush’s executive powers legacy. Though President Obama ended the deployment of troops to Iraq, he expanded the war on terror to include co-belligerents, a concept within international law that describes allies or “associated forces” of an enemy who join the

¹³ Article II, Section 2 of the Constitution reads, “The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States ...”. Article 51, Chapter VII of the Charter of the United Nations reads, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

¹⁴ S.J. Res. 114, 107th Congress, 1498 STAT. 116 (2002).

fight.¹⁵ This included affiliated groups like al-Qaeda in the Arabian Peninsula and al-Shabab. Nevertheless, the president's legal counsel asserted that "an 'associated force' is not any terrorist group in the world that merely embraces the al Qaeda ideology. More is required before we draw the legal conclusion that the group fits within the statutory authorization for the use of military force passed by the Congress in 2001."¹⁶ Namely that in order to be targeted, a group must have a strong nexus to the perpetrators of the September 11 attacks and/or Saddam Hussein's regime and weapons of mass destruction program.

Though he benefitted from the expanded executive powers bolstered by the 2001 and 2002 AUMFs - which, among other activities, permitted him to green light the successful raid against Osama bin Laden - President Obama nevertheless advocated for repealing the AUMFs in order to bring a close to the wars in Iraq and Afghanistan.¹⁷ During a 2013 address, the president outlined his plans, saying,

Unless we discipline our thinking, our definitions, our actions, we may be drawn into more wars we don't need to fight, or continue to grant Presidents unbound powers more suited for traditional armed conflicts between nation states. So I look forward to engaging Congress and the American people in efforts to refine, and ultimately repeal, the AUMF's mandate.¹⁸

¹⁵ For more on international law and co-belligerents, see Ohlin, Jens David. "Targeting Co-Belligerents." *Cornell Law Faculty Working Papers*, Paper 92. December 6, 2011. Available at: http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1095&context=clsops_papers

¹⁶ Johnson, Jeh C. Speech on "National Security Law, Lawyers and Lawyering in the Obama Administration at Yale Law School." February 22, 2012. Available at: <http://www.cfr.org/defense-and-security/jeh-johnsons-speech-national-security-law-lawyers-lawyering-obama-administration/p27448>

¹⁷ Koh, Harold. "Libya and War Powers." Testimony, Senate Foreign Relations Committee, Washington, DC. June 28, 2011. <http://www.state.gov/s/l/releases/remarks/167250.htm> During the 2011 strikes in Libya, President Obama's legal team largely discarded the War Powers Resolution because they did not consider the actions there a part of active "hostilities," and argued that the president had the authority via Article II to carry out military actions. For more on the War Powers Resolution, see footnote 20.

¹⁸ Obama, Barack. "Remarks by the President at the National Defense University." National Defense University, Fort McNair, Washington, D.C., May 23, 2013, <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>

Yet, the president's efforts were quickly tabled as a new group, the Islamic State, emerged from the Syrian civil war. The Islamic State began to amass followers, funding, and infrastructure as it waged a brutal campaign across eastern Syria and north-western Iraq. Though the president asked for a new AUMF repeatedly during this time, Congress was slow to consider options. Instead of waiting, the president decided to act unilaterally, and launched airstrikes against Islamic State targets in Syria and Iraq in 2014.

President Obama provided advanced notice to Congress, stating that the “two enacted authorizations for the use of military force ... provide authorization for certain U.S. military strikes against the Islamic State in Iraq and Syria, as well as the Khorasan Group of al-Qaeda in Syria.”¹⁹ In relying on the 2001 and 2002 AUMFs, President Obama was able to side-step two important issues. First, the president could have relied upon the Libya model, when in 2011 he launched airstrikes under his Article II authorities in order to protect Americans and American interests. But at the time of the 2014 strikes, American interests in Syria were ill-defined, making legal interpretations tenuous. Second, the president could have announced that the fight against the Islamic State was the start of a new conflict, but he would have to launch strikes under the parameters of the War Powers Resolution. That resolution allows the president to conduct military activities for only 60 days without congressional approval.²⁰

¹⁹ Iraq congressional notification available at: <http://www.whitehouse.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-iraq>; Syria congressional notification available at: <http://www.whitehouse.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-syria>.

Quote from Weed, Matthew C. “A New Authorization for Use of Military Force Against the Islamic State: Comparison of Current Proposals in Brief.” *Congressional Research Service*. November 6, 2014, 1.

²⁰ Passed in 1973, the War Powers Resolution requires the president to report troop deployments and military actions to Congress within 48 hours. Forces can remain deployed for only 60 days without an AUMF or declaration of war from Congress; with no congressional approval, forces must be withdrawn. Even so, historically, presidents have not followed the guidelines within the statute. During the 2011 strikes

However, with no notification to Congress declaring the start of a *new* conflict - no starting the clock prescribed by the War Powers Resolution - President Obama signaled that his administration was willing to bring the fight to the Islamic State under the existing AUMFs. This was significant, “for if the AUMFs are a proper basis for the strikes against the Islamic State, then there is no issue under the [War Powers Resolution] because Congress has authorized the conflict.”²¹ Why bother with the War Powers Resolution, which requires a congressional resolution to continue military activities, when the president could rely on authorities that were approved more than a decade prior?

To many, President Obama’s actions signaled the president had given up hope for a new resolution. Nevertheless, the president resolved to continue discussions with Congress over the drafting of a new Islamic State-specific AUMF in order to “right-size and update whatever authorization Congress provides to suit the current fight, rather than previous fights.”²² In early 2015, President Obama submitted a draft of his AUMF proposal to Congress. Since that time, several members of Congress have also drafted proposals for a new AUMF. However, no new resolution has yet to emerge from committee to be debated, and no moves have been made to repeal the existing legislation.

in Libya, President Obama’s legal team largely discarded the War Powers Resolution because they did not consider the actions there a part of active “hostilities,” and argued that the president had the authority via Article II to carry out military actions. For more information, see: Lederman, Marty. “The War Powers Clock(s) in Iraq.” *Just Security*. September 8, 2014. <https://www.justsecurity.org/14513/war-powers-clocks-iraq/>; and, footnote 17.

²¹ Ibid. See also Iraq congressional notification, available at: <http://www.whitehouse.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-iraq>; Syria congressional notification available at: <http://www.whitehouse.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-syria>

²² Obama, Barack. “Remarks at a Press Conference.” November 5, 2014. Available at: <http://www.whitehouse.gov/the-press-office/2014/11/05/remarks-president-press-conference>

Implications of the 2001 and 2002 AUMFs - Congress & the President

“Power ceded to the executive is not easily reclaimed,” and over the course of eight years President Bush significantly expanded executive authorities under the 2001 and 2002 AUMFs, a trend President Obama continued during his tenure.²³ Both Presidents Bush and Obama used the AUMFs to widen the counterterrorism options under the executive branch. These included broadened surveillance programs, unorthodox interrogation methods, and prolonged detention of enemy combatants. Yet this was not completely without congressional consent.

Review of the *Hamdan v. Rumsfeld* Supreme Court case suggests that President Bush implemented “his policies without first obtaining authorization from Congress, even when his policies seemed to conflict with existing statutes and when he almost certainly could have obtained congressional authorization.”²⁴ Yet, when called into question, the administration was quick to receive concurrence and approval from the legislative branch.²⁵ Congress seemed content to pass legislation affirming decisions of the executive even after they had already taken place. Controversial surveillance activities were approved and codified via the USA PATRIOT Act of 2001 (reauthorized in 2006), the Protect America Act of 2007 and the USA Freedom Act of 2015. With regard to detention programs at Guantanamo Bay and elsewhere, the Supreme Court ruled in *Hamdi v. Rumsfeld* that “detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war,” providing the legal basis for holding

²³ Murray, Shoon. “Stretching the 2001 AUMF: A History of Two Presidencies,” *Presidential Studies Quarterly*, Vol. 45, Issue 1, March 2015, 99.

²⁴ *Ibid*, 450.

²⁵ Bush enjoyed wide support through most of his Presidency - both the House and Senate maintained Republican majorities from 2001 to 2007, except for a short window in 2003 when Democrats held a one vote majority in the Senate.

detainees at Guantanamo until the “end of hostilities.”²⁶ Though the Supreme Court supported the Bush administration in *Hamdi*, the Court ruled against the administration in *Hamdan v. Rumsfeld*, and found that “President Bush lacked the authority to establish his system of military commissions” for trying enemy combatants under military laws instead of civilian ones.²⁷ Nevertheless, in spite of the *Hamdan* Court’s findings, Congress decided to support the president’s initiative by authorizing a system of military commissions for detainees under the Military Commissions Act of 2006.

When it came to the treatment of detainees, the leak of the infamous “Torture Memo” and the revelation of the harsh interrogation methods at Abu Ghraib, led to widespread condemnation of the president’s detainee policies. In response, Congress passed the Detainee Treatment Act in 2005. Even so, President Bush’s signing statement read that “the administration would interpret the amendment ‘in a manner consistent with the constitutional authority of the president to supervise the unitary executive branch and as commander in chief and consistent with the constitutional limitations on judicial power.’”²⁸ In spite of the new law, President Bush gave the executive branch leeway via the signing statement to authorize interrogation procedures as necessary.

Many of the activities conceived of under the AUMFs are those traditionally seen during war time. Yet, an AUMF is not a formal declaration of war, and “this absence of a formal declaration might suggest that we are not in a state of war. However, if the United States was not in a state of war with al-Qaeda, the President’s inherent authority to act

²⁶ *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004).

²⁷ Johnsen, Dawn E. “The Story of *Hamdan v. Rumsfeld*: Trying Enemy Combatants by Military Commission,” in *Presidential Power Stories*, ed Schroeder, Christopher H. and Bradley, Curtis A. New York: Foundation Press, 2009, 471.

²⁸ Bush, George as quoted in Bumiller, Elisabeth. “For President, Final Say on a Bill Sometimes Comes After Signing.” *New York Times*. January 16, 2006.
http://www.nytimes.com/2006/01/16/politics/16letter.html?_r=0

might be severely limited, making the AUMF an essential component to the use of force.”²⁹ To further understand this perspective, we look again to the Supreme Court. During the Civil War, President Lincoln ordered the Union to institute a naval blockade on the south in advance of any congressional declaration of war. Dozens of American merchant ships were seized during the blockade, and the merchants later sued the government for conducting unconstitutional and illegal activities.³⁰ The Supreme Court ruled that “the President’s characterization of the conflict and the actions of the enemy can create a state of war even absent congressional action” in cases of self-defense; in this instance, against the Confederacy.³¹ Yet, as the war against al-Qaeda, and now the Islamic State, evolves to include robustly offensive actions, the *Prize Cases* precedent may not be enough to justify presidential action without durable congressional authorization.

Nearly half of a century later, Supreme Court Justice Jackson ruled on the levels of presidential authority in *Youngstown Sheet & Tube v. Sawyer*. Justice Jackson defined three zones: within the highest zone, presidential authority is at its apex when it is bolstered by congressional mandate.³² At the lowest “twilight zone,” presidential authority is at its weakest, as executive actions are backed only by the President’s authorities inherent within the Constitution as Congress has not yet delegated any of its powers to the executive.³³ Using this framework, both President Bush’s and Obama’s use of force is strengthened through the passage AUMF through Congress. However, when

²⁹ Cronogue, Graham. “A New AUMF: Defining Combatants in the War on Terror.” *Duke Journal of Comparative and International Law*. Vol. 22:377, 390.

³⁰ Lee, Thomas H. and Ramsey, Michael D. “The Story of the Prize Cases” in *Presidential Power Stories*, ed Christopher H. Schroeder, and Curtis A. Bradley. (New York: Foundation Press, 2009), 51-67.

³¹ Cronogue, 390.

³² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 635-641 (1952) (Jackson, J., concurring)

³³ *Ibid*.

the president seeks to expand the scope of his powers to include his Article II authorities outside of AUMF, presidential power weakens. Critics of the 2001 and 2002 AUMFs argue that the resolutions are outdated, and that their authoritative natures wane as the years pass, moving presidential powers closer to Justice Jackson's zone of twilight. Additionally, President Obama's initial deference to, and then rejection of, the War Powers Resolution only seeks to undermine Congress's legislative powers.

Justice Frankfurter's concurring statement in the *Youngstown* case warns of the "gloss" on executive power.³⁴ We find that "Congressional inaction can be deemed as implicit delegation of war making power to the executive."³⁵ Congress can remove some of the "gloss" awarded to the executive through congressional inaction by issuing legislative authorizations for war and other military actions. Additional authorizations in the fight against terrorism would help to remove some of this "gloss." Some authors contend that future lawmakers could avoid this situation "by naming the 'enemy' rather than leaving the target up to the presidential discretion," and "by defining geographical boundaries, and by setting an expiration date."³⁶

With the legal implications of the 2001 and 2002 AUMFs in mind, we can now explore the potential consequences of repealing, amending or retaining the AUMFs.

Maintain the Status Quo

Some from President Obama's administration argue that a new Islamic State-specific AUMF is not necessary if one considers other powers afforded to the president.

In addition to the 2001 and 2002 AUMFs, the powers enumerated in Article II of the

³⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 610 (1952) (Frankfurter, F., concurring)

³⁵ Cronogue, 392.

³⁶ Murray, Shoon Kathleen. "Stretching the 2001 AUMF: A History of Two Presidencies," *Presidential Studies Quarterly*, Vol. 45, Issue 1, March 2015, 194.

Constitution and within self-defense precedents in international law could form the legal cornerstone for a new fight against the Islamic State.³⁷ Of the new conflict, President Obama stated in 2015, “existing statutes provide me with the authority I need to take these actions.”³⁸ To date, “the lack of a congressional authorization hasn't stopped the president from hitting the targets he wants to hit.”³⁹

If Congress were to draft and debate a new AUMF, it would not really be “voting on whether to go to war with the Islamic State; rather, it will vote on whether or not to retroactively endorse a war that the White House has already started.”⁴⁰ A new AUMF would only serve political, rather than statutory, ends, as President Obama effectively deployed troops to Syria, authorized advise and assist missions in Iraq, and conducted hundreds of airstrikes, all without a new AUMF or other congressional action.⁴¹

Maintaining the status quo would allow President Trump to continue the fight against the Islamic State without risking a new authorization that might come with more constraints and conditional caveats. And Congress can continue to support military actions without worrying what a vote for a new war would do to their prospects for reelection. Supporting

³⁷ Article 51, Chapter VII of the Charter of the United Nations reads, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

³⁸ Office of the Press Secretary, “Letter from the President -- Authorization for the Use of United States Armed Forces in connection with the Islamic State of Iraq and the Levant,” (February 11, 2015) <https://www.whitehouse.gov/the-press-office/2015/02/11/letter-president-authorization-use-united-states-armed-forces-connection>

³⁹ Wittes, Benjamin. “Why Does the AUMF Debate Even Matter?” *Lawfare*. November 14, 2014. <https://www.lawfareblog.com/why-does-aumf-debate-even-matter>.

⁴⁰ Golan-Vilella, Robert. “Do the New AUMF’s Limits Matter?” *The National Interest*. February 11, 2015. <http://nationalinterest.org/feature/do-the-new-aumf’s-limits-matter-all-12230>.

⁴¹ Baker, Peter; Cooper, Helene; and Sanger, David E. “Obama Sends Special Operations Forces to Help Fight ISIS in Syria.” *New York Times*. October 30, 2015. <http://www.nytimes.com/2015/10/31/world/obama-will-send-forces-to-syria-to-help-fight-the-islamic-state.html>

the military efforts in Iraq and Syria under the current AUMFs allows Congress to look tough on terrorism without any of the messy political debate.

Nevertheless, some critics demand that Congress take action, if only to affirm the balance of power against the executive branch. They assert that it is Congress's responsibility, as representatives of the people, to openly debate and deliberate over the growing threat from the Islamic State, increasing instability in the Middle East, and the limits of U.S. intervention. Maintaining the status quo would only quell the debate and stifle voices of dissent.

Repeal Both AUMFs

Repealing the 2001 and 2002 AUMFs would signal that the war with al-Qaeda is over, and that the chapter on Saddam Hussein's regime is closed. During the 2014 Iraq and Syria airstrikes, President Obama "had the opportunity to put the United States on a more focused and responsible legal path for fighting Islamic terrorists," but instead "stretched the AUMF beyond all recognition and probably ensured that it will be the legal basis for war against Islamist terrorists for quite a while to come."⁴² In permitting the president to continue military actions in the Middle East under the current AUMFs, "Congress has authorized the President to use force endlessly against practically any ambitious jihadist terrorist group that fights against the United States."⁴³ For observers in this group, the executive branch's use of AUMF is "presidential unilateralism masquerading as implausible statutory interpretation."⁴⁴ Some further contend that

⁴² Goldsmith, "Further Reflections on the Legal Rationale For Using Force Against the Islamic State," *Lawfare*, September 12, 2014, <https://www.lawfareblog.com/further-reflections-legal-rationale-using-force-against-islamic-state>

⁴³ Goldsmith, "Obama's Breathtaking Expansion of a President's Power to Make War," *Time Magazine*, September 11, 2014, <http://time.com/3326689/obama-isis-war-powers-bush/>

airstrikes under the current AUMFs are wholly illegal, as the 2001 and 2002 AUMF did not provide the president with a “blank check” to strike any target, anywhere.⁴⁵ Repealing the 2001 AUMF in particular would close the seemingly open-ended interpretations of the perpetrators and supporters of the September 11 attacks, which have been stretched to include fringe groups like al-Qaeda in the Arabian Peninsula, al-Shabab, and now the Islamic State.

Among the arguments leveraged against the 2001 and 2002 AUMFs, there is an important strain of criticism against keeping the 2002 AUMF on the books. This group asserts that when troops withdrew from Iraq in 2011, so too did the authorities under the 2002 AUMF. As one scholar wrote, “It’s not a healthy practice for the government to end its involvement in a war but leave the legal authorization for that war in place.”⁴⁶ If the 2002 AUMF had been repealed at the close of the Iraq war, military actions would not have persisted under a dated authorization born from circumstances almost two decades old. Almost three years after the start of the bombing campaigns targeting the Islamic State elements in Iraq and Syria, the executive branch’s position on the use of the 2002 AUMF is convoluted at best, and Congress remains mostly silent.⁴⁷

Keep Both AUMFs and Authorize a New One

⁴⁴ Ibid.

⁴⁵ Bomboy, Scott. “Experts Ponder Obama’s War Powers Curveball.” *Constitution Center*. September 12, 2014, <http://blog.constitutioncenter.org/2014/09/experts-ponder-obamas-war-powers-curveball/>

⁴⁶ Golan-Vilella, “A Tale of Two AUMFs,” *The National Interest*, September/October 2014, Issue 133, 62.

⁴⁷ In mid-2015, President Obama’s National Security Advisor informed the House that the 2002 “Iraq AUMF is no longer used for any U.S. government activities and the Administrations fully supports its repeal.” However, considering that President Obama’s continued notifications to Congress of the airstrikes were under the authority of the 2001 and 2002 AUMFs, the National Security Advisor’s statement rings hollow. See, Rice, Susan. “Letter to Honorable John A. Boehner, Speaker of the U.S. House of Representatives,” Senate Armed Services Committee, July 25, 2014, http://armedservices.house.gov/index.cfm/files/serve?File_id=D6A70EF0-E7ED-4A8B-B39B-9774CE10B7D3

Though the executive and legislative branches seem content supporting military actions against the Islamic State under the 2001 and 2002 resolutions, there are many who argue that an additional, Islamic State-specific AUMF is necessary in order to keep pace with the ever-changing conflict in the Middle East. Presently, to remain within the parameters of the 2001 AUMF, analysts must demonstrate a link between terrorist targets and the perpetrators of September 11 in order to advocate for kill or capture.⁴⁸ Critics contend that as terrorist ideology spreads to new groups and areas, justification for military options under the 2001 AUMF grows tenuous: Osama bin Laden is dead. Mullah Omar is dead. The Taliban is weakened. Links between emerging groups, like the Islamic State, to the September 11 attacks grow increasingly distant. This is further complicated by the Islamic State's February 2014 decision to denounce al-Qaeda.⁴⁹ The Islamic State's ties to the perpetrators of September 11 are now broken, so some argue that the group can no longer be targeted under the 2001 AUMF.

However, separate analysis demonstrates that "former supporters of Saddam Hussein reportedly provide support to the Islamic State, possibly forming a link between the original aims of the 2002 AUMF and any future actions taken against the Islamic State."⁵⁰ Further, "even with the influx of thousands of foreign fighters, almost all of the leaders of the Islamic State are former Iraqi officers, including the members of its shadowy military and security committees, and the majority of its emirs and princes."⁵¹

⁴⁸ S.J. Res. 23, 107th Congress, 224 STAT. 115 (2001). <http://www.gpo.gov/fdsys/pkg/PLAW-107publ40/html/PLAW-107publ40.htm>

⁴⁹ Sly, Liz. "Al-Qaeda Disavows Any Ties with Radical Islamist ISIS Group in Syria, Iraq." *Washington Post*. February 3, 2014, https://www.washingtonpost.com/world/middle-east/al-qaeda-disavows-any-ties-with-radical-islamist-isis-group-in-syria-iraq/2014/02/03/2c9afc3a-8cef-11e3-98ab-fe5228217bd1_story.html

⁵⁰ Weed, "A New Authorization ...", 2.

Under this optic, authorization for targeting the Islamic State can shift from the 2001 AUMF to the 2002 AUMF.

It is obvious that the 2001 and 2002 AUMFs describe “rather badly the conflict that the United States is currently fighting.”⁵² The absence of a new AUMF to target the Islamic State “constitutes a meaningful congressional acquiescence in the President’s bold and relatively attenuated claim of authority to confront the Islamic State under the 2001 AUMF.”⁵³ An immediate congressional vote on the conflict against the Islamic State, settling “for a short and simple authorization to fight the Islamic State, without seeking either to expand the president’s existing statutory authority or limit his use of forces ... should be a middle way that a majority can accept.”⁵⁴ A supplementary AUMF could include specifics not included in the 2001 and 2002 AUMF, like refining the target (the Islamic State), location (Iraq and Syria) and the scope of American military actions, and what these efforts can and cannot entail.

An Islamic State-specific AUMF could complement the 2001 and 2002 AUMFs. Both AUMFs are essential to continued counterterrorism operations. Though in many areas defeated, al-Qaeda is not dead, and the 2001 AUMF provides ample justification for continued targeting under its parameters. However, to avoid the hairsplitting requirements involved in targeting the Islamic State today under the 2001 AUMF, a new AUMF would provide counterterrorism operators clear guidelines on how to confront the

⁵¹ Sly, “The Hidden Hand Behind the Islamic State Militants? Saddam Hussein’s.” *Washington Post*. April 4, 2015. https://www.washingtonpost.com/world/middle_east/the-hidden-hand-behind-the-islamic-state-militants-saddam-husseins/2015/04/04/aa97676c-cc32-11e4-8730-4f473416e759_story.html

⁵² Ibid.

⁵³ Wittes, Benjamin. “The Consequences of Congressional Inaction on the AUMF.” *Lawfare*. April 8, 2015. <https://www.lawfareblog.com/consequences-congressional-inaction-aumf>

⁵⁴ Washington Post Editorial Board. “No Way to Fight a War.” February 14, 2015. https://www.washingtonpost.com/opinions/no-way-to-fight-a-war/2015/02/14/56f83fd2-b3b4-11e4-854b-a38d13486ba1_story.html

Islamic State. This new resolution could “complement but not replace” the 2001 and 2002 AUMFs.⁵⁵ Others caveat that “it is of vital importance that any new AUMF not create the artificial and potentially harmful limitations which are unfortunately a hallmark of the President’s [February 2015] proposal.”⁵⁶ A broad AUMF could allow the president to continue airstrikes and limited combat operations against the Islamic State in Iraq and Syria, but within distinct guidelines tailored to the terrorist group.

Separately, some scholars maintain that the executive should share with Congress the political fallout of any future wars in the Middle East. The authors of *A Statutory Framework for Next-Generation Terrorist Threats* wrote, “Presidential action based on statutory authority has more political and legal legitimacy than action based on Article II alone. Article II actions leave the president without overt support of Congress, which can later snipe his decisions or take actions to undermine them.”⁵⁷ In avoiding a vote on a new AUMF, members of Congress are in a better position to critique the president should the war become unpopular, as most wars do. It is in the president’s best interest to bring “other people along for the ride, a political sharing of risk and responsibilities, as a nation.”⁵⁸ Robust political debate among members of the legislature to repeal the old AUMFs and draft a new one ensures that responsibility is equally distributed between the

⁵⁵ Castle, William S. “The Argument for a New and Flexible Authorization for the Use of Military Force.” *Harvard Journal of Law & Public Policy*, Vol. 38, http://www.harvard-jlpp.com/wp-content/uploads/2015/05/Castle_Final.pdf, 511.

⁵⁶ Ibid.

⁵⁷ Chesney, Robert, et al., “A Statutory Framework for Next-Generation Terrorist Threats,” *Hoover Institution*, February 25, 2013. <http://www.hoover.org/research/statutory-framework-next-generation-terrorist-threats>.

⁵⁸ Pavel, Barry quoted in O’Toole, Molly. “Obama’s Dramatic Reversal on Bush’s Laws of War.” *DefenseOne*. September 15 2013. <http://www.defenseone.com/politics/2014/09/obamas-dramaticreversal-bushs-laws-war/94169/>

branches of government, and signals that the nation is collectively willing to engage in war.

Conclusion

The debate over the 2001 and 2002 AUMFs, and America's involvement in the fight against the Islamic State, continues. As President Trump increases American involvement in the military operations targeting the Islamic State, the executive's legal authorities for conducting these operations have not changed. As one scholar observes, "The [executive branch] seems to want to have its cake and eat it. It would like congressional authorization, but does not want to admit that the war is illegal without it."⁵⁹ The lack of authorization has implications beyond the legal realm, as it demonstrates that the executive branch's "failure to obtain congressional authorization is part of a broader failure to build a political consensus behind the intervention, and to articulate clear objectives for it."⁶⁰ As a result, domestic political risk and American deaths remain low, but the likelihood of a successful outcome is also low without the tangible buy-in from Congress and the American people.

Though the U.S. has already committed troops and air power, Congress has done little to address the changing nature of the conflict in legislation. Congress has also done little to check executive authorities that have grown as a result of the 2001 and 2002 AUMFs. As one scholar observes, "The framers believed that individual liberties and rights were protected not by trust in a president but by a system of divided government

⁵⁹ Somin, Ilya. "Still No Legal Authorization for the War Against ISIS." *The Volokh Conspiracy Blog, Washington Post*. June 13, 2015. <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/13/still-no-legal-authorization-for-the-war-against-isis/>

⁶⁰ Ibid.

that puts a premium on deliberation and shared power. Congress has forgotten that basic tenet at great cost.”⁶¹ The consequence of congressional inaction is an emboldened president who switches between nodes of executive power at will. Sometimes the president sources powers from the existing AUMFs, other times from Article II of the Constitution, and sometimes from the self-defense clauses within the United Nations Charter. Without a clear mandate from Congress, the executive branch will continue to pick and choose from among those legal wellsprings as it sees fit. This is not necessarily a bad thing: as a single office, the president can react quickly to events as they unfold instead of waiting for cumbersome deliberation to take place in Congress. However, as a representative democracy, lawmakers owe it to their constituents to have an open and honest debate about the threat the Islamic State poses to the American people, and to what degree lawmakers are willing to restrain or strengthen the executive to fight this threat.

However, when we consider the broader scope of American history, are the 2001 and 2002 AUMFs so unusual? Are the justifications upon which they are based so different from ones that have come before? Is it possible that present trends are really a reflection of past efforts? Chapter two will seek to frame the 2001 and 2002 AUMFs within the historical record, including declarations of war, in order to find out.

⁶¹ Fisher, Louis and Ryan C. Hendrickson. “Congress at War.” *Foreign Affairs*. Issue 87, No. 3, May-June 2008.

Chapter Two: War Powers and Congress

The first chapter of this thesis explored the 2001 and 2002 Authorizations for the Use of Military Force (AUMF). Congress and the President rely upon these AUMFs to justify current American military actions against the Islamic State terrorist group, yet critics contend that the decade-old authorizations cannot be applied to the conflict. A tenant of this debate hinges on the balance between the role of Congress in declaring war and the President's mandate as Commander in Chief to wage it. President Obama's administration argued that it had the legal authority under the current AUMFs to target the Islamic State and its supporters in Iraq, Syria and Libya.⁶² President Trump's administration has yet to outline its legal approach to targeting the Islamic State, but has already deployed troops under the previous precedence.⁶³ Nevertheless, there are many who are at odds with the executive branch's interpretation of presidential authorities.⁶⁴ They argue that operations directed against the Islamic State are outside of the scope of the 2001 and 2002 AUMFs, which focused on defeating and deterring the perpetrators of September 11 — later scaled to al-Qaeda and affiliates — and Saddam Hussein's regime

⁶² Office of the Press Secretary, "Letter from the President -- Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant," (February 11, 2015) <https://www.whitehouse.gov/the-press-office/2015/02/11/letter-president-authorization-use-united-states-armed-forces-connection>

⁶³ President Trump approved the deployment of 400 additional troops to Syria under the existing AUMFs in early March 2017. For more information, see, "Press Briefing by Press Secretary Sean Spicer, 3/10/2017, #21." *Office of the Press Secretary*, the White House. March 10, 2017. <https://www.whitehouse.gov/the-press-office/2017/03/10/press-briefing-press-secretary-sean-spicer-3102017-21>, and, Gordon, Michael R. "U.S. Is Sending 400 More Troops to Syria." *The New York Times*, March 9, 2017. https://www.nytimes.com/2017/03/09/world/middleeast/us-troops-syria.html?_r=0

⁶⁴ The *Lawfare* blog hosts contributions by legal scholars Jack Goldsmith, Benjamin Wittes, and others, and is an excellent forum for debates questioning the 2001 and 2002 AUMFs. See in particular Goldsmith, Jack. "The Legal Consequences of Islamic State + Al Qaeda Cooperation, and Implications for AUMF Reform." *Lawfare*, November 14, 2014. <https://www.lawfareblog.com/legal-consequences-islamic-state-al-qaeda-cooperation-and-implications-aumf-reform>, and Goldsmith. "Further Reflections on the Legal Rationale For Using Force Against the Islamic State." *Lawfare*, September 12, 2014. <https://www.lawfareblog.com/further-reflections-legal-rationale-using-force-against-islamic-state>

and weapons of mass destruction program in Iraq.⁶⁵

An informed discussion on the future of the 2001 and 2002 AUMFs would not be complete without a consideration of predecessor AUMFs. This second chapter seeks to analyze the legislative history of AUMFs by focusing on legislative language that empowers the President to commit American troops to armed conflicts without a declaration of war. In order to evaluate the AUMFs, the theories of 19th century Swiss military strategist Baron Antoine Henri de Jomini are utilized. Best known for his work on the nine “principles of war,” his lesser appreciated discourse on the nine “policies of war” outline distinct circumstances that may compel a nation to go to war. When we hold historical legislation against Jomini’s nine policies, a unique understanding of why Congress has authorized the President to use force in certain circumstances begins to emerge. The analysis then allows for a better understanding of why certain conflicts do not escalate to general war and how congressional authorization for the use of the U.S. military might be used in the future.

Differences between Declaring War and Using Force - An Overview

Congress and the President have myriad military options available. Two, however, are most significant: a declaration of war and an authorization for the use of military force. Each can yield substantially different results. A Congressional declaration of war commits the entire nation to “general war,”⁶⁶ which is understood to be “of the perfect kind; because one whole nation is at war with another whole nation; and *all* the members

⁶⁵ P.L. 107-40, “Authorization of the Use of U.S. Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States.” 115 Stat. 224, September 18, 2001; P.L. 107-243, “Authorization of the Use of Force Against Iraq Resolution of 2002.” 116 Stat. 1498, October 16, 2002.

⁶⁶ Justice Washington, *Bas v. Tinhy*, U.S. (4 Dall.) 37 (1800), 40.

of the nation declaring war are authorized to commit hostilities against all the members of the other, in every place, and under every circumstance.”⁶⁷ Declaring war initiates a series of chain reactions that summon and bestow sweeping authorities upon the Commander in Chief, most importantly the ability to direct all American armed forces against an identified enemy (usually a foreign nation). Additionally, the declaration initiates standby legislation, including statutes that allow the President to compel private, domestic industry to produce military hardware and arms (and seize those manufacturing plants that refuse to comply),⁶⁸ interdict all trade departing the enemy’s shores,⁶⁹ and even “authorize electronic surveillance without a court order”.⁷⁰ This legislation is set so that all of American society — public and private — must pivot so that their primary goal is to support their nation at war.

AUMFs, on the other hand, are often initiated to wage “limited war.”⁷¹ AUMFs do not bestow broad powers upon the President “because those who are authorized to commit hostilities, act under special authority, and can go no farther than to the extent of their commission.”⁷² An AUMF by itself does not confer upon the executive branch any additional privileges; for the most part, benefits are rendered via the AUMF statute itself, which may include language affording the President further authorities like equipping and arming naval vessels in order to protect merchant ships from pirates, or undertaking military assistance programs to protect allies.⁷³ However, Congress or the President may

⁶⁷ Justice Chase, *Bas v. Tinhy*, 43. “Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects and in time.”

⁶⁸ Alien Enemy Act, 50 U.S.C. § 21

⁶⁹ Trade with the Enemy Act, 12 U.S.C. § 95a

⁷⁰ Foreign Intelligence Surveillance Act, 50 U.S.C. § 1811

⁷¹ See *supra* note 40.

⁷² *Bas v. Tinhy*, 40.

seek to establish a national emergency in tandem with an AUMF, thereby invoking those statutes activated by a state of emergency. These statutes can permit extending military service obligations, increasing the number of service members in the military reserves, and imposing economic sanctions against hostile nations, to name a few.⁷⁴

So why might the executive and legislative branches seek an AUMF over a declaration of war, especially when a declaration of war comes with so many built-in authorities for the Commander in Chief? Many times, the President asks for and/or Congress drafts an AUMF because the nature of the conflict does not merit “general war.” American forces may be used to provide humanitarian aid, security assistance, or support to allies.⁷⁵ These limited military actions may not require all of the authorities invoked in a general war, and the President and Congress may decide that an AUMF is enough.

Secondly, international law is vague when it comes to specifying the type of legal

⁷³ Act of May 28, 1798, “Protection of the Commerce and Coasts of the United States.” Ch. 48, 1 Stat. 561, and P.L. 85-7, “Promotion of Peace and Stability in the Middle East.” 71 Stat. 5 March 9, 1957 [H.J.Res. 117].

⁷⁴ 10 U.S.C. § 123 and § 123 (a), and 50 U.S.C. § 1701 (known as the “International Emergency Economic Powers Act”), respectively.

⁷⁵ “War” does not encompass all military actions. Instead, military operations reside along a sliding scale of intensity; for details, see Joint Publication 3-0, *Joint Operations*. 11 Aug 2011. http://www.dtic.mil/doctrine/new_pubs/jp3_0.pdf. On the lowest end of the spectrum are those engagements characterized as “routine activities that establish, shape, maintain and refine relations with other nations and domestic civil authorities,” (Joint, x). Protecting captured ships on the Marquesas Islands in 1813, and conducting air security operations during the early 1990s in Bosnia are a few examples. Middle range operations characterized by “crisis response and limited contingency operations” include “small-scale, limited-duration operations ... which might include combat depending on the circumstances,” (Joint, xi). Deploying troops to Somalia in 1992 as part of a humanitarian response to protect United Nations aid shipments, and executing a Non-combatant Evacuation Operation (NEO) in Rwanda in 1994, are prime examples within the middle range. Military activities on the far end of the spectrum are typified by “major operations and campaigns” and include “extended-duration, large-scale operations that usually involve combat,” (Joint, xi). This includes declaring war against the Spanish in Cuba during the Spanish American War in 1898, and deploying forces to Panama in 1989 to dissolve General Noriega’s authoritarian regime. It is important to note that this scale is fluid and operations can slide along the spectrum in both directions as they evolve. For example, American involvement in the Balkans in the 1990s started on the low end of the spectrum with stability operations, and eventually escalated to the high end with American Special Operations Forces (SOF) engaged directly in ground combat.

action needed to precipitate war. Most scholarship is in agreement that a declaration of war has the effect of creating a state of war.⁷⁶ However, some assert that a nation *must* formally declare war in order to undertake actions specific to war (e.g., kill enemy soldiers, take prisoners, seize property).⁷⁷ Others contend that a formal declaration is not necessary for a state of war to exist.⁷⁸ Thus, an AUMF could be enough to generate a state of war, without actually declaring one. Since World War II, “most states ... even when engaged in armed conflict, have resisted describing the conflict as war.”⁷⁹ The charter of the United Nations states that member nations shall “save succeeding generations from the scourge of war” yet does not prohibit members from engaging in hostilities out of self-defense.⁸⁰ Following World War II, the United States has been comfortable operating in this grey area. President Bush’s legal team interpreted the 2001 and 2002 AUMFs to

⁷⁶ See Elsea, Jennifer K. and Weed, Matthew C. “Declarations of War and the Use of Military Force: Historical Background and Legal Implications.” *Congressional Research Service*. 18 April 2014, 19-21.

⁷⁷ Article I of the Hague Convention, which the United States ratified, stipulates, “The contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war.” *Convention (III) Relative to the Opening of Hostilities*. The Hague, 18 October 1907. <https://ihl-databases.icrc.org/ihl/INTRO/190?OpenDocument>

Grotius contends, “But to make a war just ... it must not only be carried on by the sovereign authority on both sides, but it must also be duly and formally declared, and declared in such a manner, as to be known to each of the belligerent powers.” See Grotius, Hugo. *The Rights of War and Peace, including the Law of Nature and of Nations*, trans by A.C. Campbell, New York: M. Walter Dunne, 1901. Available at <http://oll.libertyfund.org/titles/553>, 317.

Vattel also asserts, “Without such a public declaration of war, it would, in a treaty of peace, be too difficult to determine those acts which are to be considered as the effects of war, and those that each nation may set down as injuries of which she means to demand reparation.” See Vattel, Emmerich de. *Law of Nations*. Eds Béla Kapossy and Richard Whitmore. Indianapolis: Liberty Fund, 2008. Available at <http://oll.libertyfund.org/titles/2246>, 316.

⁷⁸ Bynkershoek states, “My opinion, then, is that a declaration is not demanded by any exigency of reason, that while it is a thing which may properly be done, it cannot be required as a matter of right. War may begin by a declaration, but it may also begin by mutual hostilities.” See Bynkershoek, Cornelius Van. *Questions of Public Law in Two Books*. 1737. Trans. Tenney Frank (1992). Available at Lonang Institute, <http://lonang.com/library/reference/bynkershoek-questions-public-law/bynk-102/>

⁷⁹ Elsea, 22.

⁸⁰ United Nations. *Charter of the United Nations*. 24 October 1945. Available at: <http://www.un.org/en/charter-united-nations/>. For the self-defense clause, see Chapter VII, Article 51 of the Charter.

permit actions typical of war, like detention of enemy combatants and electronic surveillance, yet without a formal war declaration.⁸¹

Finally, domestic law attempts to balance the inherent tension between the war powers of the legislative and executive branches. Article I of the Constitution provides Congress the right to declare war. Article II empowers the President as Commander-in-Chief of the armed forces and the ability to wage war.⁸² These roles are deceptively straightforward: seemingly one cannot act without the other. However, history concedes that American Presidents have frequently committed troops to conflict with limited Congressional consultation, or have bypassed Congress altogether. In modern times, war declarations and AUMFs are both constrained by the War Powers Resolution (WPR), which was enacted in 1973 over President Nixon's veto. The WPR was an effort by Congress to reign in the President's over-extension in dedicating troops to armed conflict without "proper consultation" of Congress during Vietnam and the Cold War.⁸³ Under the WPR, the President has 48 hours to report to Congress any instance where American

⁸¹ It is worth noting that other international standards - particularly those established under the Geneva Conventions - that pertain to norms like proportionality, the treatment of non-combatants, and the types of munitions used, are not bound by conventions of war and are still observed by most signatories regardless of the status of the military action.

Supreme Court decisions rendered during President Bush's administration substantiate actions typically authorized in war. The *Hamdi v. Rumsfeld* case "interpreted the AUMF as authorizing the detention of a U.S. citizen captured in Afghanistan as a 'fundamental incident of waging war'" in spite of the fact that an AUMF, rather than a war declaration, authorized the American military actions in Afghanistan (Elsea, 24). Rulings on the Foreign Intelligence Surveillance Act (FISA) outlined additional AUMF exemptions. Upon a declaration of war, the President is only afforded 14 days to conduct wiretaps without a court order. President Bush's administration argued that counterterrorism concerns under the 2001 AUMF permitted FISA activities outside of the two-week window. (This was further codified in "Protect America Act," P.L. 110-55, which Congress passed to authorize additional electronic surveillance measures in support of counterterrorism activities.)

⁸² U.S. Constitution, Article I and Article II. September 17, 1787. Available at: <https://www.archives.gov/founding-docs/constitution-transcript>

⁸³ Baker III, James A., Christopher, Warren, et al. *National War Powers Commission*. Miller Center of Public Affairs, University of Virginia, 21-26. The War Powers Resolution was precipitated by the Gulf of Tonkin Resolution - one of the AUMFs examined later in this paper - after "Congress attracted criticism for passing the Tonkin resolution too quickly and with little scrutiny" and lawmakers sought options to bring about the end of American involvement in Vietnam (Baker, 21).

armed forces are “introduced into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.”⁸⁴ This could be at the outbreak of war — when the President must forego an initial consultation of Congress in order to react quickly — or when benign military activities unexpectedly escalate. The President must terminate any military actions within 90 days if Congress has not authorized them. The WPR is important because it seeks to put military authorizations back in the hands of Congress. Nevertheless, the President has frequently side-stepped the WPR since its inception, especially when it comes to AUMFs, and Congress has done little to enforce the Resolution’s conditions.⁸⁵ In this way, the executive branch has successfully conducted military actions with only limited input or guidance from Congress.

With these three points in mind — the scale of military actions, international legal norms and Congressional oversight — a pattern on why Presidents may favor an AUMF over a declaration of war begins to emerge. If the President can avoid the politics surrounding a war declaration, and yet still reap the benefits of declaring war, then what incentive does the President have to choose war, which is almost always politically unpalatable? In its short history, the United States has deployed its military hundreds of times to support a wide spectrum of operations, beginning in 1798 with the United States’ undeclared naval war with France. Since that time, the United States has consistently engaged in some form of military operation overseas, from humanitarian aid missions to

⁸⁴ 50 U.S.C. § 1541.

⁸⁵ Baker III at page 24 observes, “Every President since Ford has questioned the constitutionality of the War Powers Resolution and submitted reports that are ‘consistent with,’ but not ‘pursuant to’ the statute.” Additionally, though individual members of Congress have brought lawsuits against the President for not observing the WPR, “Congress as a whole has never sought to compel the President to comply with the War Powers Resolution of 1973 or file a report under Section 4(a) of the Resolution.”

drone strikes.⁸⁶ Many of these conflicts were preceded by presidential requests for “broad authority to use U.S. military force in a specific region of the world in order to defend U.S. interests or friendly states as the President deems appropriate.”⁸⁷ Contrastingly, Congress has only enacted eleven declarations of war relating to five separate wars, with the last formal declaration during World War II.⁸⁸

Given that, in many ways, AUMFs permit activities often reserved for a declaration of war, we must wonder if something fundamental in the nature of war has changed. The contemporary Congress and the President are complicit in avoiding declarations of war. Thus, we must seek to scrutinize the record, and establish a baseline on which to evaluate AUMFs and war declarations. To do so, we look to Jomini. His nine “policies of war” outline a framework of timeless justifications for war against which we can examine legislative rhetoric. If we put war declarations on Jomini’s scale, we may discover that AUMFs are even *more* war-like, and fall into many categories of war justifications typically reserved for outright declarations. In this way, we may conclude that AUMFs are simply war declarations wrapped in sheep’s clothing.

Table 1. *AUMF Statutes 1798 to 2002.*

	Title	Date	Target
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⁸⁶ The Congressional Research Service neatly documented almost all of these deployments in an extensive report to Congress in 2015. See, Torreón, Barbara Salazar. *Instances of Use of United States Armed Forces Abroad, 1798-2015*. Congressional Research Service. 15 Oct 2015. <https://www.fas.org/sgp/crs/natsec/R42738.pdf>

⁸⁷ Elsea, 5.

⁸⁸ Though the Japanese attack on Pearl Harbor resulted in the United States’ initial declaration of war during that conflict, President Roosevelt asked Congress five more times to declare war against individual nations, with the final declarations approved between June 2-5, 1942 against Rumania, Bulgaria and Hungary. See the following war resolutions: Japan: Act of Dec. 8, 1941, Ch. 561, 55 Stat. 795; Germany: Act of Dec. 11, 1941, Ch. 564, 55 Stat. 796; Italy: Act of Dec. 11, 1941, Ch. 565, 55 Stat. 796; Bulgaria: Act of June 5, 1942, Ch. 323, 56 Stat. 307; Hungary: Act of June 5, 1942, Ch. 324, 56 Stat. 307; Rumania: Act of June 5, 1942, Ch. 325, 56 Stat. 307. With the exception of Austria-Hungary, Congress affirmed in its legislative language that a state of war had been “thrust upon the United States,” that the US role was of a nation attacked and not one of an aggressor.

1	<i>Protection of the Commerce and Coasts of the United States</i>	May 28, 1798	France
2	<i>Protection of the Commerce of the United States</i>	July 9, 1798	France
3	<i>Protection of the Commerce and Seamen of the United States Against Tripolitan Cruisers</i>	February 6, 1802	Tripoli
4	<i>Protection of the Commerce and Seamen of the United States Against the Algerian Cruisers</i>	March 3, 1815	Algeria
5	<i>Suppression of Piracy</i>	1830s-1860s	Undefined
6	<i>Authorization for the President to Employ the Armed Forces of the United States for Protecting the Security of Formosa, the Pescadores, and Related Positions and Territories of That Area</i>	January 29, 1955	Formosa and the Pescadores
7	<i>Promotion of Peace and Stability in the Middle East</i>	March 9, 1957	Middle East
8	<i>Maintenance of International Peace and Security in Southeast Asia</i>	August 10, 1964	Southeast Asia
9	<i>Multinational Force in Lebanon</i>	October 12, 1983	Lebanon
10	<i>Authorization of the Use of U.S. Armed Forces Pursuant to U.N. Security Council Resolution 678 with Respect to Iraq</i>	January 14, 1991	Iraq
11	<i>Authorization of the Use of U.S. Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States</i>	September 18, 2001	Undefined
12	<i>Authorization of the Use of Force Against Iraq Resolution of 2002</i>	October 16, 2002	Iraq

Legislation under Review

Though Congress has authorized the President to use force dozens of times, this paper will focus on twelve AUMF statutes. These statutes authorized activities across the spectrum of military operations;⁸⁹ for example, the 1983 foray into Lebanon was an effort to increase peace and stability in the Middle East, while the piracy wars in the early 1800s were aggressive defensive operations aimed at protecting American commerce and

⁸⁹ For details on the types of military operations, see Joint Publication 3-0, *Joint Operations*. 11 Aug 2011. http://www.dtic.mil/doctrine/new_pubs/jp3_0.pdf.

keeping shipping lanes open.

Table 2. *American Declarations of War.*

	Title	Date	War
1	War with Great Britain 1812	June 18, 1812	War of 1812
2	War with Mexico 1846	May 13, 1846	Mexican-American War
3	War with Spain	April 25, 1898	Spanish-American War
4	War with Germany	April 6, 1917	WWI
5	War with Austria-Hungary 1917	December 7, 1917	WWI
6	War with Japan 1941	December 8, 1941	WWII
7	War with Germany 1941	December 11, 1941	WWII
8	War with Italy 1941	December 11, 1941	WWII
9	War with Bulgaria 1942	June 5, 1942	WWII
10	War with Hungary 1942	June 5, 1942	WWII
11	War with Rumania 1942	June 5, 1942	WWII

All were debated and passed through both houses of Congress. These statutes are listed in Table 1. In addition, this paper will highlight eleven war declarations, which are outlined in Table 2.

There are some notable absences within Table 1. Though often referred to as the “Korean War,” the 1950 military conflict on the Korean peninsula was not prefaced by any legislation, and thus could not be included. Though the War Powers Resolution was passed in the 1970s, both Congress and the executive branch did not seek formal approval for any operations in the 1980s, including the invasions of Grenada in 1983 and Panama in 1989, and 1983 air campaign in Libya (in response to the Lockerbie bombing).⁹⁰ Formal approval was also not sought for several operations in the 1990s,

including Somalia, Haiti, and the former Yugoslavia, as “even when asserting itself, [Congress] never drew a hard line claiming the exclusive power to decide when and where to make war.”⁹⁰ In contrast with the enmity of the Vietnam era, the military operations in the 1980s and ‘90s “were short in duration, were considered successful, and thus did not attract significant opposition from the American people.”⁹² Additionally, some sources contend that during this time communication between the executive and legislative branches improved, and that “even in cases where the President and Congress openly disagreed, the two branches engaged in some form of dialogue.”⁹³ Many military activities in the 21st century, though seemingly disparate - drone strikes and direct action missions in Libya, Yemen, the Horn of Africa and most recently Syria - were all conducted under the auspices of the 2001 AUMF. An examination of the language within these Congressional authorizations allows us to determine why Congress authorized the President to use the American military to conduct hostilities. As law, these resolutions also help us understand the “will” of Congress vis-a-vis the President.

Jomini and the Nine Policies of War

Examining legislative language is not particularly illuminating if we do not have a measure against which to quantify and categorize details within the text of the legislation. To do this, we look to Jomini and his nine “policies of war.” The Swiss military strategist

⁹⁰ It is worth noting that the House of Representatives did pass legislation regarding Grenada ... in praise of success of the military campaign! See Richards, Clay F. “GOP Governors Praise Reagan Record.” 15 November 1983. *United International Press*. <http://www.upi.com/Archives/1983/11/15/GOP-governors-praise-Reagan-record/8588437720400/> and Smith, Hedrick. “O’Neill Now Calls Grenada Invasion ‘Justified’ Action.” 09 November 1983. *New York Times*. <http://www.nytimes.com/1983/11/09/world/o-neill-now-calls-grenada-invasion-justified-action.html>

⁹¹ Baker III, 18.

⁹² Ibid.

⁹³ Ibid.

is best known for his work on the nine “principles of war,” which were informed by his experiences during the great European wars while serving under Napoleon and Czar Alexander.⁹⁴ Jomini’s theories impressed his superior officers, who were taken by his scientific approach to warfare. His concepts - including massing forces at the enemy’s point of friction, establishing interior lines of maneuver, and the importance of unity of command - were adopted by the US Army in 1921 and later adapted and incorporated into American military doctrine.⁹⁵ In fact, junior officers still study Jomini’s nine principles of war today.

Jomini’s also wrote nine “policies of war.”⁹⁶ These are both lesser known and explored in the literature. In the opening of *The Art of War*, which in later chapters details his nine principles, Jomini underscores the importance of the policies of war. He writes, “Under this heading [policy of war] are included those considerations from which a statesman concludes whether a war is proper, opportune, or indispensable, and

⁹⁴ At the time of Jomini’s writing in the 1800s, war was simple. Young Jomini was inspired by the excitement of the French Revolution, and joined the French military in 1798. He then served under Napoleon during the campaigns in Prussia and Austerlitz. Throughout this time, Jomini crafted many of his theories, which eventually caught the eye of Napoleon who promoted Jomini to a position on his staff. However, Jomini’s arrogance rankled many of his compatriots, who eventually conspired to see to Jomini’s arrest. Disheartened by the actions of his peers, in 1813 Jomini elected to join the Russian army, where he spent the remainder of his military service publishing works on military strategy and history. For additional information on Jomini’s background, see G.B.M. “General Jomini.” *The Galaxy*. Vol. 7, Issue 6, June 1869, 874-885; and, Gilbert, Adrian. *The Encyclopedia of Warfare: From Earliest Time to the Present Day*. Fitzroy Dearborn Publishers: London, 2000, 133.

⁹⁵ 1921 U.S. Army Training Regulation No. 10-5; for details, see Glenn, Russell W. “No More Principles of War?” *Parameters*. Spring 1998, 48-66. Available at: <http://strategicstudiesinstitute.army.mil/pubs/parameters/Articles/98spring/glenn.htm>.

⁹⁶ In a direct translation of *The Art of War* by the Perseus Center at Tufts University, the heading of the first chapter of Jomini’s tome is translated as “The Policy of War.” In the U.S. Army’s 1862 translation, this is translated as “Statesmanship in Its Relation to War.” Though I draw from the U.S. Army’s translation throughout this thesis due to its clarity, I believe the original, close translation of this title as “Policy of War” best captures the issues at hand. For the US Army translation, see Jomini, Baron de. *The Art of War*. Trans. Wendell G.H. and Craighill, W.P. US Army. 1862. Available at: http://www.au.af.mil/au.awc/awcgate/readings/jomini_art_of_war/13549-h.htm. For the Tufts translation, see Jomini, Baron de. *Summary of the Art of War, or a New Analytical Compend of the Principle Combinations of Strategy, of Grand Tactics and of Military Policy*. Trans. Winship, O.F. Available at: <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A2001.05.0051%3Achapter%3D1>

determines the various operations necessary to attain the object of the war.”⁹⁷ Before exploring how war ought to be conducted, Jomini contends that the strategic thinker must understand why war is conducted; the tactician must identify the type of war he hopes to fight before he can fight it. Jomini observes that “these different kinds of war influence in some degree the nature and extent of the efforts and operations necessary for the proposed end.”⁹⁸

The nuances between officially declaring war, authorizing the use of force, or pledging troops to conflicts short of war, did not exist during Jomini’s time. When nations sought to commit troops and national resources to resolve conflicts on a battlefield, this was simply considered war, not something more or less.⁹⁹ Though Jomini never provided us with a clear definition of war, his contemporary, Carl von Clausewitz observed that war is “an act of violence intended to compel our opponent to fulfill our will.”¹⁰⁰

By today’s standard, Clausewitz’s definition of war and Jomini’s strategic observations encompass many of our military’s actions, from stability operations to crisis response. Were both Jomini and Clausewitz to be transplanted into today’s defense landscape, they would likely be baffled by the plethora of options available to lawmakers and soldiers when it comes to defining and engaging in war or armed conflict. Under congressional and presidential support, we subscribe to varying degrees of war and

⁹⁷ Jomini, 14.

⁹⁸ Jomini, 14. It is worth noting that Jomini did not rank or categorize his nine policies - instead they are listed at random. He notes, “War is always to be conducted according to the great principles of the art; but great discretion must be exercised in the nature of the operations to be undertaken, which should depend on the circumstances of the case,” (15). Each war is different, thus means to achieve the ends will also be different depending on the situation at hand.

⁹⁹ Rapoport, Anatol. “Introduction.” In Clausewitz, Carl von. *On War*. Penguin Books: London, 1832, 17-29.

¹⁰⁰ Ibid, 101.

conflict. Both the legislative and executive branches remain content operating in a grey area that would have been unfathomable to military strategists from the 19th century.

For Jomini, however, the situation has always been clear cut, and this lack of ambiguity allows us to draw out the key themes in his policies of war without being mired by the nuances within *Joint Publication 3-0*'s spectrum of military operations, or the tenuous legal definitions embraced by President Bush and President Obama's administrations. Jomini's policies of war are as follows:

- To reclaim certain rights or to defend them;
- To protect and maintain the great interests of the state, as commerce, manufactures, or agriculture;
- To uphold neighboring states whose existence is necessary either for the safety of the government or the balance of power;
- To fulfill the obligations of offensive and defensive alliances;
- To propagate political or religious theories, to crush them out, or to defend them;
- To increase the influence and power of the state by acquisitions of territory;
- 7. To defend the threatened independence of the state;
- 8. To avenge insulted honor;
- 9. From a mania for conquest.¹⁰¹

Jomini's policies are not unique in the literature of war theory.¹⁰² His policies are intended for the statesman - in our case, members of Congress - for determining what kind of war a statesman hopes to advocate for and conduct. In recent years, and especially in an age of nuclear weapons, threats to the United States' national security and world peace factor into lawmakers' calculations on whether or not troops should be

¹⁰¹ Jomini, 14.

¹⁰² Michael Howard maintains a similar outlook to Jomini, writing, "However inchoate or disreputable the motives for war may be, its initiation is almost by definition a deliberate and carefully considered act and its conduct, at least at the more advanced levels of social development, a matter of very precise central control. If history shows any record of 'accidental' wars" we have yet to find them. Howard suggests that wars are fought in an effort to forestall threats to the nation. He writes, "... in general, men have fought during the past two hundred years neither because they are aggressive nor because they are acquisitive animals, but because they are reasoning ones: because they discern, or believe that they can discern, dangers before they become immediate, the possibility of threats before they are made." See Howard, Michael. "The Causes of Wars." *The Wilson Quarterly* (1976-) 8, no. 3 (1984): 95-97.

committed to conflict. Efforts to defend the national security of the United States, and her allies, have been central to many decisions to engage in military actions. In many ways, Jomini's policies describe responses to threats - be it to trade and commerce in Policy 2, or independence in Policy 7 - as reason enough to compel a nation to war.

The world has changed significantly since Jomini's time. There were no "non-state actors" in the way we conceive of them today; the closest comparison might be defectors within a country plotting a coup against the regime in power, or pirates at sea. The most terrible weapon available might have been a cannon or trebuchet; today nuclear warheads mounted on bombers or launched by submarines present a viable and potentially catastrophic threat. Given Jomini's impact on U.S. military doctrine and his influence on the legacy of American officers and their strategies from the Revolutionary War onward, examination of Jomini's policies of war may help us better understand why the U.S. Congress has decided to engage in armed conflict in its short history. Though more than two hundred years separate Jomini's theories from the present day, his observations are particularly salient when we scrutinize the American role in continued armed conflicts in Iraq and Afghanistan, and against global terrorism. We can use Jomini's nine policies as a quantitative benchmark against which we can measure the qualitative language of Congressional action.

Congressional Legislation and Nine Policies

Each of the twelve AUMF statutes and eleven war declarations examined in this paper have been scrutinized through the lens of Jomini's nine policies. In each case, the legislative text was examined for its applicability to a policy of war. For example, if a

legislative clause or statement implied that Congress authorized the President to use force to defend an ally, then that legislation fulfilled Policy 4 - “fulfilled the obligations of alliances.” If that same legislation also included text that described the President’s ability to use military force to defeat Communism, then that legislation would also fulfill Policy 5 - “to crush out political theories.” Appendix 1 includes a comprehensive chart, detailing the precise authorization language for the twelve statutes and section(s) that relate to Jomini’s nine policies. As the example above shows, if an AUMF contains language that fits more than one policy, it is categorized more than once.

Table 3. *Policies of War and AUMF*

Policy of War	Authorizations	Total
1. To reclaim certain rights or to defend them	France (May 1798), Southeast Asia (1964), Global Terrorism (2001)	3
2. To protect and maintain the great interests of the state, as commerce, manufactures, or agriculture	France (May 1798), France (July 1798), Tripoli (1802), Algeria (1815), Piracy (1830s)	5
3. To uphold neighboring states whose existence is necessary either for the safety of the government or the balance of power	Formosa (1955), Middle East (1957), Southeast Asia (1964), Lebanon (1983), Iraq (1991), Iraq (2002)	6
4. To fulfill the obligations of offensive and defensive alliances	Southeast Asia (1964), Lebanon (1983), Iraq (1991), Iraq (2002)	4
5. To propagate political or religious theories, to crush them out, or to defend them	Formosa (1955), Middle East (1957), Southeast Asia (1964), Global Terrorism (2001), Iraq (2002)	5
6. To increase the influence and power of the state by acquisitions of territory		0
7. To defend the threatened independence of the state	France (May 1798), Tripoli (1802), Algeria (1815), Iraq (1991), Iraq (2002) ** Every American declaration of war	5 + 11
8. To avenge insulted honor	Global Terrorism (2001), Iraq (2002)	2
9. From a mania for conquest		0

As the United States has matured, AUMFs have changed focus. Generally, early legislative statutes fall under Policy 2 (“to protect and maintain the great interests of the state, as commerce”) and 7 (“to defend the threatened independence of the state”). Immediately following the establishment of the United States, the new country faced many threats to its commerce from sea, particularly from the French. Congress asserted that the French “have recently captured the vessels and property of citizens thereof, on and near the coasts, in violation of the law of nations, and treaties between the United States and the French nation,” and further, “have committed depredations of the commerce of the United States ...”¹⁰³ These pronouncements squarely fell within Policy 2 (commerce), but included elements from Policies 1 (defending rights) and 7 (defending independence). Thus, the May 1798 legislation authorized the President to “instruct and direct the commanders of armed vessels belonging to the United States to seize, take and bring into any port ... any such armed vessel which have committed ... depredations of the vessels belonging to [American] citizens.”¹⁰⁴ A month later, additional legislation further authorized the President to “instruct the commanders of the public armed vessels ... to subdue, seize and take any armed French vessel;” “grant to the owners of private armed ships ... special commissions in the form which he shall direct.”¹⁰⁵

In the following years Congress continued to use the rhetoric within Policies 2 and 7 as reasons to authorize of the President’s use of force. At the time, American maritime commerce faced threats from Tripoli and Algeria, and acts of piracy against American merchants traveling through the Caribbean and along the Latin American coast

¹⁰³ Act of May 28, 1798, “Protection of the Commerce and Coasts of the United States.” Ch. 48, 1 Stat. 561.

¹⁰⁴ Ibid.

¹⁰⁵ Act of July 9, 1798, “Protection of the Commerce of the United States.” Ch. 68, 1 Stat. 578.

line were frequent. As a new nation, the United States depended greatly on international trade not only for income, but also to cement America's role as a viable European trade partner, and to reinforce the United States' newly-won independence from the English monarchy. Congress did not declare war on France, Tripoli or Algeria - a national war immediately following the American war for independence would have been crippling as the nation sought to rehabilitate - but instead saw fit to restrain the President's actions to the sea and authorize the use of the Navy and merchant marines. In this way, Congress and the President were able to use limited assets to protect American commercial interests at sea, and to defend America's sovereignty.

As the 20th century began, Congress began to design AUMF language to reflect new threats to the nation and its allies. In this period, Policy 3 ("to uphold neighboring states whose existence is necessary ... for the balance of power") and Policy 5 ("to propagate political or religious theories, to crush them out, or to defend them") were the most frequent justifications adduced in legislative language. This period witnessed an increase in military intervention operations overseas. As Jomini observed, "It may be doubtful whether a nation has the right to interfere in the internal affairs of another people; but it certainly has a right to oppose it when it propagates disorder which may reach the adjoining states" and this sentiment aligned with the government's views.¹⁰⁶

The use of force in Formosa, the Middle East, Southeast Asia, Lebanon, and Iraq twice, were all periods of American intervention overseas. Congress justified intervention through a desire to maintain a balance of power within those regions of the world, and to forestall the spread of ideologies, like Communism, that were not consistent with

¹⁰⁶ Jomini, 19.

American values. In the Formosa statute (1955), the Middle East (1957) and Southeast Asia (1964), Congress used near identical language: “the United States regards as vital to its national interest and to world peace” the maintenance of security/national integrity/stability in a country or region - a shared sentiment of Policy 3.¹⁰⁷ The Middle East and Southeast Asia statutes both explicitly cite threats from Communism, and also align with Policy 5.¹⁰⁸

Though not specifically referencing Communism, the Formosa legislation cites threats from China, which had just emerged from the 1949 Communist Revolution.¹⁰⁹ As Jomini lamented, “the safety of the army may be endangered by these distant interventions. The counterbalancing advantage is that its own territory cannot then be easily invaded, since the scene of hostilities is so distant; so that what may be a misfortune for the general may be, in a measure, an advantage to the state.”¹¹⁰ In the case of these three statutes, conflict was far from America’s shores, and though some might have deplored the use of American forces, the threat to the homeland remained low. And in fact, the advantages to the state in maintaining regional stability and promoting American values outweighed the risks.

¹⁰⁷ For the exact language in each statute, see Appendix 1.

¹⁰⁸ In the Middle East - “assistance against armed aggression from any country controlled by international communism.” (P.L. 85-7, “Promotion of Peace and Stability in the Middle East.” 71 Stat. 5 March 9, 1957 [H.J.Res. 117]).

In Southeast Asia - “deliberate and systemic campaign of aggression that the Communist regime in North Vietnam has been waging against its neighbors.” (P.L. 88-408, “Maintenance of International Peace and Security in Southeast Asia.” 78 Stat. 384, August 10, 1964).

¹⁰⁹ The Formosa Legislation states, “... the Mutual Defense Treaty between the United States of America and the Republic of China, which recognizes that an armed attack in the West Pacific area ... would be dangerous to the peace and safety of the parties to the treaty.” The Treaty, signed in early 1955, prevented the annexation of Taiwan by the Chinese. See: P.L. 84-4, “Authorization for the President to Employ the Armed Forces of the United States for Protecting the Security of Formosa, the Pescadores, and Related Positions and Territories of That Area.” 69 Stat. 7, January 29, 1955.

¹¹⁰ Jomini, 21.

It is worth noting that the statute authorizing the use of force in Southeast Asia, better known as the “Gulf of Tonkin Resolution,” was controversial. Many felt that the resolution had been ratified too quickly. Senator Ernest Gruening later reflected, “The mood then was that ‘papa knows best’—that the President had information we didn’t have ... We assumed that what the President told us was true.”¹¹¹ The discovery of misinformation led to outrage in later years as the war in Vietnam grew more bloody and protracted. In an effort to restrict the use of force by the President in the future, Congress passed the War Powers Resolution (WPR) in an effort to “require the President to more openly and actively consult with Congress before engaging in future hostilities.”¹¹² The WPR outlines specific reporting requirements, necessitating “the President to consult with Congress before introducing U.S. armed forces into hostilities or situations where hostilities are imminent, and continue such consultations as long as U.S. armed forces remain in such situations.”¹¹³

Since Vietnam, Congressional authorizations are enacted pursuant to the WPR. This shift is reflected in the Lebanon statute (1983), whereby Congress tailored the authorization for American intervention and included clauses on how the American-led Multinational Force would conduct itself with regard to the WPR.¹¹⁴ Congress’s justification remained in line with statutes passed prior to the WPR; in this case, under Jomini’s Policy 3, Congress justified intervention in order to “remov[e] of all foreign forces from Lebanon” as an “essential United States foreign policy objective in the Middle East.”¹¹⁵

¹¹¹ Gruening, Ernest. As quoted in Baker III, 22.

¹¹² Baker III, 21. Also, “War Powers Resolution,” 50 U.S. Code § 1541.

¹¹³ “Overview.” *War Powers*. Law Library of Congress. <http://www.loc.gov/law/help/war-powers.php>.

¹¹⁴ P.L. 98-43, “Multinational Force in Lebanon.” 97 Stat. 214, June 27, 1983 [S. 639].

The last two statutes that fall within Policy 3 are the 1991 use of force in Iraq during Desert Storm and the 2002 statute against Saddam Hussein's regime. Whereas the four previous resolutions authorizing military intervention cited efforts to promote regional stability, both Iraq resolutions cite the threat of weapons of mass destruction against global security.¹¹⁶ Jomini could not have possibly conceived of nuclear and biological weapons, let alone any weapon that could have repercussions on a global scale. Nevertheless, Policy 3 accounts for threats to the balance of power, and weapons of mass destruction fall within this category.

Saddam Hussein's authoritarian mindset in Iraq, especially one seemingly willing to develop and use chemical and biological weapons, ran counter to western efforts to promote peace and democracy abroad. After the September 11 terrorist attacks, efforts to endorse democracy abroad were widely supported by members of Congress.¹¹⁷ In this vein, the 2002 statute referenced Policy 5, to crush out a political theory. Though this sentiment was also held in the 1900s, the 1991 statute did not explicitly cite this in its language, so it was not counted against Policy 5.

Throughout the history of authorizing military force, Congress has extensively used Jomini's Policies 3 and 5. From the nation's founding, to the Cold War era and the threat of Communism, to contemporary efforts to combat terrorism, Congress has attempted to maintain regional stability and the balance of power to justify armed

¹¹⁵ Ibid.

¹¹⁶ The 1991 statute states, "Iraq's ... demonstrated willingness to use weapons of mass destruction pose a grave threat to world peace," (P.L. 102-1, "Authorization of the Use of U.S. Armed Forces Pursuant to U.N. Security Council Resolution 678 with Respect to Iraq." 105 Stat. 3, January 14, 1991). The 2002 statute states, "Iraq's continuing weapons of mass destruction programs threatened vital United States interests and international peace and security." (P.L. 107-243, "Authorization of the Use of Force Against Iraq Resolution of 2002." 116 Stat. 1498, October 16, 2002).

¹¹⁷ For additional details on Congressional actions immediately following September 11, 2001, see: Golan-Vilella, "A Tale of Two AUMFs," *The National Interest*, September/October 2014, Issue 133.

intervention abroad. However, we must remember that Jomini's policies of war are not prescriptive. Though he conceived of Policy 5, he believed that wars of political or religious opinion "enlist the worst passions, and become vindictive, cruel, and terrible."¹¹⁸ His observations were prescient when we look to American intervention in Vietnam, and again in Iraq and Afghanistan. Jomini wrote, "to attempt to restrain such a mob by a foreign force is to attempt to restrain the explosion of a mine when the powder has already been ignited: it is far better to await the explosion and afterward fill up the crater than to prevent it and perish in the attempt."¹¹⁹

Though not framed in religious terms, the conflicts in Iraq and Afghanistan were perceived by many in the region to be efforts to expand Christianity and western influence, tenets that America's enemies used to gain followers and recruits.¹²⁰ Jomini contends, "in a military view these wars are fearful, since the invading force not only is met by the armies of the enemy, but is exposed to the attacks of an exacerbad people."¹²¹ However, for Congress's purposes, the effort was to demonstrate to constituents that Congress supported American principles abroad.

The 2001 statute, which laid the groundwork for the Global War on Terrorism, and the 2002 statute, which bolstered the war on terror in Iraq, are perhaps the most unique of all Congressional authorizations. The 2002 statute referenced five of Jomini's nine policies, the most of any statute examined in this study. In addition to Policies 3 and 5, the statute cited Policy 4 ("to fulfill ... the obligations of alliances"), Policy 7 ("to

¹¹⁸ Jomini, 25.

¹¹⁹ Jomini, 26.

¹²⁰ For more information on Middle Eastern insurgents' use of American political rhetoric in recruitment efforts, see, Jorisch, Avi J. "Al-Manar and the War in Iraq." *Middle East Intelligence Bulletin*. Vol. 5, No. 4, April 2003. http://www.meforum.org/meib/articles/0304_11.htm

¹²¹ Jomini, 26.

defeat the threatened independence of the state”) and Policy 8 (“to avenge insulted honor”). The 2001 statute referenced Policy 1 (“to defend rights”), Policy 5 and Policy 8.

In the aftermath of the attacks of September 11, 2001, the United States rallied behind its leadership, and Congress sought to provide all means available to the President to pursue and defeat the perpetrators of the attack and their supporters, who had not yet been identified. Avenging insulted honor by responding to the most devastating attack on American soil since Pearl Harbor was foremost in the minds of America’s lawmakers. In 2002, Congress capitalized on this sentiment yet again, writing “on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens” as justification for intervention into Iraq.¹²²

The 2001 authorization is unique as it is the only one without a clear geographic boundary. The limitations are few, as the authorization sanctions the use of force “...against those nations, organizations, or persons ... [that] planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”¹²³ In addition to Policy 8, which provided the President the freedom to avenge America’s honor, the lack of clearly-defined limitations was also bolstered by Policy 5 in writing that the President can “to take action to deter and prevent acts of international terrorism against the United States.”¹²⁴

A critical reading of the 2002 authorization, with its basis in five of Jomini’s policies, suggests that Congress was looking to reinforce their justification for engaging in conflict in Iraq. While most statutes were grounded in two or three policies, the 2002

¹²² P.L. 107-243.

¹²³ P.L. 107-40, “Authorization of the Use of U.S. Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States.” 115 Stat. 224, September 18, 2001.

¹²⁴ Ibid.

authorization referenced five. Congress offered layer upon layer of justification for intervention in Iraq. Not only did "Iraq's continuing weapons of mass destruction programs threaten vital United States interests and international peace and security" (Policy 3), but Congress also cited "the risk that the current Iraqi regime will either employ those weapons to launch a surprise attack against the United States ... or provide them to international terrorists who would do so" (Policy 7).¹²⁵ The threat, now not only from Saddam Hussein's regime but also terrorists, was extended to bolster the Global War on Terrorism (Policy 8) as Congress asserted that Saddam's regime both supported and harbored terrorists who sought to spread terrorist ideology (Policy 5). Finally, Congress sought to enforce United Nations Security Council resolutions (Policy 4) through the use of force.

Why so many justifications? One interpretation suggests Congress looked to bolster their rationale for armed hostilities, as Congress may have felt that the reasons for intervening in Iraq were weak on their own. This is in line with what the American public later learned about the intelligence garnered to support the Iraq conflict, which had been exaggerated, and in some cases fabricated, to substantiate American intervention.¹²⁶ The reasons for engaging in Iraq could have been justified along Policy 5 alone, for as Jomini observes, "Governments may in good faith intervene to prevent the spreading of a political disease whose principles threaten social order, and, although these fears are generally exaggerated and are often mere pretexts, it is possible that a state may believe

¹²⁵ P.L. 107-243, "Authorization of the Use of Force Against Iraq Resolution of 2002." 116 Stat. 1498, October 16, 2002.

¹²⁶ For details on the intelligence that informed the Iraq war decision-making process, see: Pillar, Paul R. "Intelligence, Policy, and the War in Iraq." *Foreign Affairs* 85, no. 2 (2006): 15-27; and, Pfiffner, James P. "Did President Bush Mislead the Country in Arguments for War with Iraq?" *Presidential Studies Quarterly* 34, Issue 1 (March 2004), 25-46.

its own institutions menaced.”¹²⁷ The degree of that menace, however, was not clearly defined, and in turn led to open-ended interpretations of America’s reasons to conduct hostilities in Iraq. Jomini’s reflections are particularly prophetic,

The wars of Islamism, the Crusades, the Thirty Years’ War, the wars of the League, present nearly the same characteristics. Often religion is the pretext to obtain political power, and the war is not really one of dogmas. The successors of Mohammad cared more to extend their empire than to preach the Koran, and Philip II, bigot as he was, did not sustain the League in France for the purpose of advancing the Roman Church. We agree with M. Ancelot that Louis IX, when he went on a crusade in Egypt, thought more of the commerce of the Indies than of gaining possession of the Holy Sepulcher.¹²⁸

In contrast with the twelve AUMF statutes, which fall under various policies of war depending on the circumstance, the eleven declarations of war all fall squarely under Policy 7 “to defend the threatened independence of the state.” The first three declared wars in America’s history — with Great Britain, Spain, and Mexico — did not include “whereas” clauses within the legislation, therefore justification for the war was not explicit. However, the remaining war declarations (with the exception of Austria-Hungary) proclaim a “state of war ... has thus been thrust upon the United States.” Thus, American war declarations are always reactive and in response to provocation, rather than proactive response to perceived threat, which we have seen in several AUMFs.

Conclusion

As we can see, Congressional justifications are paramount because they provide the basis and outline the reasons for American military actions. When commanders cannot clearly describe the reasons for American intervention, the cause of conflict can

¹²⁷ Jomini, 36.

¹²⁸ Ibid, 25.

be questioned. When we look to the future of US armed conflict in the Middle East against the Islamic State terrorist organization, the justifications outlined in the 2001 and 2002 authorizations may no longer be valid.¹²⁹ Is there an end to the United States' efforts to avenge insulted honor? Must the independence of the state continue to be defended? Or does this defense inspire leagues of America's enemies, thus perpetuating the violence that the legislation originally sought to preempt? Jomini cautions, "In wars of this character the essentials are to secure a general who is both a statesman and a soldier; to have clear stipulations with the allies as to the part to be taken by each in the principle operations; finally, to agree upon an objective point which shall be in harmony with the common interests."¹³⁰ Clear stipulations and a defined objective would benefit future authorizations by tailoring the military requirement to the situation at hand.

However, authorization for the use of force is not solely a Congressional action. In every one of the twelve cited statutes, the President asked Congress for authorization to use military force. How the Presidents requests force, and more importantly the reasons the President uses to justify the use, present another important side to this discussion. Analyzing Presidential requests to Congress under Jomini's nine policies in order to see how they differ, and compare with, Congressional justifications, will be explored in the following chapter.

¹²⁹ Senator Tim Kaine has been extremely vocal on this point. He said, "So at the end of this administration, with the complicity of this Congress, we have basically come up with a war doctrine that says 'wherever and whenever,' as long as the president feels it's a good idea -- without Congress even needing to do anything about it." As quoted in Jones, Susan. "Sen. Tim Kaine: 'We have Made a Complete Hash of the ... Doctrine of War.'" *CNS News*. 29 April 2016. Available at: <http://www.cnsnews.com/news/article/susan-jones/sen-tim-kaine-we-have-made-complete-hash-the-doctrines-war>

¹³⁰ Jomini, 21.

Chapter Three: Jomini and Presidential Requests to Congress for War Authorities

Chapter one of this thesis explored the 2001 and 2002 Authorizations for the Use of Military Force (AUMF), and whether or not they continue to fortify a sound legal framework for the current conflicts in Iraq and Afghanistan more than 15 years since enactment. That chapter highlighted both AUMFs because they are anomalies. Most legislation, especially that which authorizes military operations, includes a target and a timeline, along with firm constraints to check presidential actions. Both AUMFs lack these qualities, yet have stood as the legal backbone for military activities overseas for more than a decade, resulting in controversial executive branch powers. The second chapter sought to place the 2001 and 2002 AUMFs within the greater legislative record to determine if they were different from past AUMFs and declarations of war.

This chapter seeks to take a step further, and examine the differences from an executive branch perspective. We come full circle, as part of the reason why the 2001 and 2002 AUMFs prove so controversial is that they provide the president with seemingly open-ended powers to wage war against an ill-defined target. Analyzing presidential requests for the 2001 and 2002 AUMFs against the AUMFs and declarations of war since America's founding will help us further determine if the former are so abnormal, or if they align within a historical pattern. Was the presidential rationale behind the current AUMFs different from previous executives? Or do they fall in line? This analysis, in turn, will help us make a final judgement based on the three chapters of this thesis, of the degree of uniqueness of 2001 and 2002 AUMFs, and recommend for their repeal, amendment, or retention.

Executive Communication with Congress over War Powers

The Constitution requires the president to report to Congress via a State of the Union address.¹³¹ In keeping with this requirement, since 1790 presidents have annually outlined their executive branch initiatives to Congress in order to lobby for federal priorities and request funding.¹³² This often includes highlights of the president's budget proposal and the health of the economy. Presidents may also address Congress outside of the State of the Union to advocate for special plans or strategies.

Issues of war and military conflict often fall into the latter category. Though presidents may provide updates on defense appropriations and military actions via the State of the Union, direct requests are frequently presented separately. Though routine, these requests are often hotly debated due to natural tensions between the legislative and executive branches over war powers. The legal and academic debates stem from various interpretations of the Constitution, and the 1973 War Powers Resolution.

At first glance, the Constitution is clear cut when it comes to war authorities. Article I of the Constitution endows Congress with the power to declare war; Article II confers Commander-in-Chief authorities upon the president.¹³³ A traditional legal reading of the Constitution posits that, in order to wage war, the president must first be granted war-making authority from Congress. Some contemporary interpretations, however, find

¹³¹ U.S. Constitution. Article II, Section 3, Clause 1. September 17, 1787. Available at: <https://www.archives.gov/founding-docs/constitution-transcript>. The President “shall from time to time give to the Congress information of the State of the Union, and recommend to their consideration such measure as he shall judge necessary and expedient.”

¹³² U.S. House of Representatives. “List of In-Person Annual Message and State of the Union Addresses.” *History, Art & Archives of the U.S. House of Representatives*. <http://history.house.gov/Institution/SOTU/List/>

¹³³ U.S. Constitution. Article I, Section 8; and Article II, Section 2.

that the distinction is murky. Some scholars contend that more 200 years on, interpretations of Constitutional principles - like war authorities - have become outdated, and do not take advances in technology and globalization into account.¹³⁴ Others maintain that Congress' "declare war" clause was never intended to check presidential war authorities, as "when the Constitution was written... a declaration of war served diplomatic notice about a change in legal relations between nations. It had little to do with launching hostilities."¹³⁵ Instead, the Constitution granted Congress the power of the purse as the chief mechanism for countering executive war-making, not the power to initiate war in the first place.¹³⁶

In spite of the debate over war powers, presidents since John Adams have requested from Congress the authorization to use the armed forces of the United States in order to engage in war or military activities. In examining the text of these requests, we find that presidents almost bitterly solicit Congress for war authorities, and do so out of obligation or legal responsibility. Ahead of Desert Storm, President Bush called congressional action the country's "last best chance for peace."¹³⁷ He chastised the legislative branch for delays, writing, "It would have been most constructive if he

¹³⁴ For more on this perspective, see Mervin, David. "Demise of the War Clause." *Presidential Studies Quarterly*. Vol. 30, Issue 4, December 2000, 770-776. He writes, "In the same way that some other features of the Constitution have become anachronisms, literal readings of the War Clause are not supportable in the modern age, and we cannot ignore the limitations of the framers' mindset," (776).

¹³⁵ Yoo, John. "War Powers Belong to the President." *American Bar Association Journal*. February 1, 2012. Available at: http://www.abajournal.com/magazine/article/war_powers_belong_to_the_president. Yoo was President George W. Bush's legal advisor in the aftermath of September 11, and played a key role in shaping unconventional interpretations of the Constitution.

¹³⁶ Yoo said, "Many critics of the Constitution claimed that it vested too much power in the executive over the military; not a single defender of the Constitution responded that the declare war clause would give Congress any power to prevent this. Rather, James Madison in the Virginia ratifying convention argued that it would be Congress's power of the purse that would control the executive sword." See Yoo, John. "Interview with John Yoo." *University of Chicago Press*. 2005. Available at: <http://www.press.uchicago.edu/Misc/Chicago/960315in.html>

¹³⁷ Bush, George. "Letter to Congressional Leaders on the Persian Gulf Crisis." January 8, 1991. Online by Gerhard Peters and John T. Woolley. *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=19196>.

[Secretary of State Baker] could have presented the Iraqi government a Resolution passed by both houses of Congress supporting the U.N. position.”¹³⁸ To counter Communist aggression against the Republic of China, President Eisenhower stated, “Until Congress can act I would not hesitate, as far as my Constitutional powers extend, to take whatever emergency action might be forced upon us in order to protect the rights and security of the United States.”¹³⁹ Presidents seek congressional approval, but sometimes with the threat of unilateral executive action if the legislature continues to delay support.

Thus, there are times when presidents do act independently, dedicating troops to combat without consulting Congress.¹⁴⁰ Congress’ frustrations with unilateral presidential decision making reached a climax during the Vietnam war following the Gulf of Tonkin incident. With a rising body count in Vietnam and an enraged public, Congress passed the War Powers Resolution in 1973 over President Nixon’s veto in an effort to reign in presidential actions. The War Powers Resolution “insure[s] that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities.”¹⁴¹ The resolution mandates that the president notify Congress within 48 hours of deploying American forces. The president then has 60 days to seek congressional approval for the military action; otherwise, American troops must be withdrawn from the conflict.¹⁴²

¹³⁸ Ibid.

¹³⁹ Eisenhower, Dwight. “Special Message to the Congress Regarding the United States Policy for the Defense of Formosa.” January 24, 1955. Online by Gerhard Peters and John T. Woolley. *The American Presidency Project*. <http://presidency.ucsb.edu/ws/?pid=10355>.

¹⁴⁰ Prior to the War Powers Resolution, presidents engaged in unilateral military activities, most memorably the Korean War. The War Powers Resolution was a Congressional effort to curtail unilateral presidential military activities, however, presidents continued to dedicate forces to such conflicts as Kosovo and the Balkans, Somalia, Grenada and Panama. But in most cases, presidents usually wrap up conflicts in the post-War Powers Resolution era within the 60 day period prescribed by the resolution, narrowly avoiding political fall-out.

¹⁴¹ 50 U.S.C., Ch. 33, *War Powers Resolution*, November 7, 1973. § 1541.

Since its passage, all presidents have taken issue with the War Powers Resolution. Presidents often include in their AUMF signing statements that, though they act within the parameters of the War Powers Resolution, they still contend that the resolution is unconstitutional.¹⁴³ For example, President Reagan, when signing the 1983 AUMF to dedicate American troops to the conflict in Lebanon, wrote, “In signing this resolution ... I do not and cannot cede any of the authority vested in me under the Constitution as President and as Commander in Chief ... Nor should my signing be viewed as any acknowledgment that the President’s constitutional authority can be impermissibly infringed by statute.”¹⁴⁴ Likewise, in signing the Desert Storm AUMF into law, President Bush wrote, “my request for congressional support did not, and my signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President’s constitutional authority to use Armed Forces to defend vital U.S. interests or the constitutionality of the War Powers Resolution.”¹⁴⁵

Even more problematic of the War Powers Resolution is that the text of the legislation does not define “hostilities,” providing executive legal teams room with which to interpret the nature of military activities. Is a mortar attack targeting an American installation considered “hostilities?” What about service members returning fire during a

¹⁴² Ibid, § 1544.

¹⁴³ A “signing statement” is a memo written by the President upon signing a piece of legislation into law, and the practice dates back to President Monroe. Generally, the statement is benign, and praises the legislation or the work of Congress. Other times, signing statements are more controversial. These “statements involve claims by presidents that they believe some part of the legislation infringes on the constitutional powers of the presidency, and, therefore, they intend to ignore it or to implement it only in ways they believe is constitutional.” See Woolley, John T. “Presidential Signing Statements.” *The American Presidency Project*. <http://www.presidency.ucsb.edu/signingstatements.php>

¹⁴⁴ Reagan, Ronald. “Statement on Signing the Multinational Force in Lebanon Resolution.” October 12, 1983. Online by Gerhard Peters and John T. Woolley. *The American Presidency Project*. <http://presidency.ucsb.edu/ws/?pid=40624>.

¹⁴⁵ Bush, George H.W. “Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq.” January 14, 1991. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=19217>.

U.N.-sanctioned peacekeeping mission? The lack of a concrete legal definition of “hostilities” came into play frequently during the administrations of President Bush and President Obama, who committed troops to conflicts in Libya, Yemen and other locations without notifying Congress, suggesting that the activities in those countries did not merit “hostilities” and thus did not require congressional approval.¹⁴⁶ Yet the president is not exclusively to blame for this situation. Though the executive branch has benefitted from this loophole, Congress has done little to negate the interpretation. There has been no amendment to the resolution to more closely define hostilities, nor to tighten the parameters around the deployments of troops.¹⁴⁷

Thus, presidents up to the present continue to operate in the grey space within the War Powers Resolution and the parameters of their Article II authorities. As we shall see in the analysis below, the United States has not declared war, and the president has not requested a declaration of war, since 1942. However, since that time, many presidents have requested, and received, AUMF.

Chapter two highlighted the legal differences between a declaration of war and an AUMF. In sum, a war declaration automatically activates a number of stand-by authorities that can only be triggered by a declaration. These include seizure of private infrastructure, initiation of special intelligence-gathering techniques, activation of the military reserves, and others. There is scholarly debate over whether or not a state of war must be “declared” in order to begin war-like actions, but contemporary consensus is that

¹⁴⁶ For further information on interpretations of President Obama’s legal authorities for the 2011 air strikes in Libya, see Fisher, Louis. “The Law: Military Operations in Libya: No War? No Hostilities?” *Presidential Studies Quarterly*. Vol. 42, Issue 1, March 2012, 176-189.

¹⁴⁷ The 2008 National War Powers Commission Report put forth the War Powers Consultation Act of 2009 in an effort to amend some of the flaws of the War Powers Resolution. However, it did not find a champion in Congress until 2014 under a bipartisan effort between Senators John McCain (R-Ariz) and Tim Kaine (D-Va), but the legislation eventually stalled in committee.

nations may conduct acts of war without a formal declaration. The importance of declaring war thus becomes one of communication. Do American citizens understand that their nation is at war? And does the subject of the war declaration or AUMF (or in the case of the 2001 AUMF, the non-state actor) understand that it is the target of U.S. military actions?

Understanding what an AUMF or declaration of war brings to the table helps us understand why a president may request one over the other. For example, in 1983, President Reagan did not need to be able to seize elements of private industry in order to accomplish his goals in Lebanon; thus, an AUMF was a more fitting request. In the aftermath of the September 11 attacks, President Bush could have asked for a declaration of war. But with an undefined enemy still at large, President Bush decided to combat a non-state actor via an AUMF, a piece of legislation that is still used to target hostile actors through the present day.

Methodology and Jomini

The second chapter of this thesis examined the legislative language of American declarations of war and AUMF against Jomini's nine policies of war (see Appendix 2 for a complete list). This chapter seeks to do the same, this time comparing presidential requests to Congress against Jomini's metric. In so doing, this chapter endeavors to categorize presidential justifications for encouraging Congress to authorize force or declare war over time. In turn, this will help us understand changes in presidential conceptions of war and military action, and better appreciate the 2001 and 2002 AUMFs within a greater historical context.

Jomini's background and military philosophy was explored at length in chapter two. However, to refresh the reader's memory, Jomini is a 19th century military theorist whose concepts of war and strategy are still studied by American officers today. Jomini conceived of nine "policies of war" which include "those considerations from which a statesman concludes whether a war is proper, opportune, or indispensable, and determines the various operations necessary to attain the object of the war."¹⁴⁸ The nine policies of war are as follows:

- To reclaim certain rights or to defend them;
- To protect and maintain the great interests of the state, as commerce, manufactures, or agriculture;
- To uphold neighboring states whose existence is necessary either for the safety of the government or the balance of power;
- To fulfill the obligations of offensive and defensive alliances;
- To propagate political or religious theories, to crush them out, or to defend them;
- To increase the influence and power of the state by acquisitions of territory;
- 7. To defend the threatened independence of the state;
- 8. To avenge insulted honor;
- 9. From a mania for conquest.¹⁴⁹

Comparisons of presidential requests for a declaration of war or an AUMF against Jomini's nine policies was completed with a close reading of the text at hand. As this research spans all of American history, the scope of this paper would be too great if we were to consider the breadth of supporting documents that bolstered and shaped each request. In an effort to tailor the research and analysis, this paper will focus strictly on the text of the request, with analysis centered on major events within American history that may shape our understanding of the context.

¹⁴⁸ Jomini, Baron de. *The Art of War*. Trans. Wendell G.H. and Craighill, W.P. US Army. 1862. Available at: http://www.au.af.mil/au.awc/awcgate/readings/jomini_art_of_war/13549-h.htm, 14.

¹⁴⁹ Ibid.

Metrics

Of the 11 declarations of war and 12 AUMFs examined in chapter two, almost all were preceded by presidential requests to Congress.¹⁵⁰ Some Presidents drafted requests by hand, while others chose to deliver a public address to a joint session of Congress.

One may anticipate that presidential requests to Congress for a declaration of war or AUMF would fall parallel to the corresponding legislation analyzed in chapter two, but this was not the case. In fact, presidential requests for a declaration of war correlated with Jomini's policies 1, 4 and 7: 1) reclaiming or defending rights, 4) supporting allies, and 7) defending the threatened independence of the state (see Table 1). Presidential requests to Congress for AUMF strongly conformed to Jomini's policies 1 through 5: 1) reclaiming or defending rights, 2) protecting state interests, 3) bolstering neighboring states, 4) supporting allies, and 5) crushing political/religious theories (see Table 2).¹⁵¹

¹⁵⁰ There are a few exceptions. Of the AUMFs: the act of July 9, 1798, *Protection of the Commerce of the United States*, was preceded by two months with the act of May 28, 1798, *Protection of the Commerce and Coasts of the United States*. President Adams' speech to Congress in on May 16, 1798 discussing French harassment of American vessels was a precursor to the May 28 AUMF. One could contend that his speech also advocated for the July 9 AUMF, which clarified and expanded the naval authorities granted to the President in the May 28 AUMF. President Adams did not deliver a separate message ahead of the July 9 AUMF.

Additionally, President Madison did not release a formal request to Congress regarding the suppression of piracy against American commercial interests in the Caribbean and Latin America. Instead, he mentioned the situation in his "Annual Message" (which would later become known as the State of the Union), and underscored the need for an American naval presence in those areas. Congress would go on to release several pieces of legislation between 1819-1823 authorizing force against acts of piracy in the region, though these acts are not directly tied to President Madison's message.

Finally, against hostile actions from Algeria, President Madison asked that Congress declare war against the Dey of Algiers. Congress did not oblige President Madison's request for war, but instead authorized the use of the U.S. Navy and the merchant marine.

Of the declarations of war, both the War of 1812 and Mexican-American War of 1846 were not preceded by any sort of presidential request. Instead, President Madison and President Polk released statements to the public following the congressional declarations of war. In these statements, both Presidents encouraged Americans to remain calm, uphold the rule of law, and support the war effort.

¹⁵¹ Full citations for the requests listed in both Table 1 and Table 2 can be found in Appendix 4.

Requests for a Declaration of War

In examining requests for declarations of war, we can break them into two groups: those relating to WWI and WWII, and everything else. At the onset of World War I, President Wilson urged American neutrality.¹⁵² By 1917, however, German submarine warfare against neutral targets compelled President Wilson to urge Congress to declare war after spending years on the sidelines. In an address to a joint session of Congress, President Wilson made the case for war with Germany. Consistent with presidential appeals during World War II, President Wilson's central point was that Germany had declared war against the United States, and that the United States must respond in kind. He said, "I advise that the Congress declare the recent course of the Imperial German Government to be in fact nothing less than war against the government and people of the United States; that it formally accept the status of belligerent which has thus been thrust upon it."¹⁵³ German naval aggression not only threatened the independence of the United States, but directly threatened American merchant vessels and passenger ships. Additionally, President Wilson underscored the need to reciprocate German actions in order to defend the rights of the American people, saying, "We enter this war only where we are clearly forced into it because there are no other means of defending our rights."¹⁵⁴ Finally, the president saw a moral line in countermanding the policies of the Germans, describing "the menace to that peace and freedom lies in the existence of autocratic

¹⁵² "The United States must be neutral in fact, as well as in name, during these days that are to try men's souls. We must be impartial in thought, as well as action, must put a curb upon our sentiments, as well as upon every transaction that might be construed as a preference of one party to the struggle before another." See, Wilson, Woodrow. "Message on Neutrality." August 19, 1914. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=65382>.

¹⁵³ Wilson, Woodrow. "Address to a Joint Session of Congress Requesting a Declaration of War Against Germany." April 2, 1917. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=65366>.

¹⁵⁴ Ibid.

governments backed by organized force which is controlled wholly by their will, not by the will of their people.”¹⁵⁵ In sum, President Wilson’s request to Congress fell squarely within Jomini’s policies 1, 2, 5 and 7.

Months later, during his Annual Message, President Wilson urged Congress to declare war against Austria-Hungary. Using the declaration of war against Germany as a foil, President Wilson invoked Jomini’s policies 1, 5 and 7 to justify war against Austria-Hungary as an ally of the Germans. President Wilson asserted, “We are in fact fighting for their [the people of Austria-Hungary] emancipation from fear, along with our own-- from the fear as well as from the fact of unjust attack by neighbors or rivals or schemers after world empire.”¹⁵⁶

Table 4. *Policies of War & Presidential Requests for Declaration of War.*

Policy of War	Presidential Requests for Declaration of War	Total
1. To reclaim certain rights or to defend them	Mexican-American War (1846), WWI (Germany, 1917), WWI (Austria-Hungary, 1917), WWII (Japan 1941), WWII (Germany, 1941), WWII (Italy, 1941)	6
2. To protect and maintain the great interests of the state, as commerce, manufactures, or agriculture	Mexican-American War (1846), Spanish-American War (1898), Algeria (1801), WWI (Germany 1917), WWII (Japan 1941)	5
3. To uphold neighboring states whose existence is necessary either for the safety of the government or the balance of power	Spanish-American War (1898)	1
4. To fulfill the obligations of offensive and defensive alliances	WWII (Hungary, 1942), WWII (Rumania, 1942), WWII (Bulgaria, 1942)	3
5. To propagate political or religious theories, to crush them out, or to defend them	WWI (Germany, 1917), WWI (Austria-Hungary, 1917)	2
6. To increase the influence and power of the state by acquisitions of territory	Mexican-American War (1846)	1

¹⁵⁵ Ibid.

¹⁵⁶ Wilson, Woodrow. “Fifth Annual Message.” December 4, 1917. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=29558>.

7. To defend the threatened independence of the state	Algeria (1801), Mexican-American War (1846), WWI (Germany, 1917), WWI (Austria-Hungary, 1917), WWII (Japan 1941), WWII (Germany, 1941), WWII (Italy, 1941), WWII (Hungary, 1942), WWII (Rumania, 1942), WWII (Bulgaria, 1942)	10
8. To avenge insulted honor	WWII (Japan 1941)	1
9. From a mania for conquest		0

Thirty years later, President Roosevelt's requests to Congress for declarations of war against the Axis Powers in World War II echoed President Wilson's sentiments. While it took two years following the sinking of the *Lusitania* to draw America into World War I, the deliberate Japanese attack on Pearl Harbor immediately committed America to World War II in retaliation. Of the incident President Roosevelt said, "Hostilities exist. There is no blinking at the fact that our people, our territory, and our interests are in grave danger."¹⁵⁷ President Roosevelt went on to line out justifications in line with Jomini's policies 1, 2, 7 and 8. Of policy 8 - *to avenge insulted honor* - the Japanese planned the attacks on Pearl Harbor while American statesmen sought to negotiate peace with the Japanese government in the Pacific. The president said, "I believe that I interpret the will of the Congress and of the people when I assert that we will not only defend ourselves to the uttermost but will make it very certain that this form of treachery shall never again endanger us."¹⁵⁸ This treachery marked the foundation of American participation in World War II, and was followed by two additional presidential requests to Congress for declarations of war against Germany and Italy, and Bulgaria,

¹⁵⁷ Roosevelt, Franklin D. "Address to Congress Requesting a Declaration of War with Japan." December 8, 1941. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=16053>.

¹⁵⁸ Ibid.

Hungary and Rumania. Both included a reference to policy 7; President Roosevelt noted that the countries in question had already declared war against the United States, and urged Congress to reciprocate.¹⁵⁹ Significantly, the request for war against Germany and Italy included a reference to policy 1, to ensure “victory of the forces of justice and of righteousness over the forces of savagery and of barbarism.”¹⁶⁰ The request against Bulgaria, Hungary and Rumania included a reference to policy 4, due to those countries’ “military activities directed against the United Nations.”¹⁶¹

Outside of World War I and II, the remaining wars in U.S. history are the War of 1812, the Mexican-American War and the Spanish-American War. Of these three wars, two were preceded by a presidential request to Congress - the Mexican-American War and the Spanish-American War. As for the Mexican-American War, President Polk’s request to Congress was unique as it was the only request that included a desire to annex territory (policy 6); in this case, the area of Texas. President Polk asserted, “I could not for a moment entertain the idea that the claims of our much-injured and long- suffering citizens, many of which had existed for more than twenty years, should be postponed or separated from the settlement of the boundary question.”¹⁶² In addition, Mexican advances resulted in “a long-continued series of menaces have at last invaded our territory and shed the blood of our fellow-citizens on our own soil,” further compelling the president to

¹⁵⁹ Each request from President Roosevelt included the following statement: “The government of [country], pursuing its course of world conquest, declared war against the United States,” thus directly threatening American independence.

¹⁶⁰ Roosevelt, Franklin D. “Message to Congress Requesting War Declarations with Germany and Italy”, December 11, 1941. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=16058>.

¹⁶¹ Roosevelt, Franklin D. “Message to Congress on a State of War Between the United States and Hungary, Rumania, and Bulgaria.” June 2, 1942. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=16265>.

¹⁶² Polk, James K. “Special Message to Congress on Mexican Relations.” May 11, 1846. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=67907>.

request a declaration of war.¹⁶³ In 1898, President McKinley sought to convince Congress to declare war against Spain over Spanish military actions in Cuba. President McKinley lamented, “The right to intervene may be justified by the very serious injury to the commerce, trade, and business of our people and by the wanton destruction of property and devastation of the island,” citing policy 2.¹⁶⁴ Additionally, the President referred to policy 3 by asserting, “It is no answer to say this is all in another country, belonging to another nation, and is therefore none of our business. It is specially our duty, for [Cuba] is right at our door.”¹⁶⁵ With hostilities in its back yard, it was in America’s best interest to engage in the conflict in Cuba, less it spread to America’s shores. All that remains is the War of 1812, which was declared by Congress without a presidential request, and thus was not included in this assessment.¹⁶⁶

The one outlier is President Madison’s 1815 request to Congress to declare a state of war against Algeria. He wrote, “The considerations which rendered it unnecessary and unimportant to commence hostile operations on the part of the United States, being now terminated by the peace with Great Britain, which opens the prospect of an active and valuable trade of their citizens within the range of the Algerian cruisers, I recommend ... a state of war.”¹⁶⁷ Riding the coattails of the 1815 treaty with Great Britain at Ghent,

¹⁶³ Ibid.

¹⁶⁴ McKinley, William. “Message to Congress Requesting a Declaration of War With Spain”, April 11, 1898. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=103901>.

¹⁶⁵ Ibid.

¹⁶⁶ American actions leading up to the War of 1812 were fiercely debated within Congress. Eventually the “War Hawks” pressured President Madison after America’s victory during the 1811 Battle of Tippecanoe to sign the 1812 war resolution against Britain.

¹⁶⁷ Madison, James. “Message to Congress.” February 23, 1815. *Annals of Congress*. Senate, 13th Congress, 3rd Session, 269.

President Madison felt he could request war with Algeria. However, this was downgraded by Congress to an AUMF, but President Madison got his maritime forces nonetheless.

Requests for an AUMF

In contrast with requests for a declaration of war which end after World War II, presidential requests for an AUMF span American history up until the present. With the exception of the military actions in Formosa in 1955 and the Global War on Terrorism (GWOT) in 2001, which both cited policy 7, all AUMF requests align within Jomini's policies 1 through 5. However, not all AUMF requests cite all five policies. Within policies 1 through 5, the policies cited with the most frequency are: 4) fulfilling alliances (8 times), 3) uphold neighboring states (7 times); and; 2) to protect the interests of the state (5 times). These were used as justification in 7 out of 10 presidential requests. We will explore the reasons why below.

Table 5. *Policies of War & Presidential Requests for AUMF.*

Policy of War	Presidential Requests for AUMF	Total
1. To reclaim certain rights or to defend them	France (1797), Middle East (1957), War on Terror (2001), Iraq (2002)	4
2. To protect and maintain the great interests of the state, as commerce, manufactures, or agriculture	France (1797), Tripoli (1801), Piracy (1819), Middle East (1957), Vietnam (1964), Desert Storm (1991)	6
3. To uphold neighboring states whose existence is necessary either for the safety of the government or the balance of power	Piracy (1819), Formosa (1955), Middle East (1957), Vietnam (1964), Lebanon (1983), Desert Storm (1991), Iraq (2002)	7
4. To fulfill the obligations of offensive and defensive alliances	Tripoli (1801), Formosa (1955), Middle East (1957), Vietnam (1964), Lebanon (1983), Desert Storm (1991), War on Terror (2001), Iraq (2002)	8
5. To propagate political or religious theories, to crush them out, or to defend them	Formosa (1955), Middle East (1957), Vietnam (1964), War on Terror (2001), Iraq (2002)	5

6. To increase the influence and power of the state by acquisitions of territory		0
7. To defend the threatened independence of the state	Formosa (1955), War on Terror (2001)	2
8. To avenge insulted honor		0
9. From a mania for conquest		0

Examination of the AUMF request timeline reveals a significant gap between 1820 and 1955. In addition to the Civil War, within this gap reside almost all American declarations of war (10 of 11). Thus, it is useful to divide AUMF requests into three groups: those delivered prior to 1820, those prior to the passage of the War Powers Resolution (1973), and those after the War Powers Resolution (1973 to present).

The earliest AUMF requests - the pre-1820 group - are characterized as petitions to counter piracy and harassment on the high seas. The three requests in this group did not cite Policy 4 - *fulfilling alliances* - as a justification largely due to the new nation's foreign policy of avoiding "entangling alliances" following the fight for independence.¹⁶⁸ Additionally, combatting the threat against piracy required defensive action to protect the state, and was not an effort to uphold alliances. In fact, each of these same AUMFs reference policy 2 - *to protect the interests of the state* - underscoring the defensive nature of the request. In a speech to Congress, President Adams asserted, "While we are endeavoring to adjust all of our differences with France by amicable negotiation, the progress of the war in Europe, the depredations on our commerce, the personal injuries to our citizens, and general complexion of affairs, render it my indispensable duty to

¹⁶⁸ Quinn, Adam. *US Foreign Policy in Context: National Ideology from the Founders to the Bush Doctrine*. Routledge, New York: 2010, 51.

recommend to your consideration effectual measures of defense.”¹⁶⁹ Military actions during this time were strictly maritime, and did not encompass a whole of military approach to the piracy problem set. This may explain why presidents advocated for an AUMF vice an all-out war declaration.

Three AUMF requests reside in the second group, from 1820 to 1973. The first half of this period was colored by the great wars. The three requests dwell at the far end of the time frame, with requests for military force in Formosa in 1955, Middle East in 1957 and Southeast Asia in 1964. Though the nation benefitted from the post-World War II economic boom, the growing threat from Soviet communism loomed large. Thus the use of policy 5 - *crushing out political theories* - is the most significant in this period. Bolstering Formosa - known today as Taiwan - and Chaing Kai-shek’s Republic of China was key in the United States’ strategy to contain communism from spreading across the Pacific. President Eisenhower inherited President Truman’s foray into Korea, which Truman conducted without a congressional authorization or declaration of war, as he categorized the military actions in Korea as a police mission. With regard to Formosa, President Eisenhower said, “The United States and the friendly Government of the Republic of China, and indeed all of the free nations, have a common interest that Formosa and the Pescadores should not fall into the control of aggressive Communist forces.”¹⁷⁰ Additionally, President Eisenhower was the only president during this period who invoked policy 7 - *defending the threatened interests of the state* - by adding, “Clearly, this existing and developing situation poses a serious danger to the security of

¹⁶⁹ Adams, John. “President’s Speech.” May 16, 1797. *Annals of Congress*. House of Representatives, 5th Congress, 1st Session, 56.

¹⁷⁰ Eisenhower, Dwight. “Special Message to Congress Regarding United States Policy for the Defense of Formosa.” January 24, 1955. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=10355>.

our country and of the entire Pacific area and indeed to the peace of the world.”¹⁷¹

President Eisenhower’s administration would be colored by the opening salvos of the Cold War and the growing threat from global Communism. In 1957, he again requested forces, this time to counter Communists in the Middle East. He said, “All of this instability has been heightened and, at times, manipulated by International Communism.”¹⁷² In both of his requests for the use of force, Eisenhower cited policies 3, 4 and 5 underscoring the risks Communism posed to regional stability and international allies. He said, “If the nations of that area should lose their independence, if they were dominated by alien forces hostile to freedom, that would be both a tragedy for the area and for many other free nations whose economic life would be subject to near strangulation... All of this would have the most adverse, if not disastrous, effect upon our own nation's economic life and political prospects.”¹⁷³ In President Eisenhower’s view, the issue of Communism would have both a global, and a local, impact.

President Johnson’s request for forces in Southeast Asia was colored along similar lines as President Eisenhower’s. “We must make it clear to all,” said Johnson, “that the United States is united in its determination to bring about the end of Communist subversion and aggression in the area.”¹⁷⁴ Like Eisenhower, President Johnson also invoked policies 3 and 4 in upholding allies and maintaining regional stability. Unlike Eisenhower, however, President Johnson’s actions in Southeast Asia grew prolonged.

¹⁷¹ Ibid.

¹⁷² Eisenhower, Dwight. “Special Message to the Congress on the Situation in the Middle East.” January 5, 1957. Online by Gerhard Peters and John T. Woolley. *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=11007>.

¹⁷³ Ibid.

¹⁷⁴ Johnson, Lyndon. “Special Message to the Congress on U.S. Policy in Southeast Asia.” August 5, 1964. Online by Gerhard Peters and John T. Woolley. *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=26422>.

Though he initially requested force from Congress, Johnson's, and later President Nixon's, administrations continued to provide military support to the conflict without congressional consultation. As the body count rose and public support fell, Congress passed the War Powers Resolution to prevent further executive involvement in military actions without regular congressional consent. The president's initiatives were directly countered by Congressional actions. This is one of the few instances in this study where we see a direct correlation between Congress and the executive in the administration of war power authorities.

With this in mind, the third period of presidential AUMF requests are those that fall in the post-War Powers Resolution period, from 1973 until the present. Here we find our final four AUMF requests: Lebanon (1983), Desert Storm (1991), Global War on Terrorism (2001) and Iraq (2002). All but the 2001 request cited policy 3 - *to uphold neighboring states* - which makes sense, as the 2001 request was in direct response to the September 11 attacks, which were a deliberate assault against the United States. President Bush was more concerned with keeping the country safe than maintaining a balance of power with international allies. That being said, the AUMF requests in this era did cite policy 4 - *fulfilling alliances* - including the 2001 AUMF request, which contended that "this enemy attacked not just our people, but all freedom-loving people everywhere in the world."¹⁷⁵ The other conflicts during this era, especially the interventions in Lebanon and Iraq, relied heavily on international alliances to not only curry support for the activities, but to also demonstrate broad consensus for the military actions in those regions.

¹⁷⁵ Bush, George W. "Remarks by the President in Photo Opportunity with National Security Team." September 12, 2001. *Department of State Archives*. Available at: <https://2001-2009.state.gov/coalition/cr/rm/2001/5042.htm>.

In the post-War Powers Resolution era, presidents are forced to recognize that they must cede approval for their war-making powers to Congress. The four requests mark time in line with section 4 (b) of the War Powers Resolution, which requires the president to request congressional endorsement. Each president in this period has done so begrudgingly, which is best indicated in their signing statements of the legislation Congress passed. All decry the War Powers Resolution and consider it an infringement of the executive's constitutional rights. Yet they all submit to it.

Conclusion

In examining presidential requests to Congress against Jomini's metric, significant differences between presidential requests for AUMF and declarations of war are revealed. One further categorization of the requests might help us appreciate the differences: requests prefaced by an attack on the nation, and those that were not. The sentiment that "a state of war has been thrust upon the United States" was consistent throughout the World War I and II requests. One could similarly argue that a state of war was "thrust" upon the U.S. via the September 11 attacks. The request justifications for the WWI and WWII declarations of war, and the 2001 AUMF are very similar: they all rely upon Jomini's policies 1 and 7. While there is emphasis on upholding international alliances, the focus is internal and actions are not taken to uphold neighboring states (policy 3). The requests center on defending the United States, and reclaiming American rights. In the 2001 AUMF request, President Bush said, "We will not allow this enemy to win the war by changing our way of life or restricting our freedoms."¹⁷⁶ This is reminiscent of

¹⁷⁶ Ibid.

President Roosevelt's statements after the attacks on Pearl Harbor when he said, "The people of the United States have already formed their opinions and well understand the implications to the very life and safety of our Nation."¹⁷⁷ In both cases, the homeland was attacked by an outside force. And in both cases, the president sought to use all means necessary to protect the nation and deter future assaults. Thus, we may posit that the 2001 AUMF request is a modern day request for a declaration of war.

But if this is so, then why in 2001 did President Bush seek an AUMF instead of a declaration of war? Again we look to the World War I and II requests. The bombardment on Pearl Harbor was a Japanese military action, and the Japanese Empire was a defined and known actor. The 2001 attack was conducted by a non-state actor, and in the days immediately following the attacks, President Bush's administration struggled to positively identify the perpetrators. In an effort to react quickly, President Bush declared a state of emergency, and requested from Congress the authorization to use the military. The threat was not clearly defined, there was no precedent for declaring war against a terrorist group, and the president did not know if further attacks were imminent. Of Pearl Harbor, President Roosevelt said, "The United States was at peace with that Nation and, at the solicitation of Japan, was still in conversation with its Government and its Emperor looking toward the maintenance of peace in the Pacific."¹⁷⁸ Japanese aggression in the Pacific was already a known activity, and the United States had deliberated for years

¹⁷⁷ Roosevelt, Franklin D. "Address to Congress Requesting a Declaration of War with Japan." December 8, 1941. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=16053>.

¹⁷⁸ Roosevelt, Franklin D. "Address to Congress Requesting a Declaration of War with Japan." December 8, 1941. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=16053>.

prior whether or not it would join the British in the war effort. Thus, Pearl Harbor proved to be a tipping point, not a starting point.

In the verbiage of the World War I and II requests, the presidents in those eras prefaced their requests with a synopsis of the on-going conflicts in Europe and the Pacific. In requesting a declaration of war with Germany, President Wilson first reminded Congress of his previous speeches on Imperial Germany's submarine warfare. He said, "When I addressed the Congress on the twenty-sixth of February last I thought that it would suffice to assert our neutral rights with arms, our right to use the seas against unlawful interference, our right to keep our people safe against unlawful violence. But armed neutrality, it now appears, is impracticable."¹⁷⁹ Two decades later, President Roosevelt made a similar statement about Germany, saying, "The long known and the long expected has thus taken place. The forces endeavoring to enslave the entire world now are moving toward this hemisphere."¹⁸⁰ In contrast, the September 11 attacks were unknown and unexpected. Thus, in comparison with the historical record, at the time of the September 11 attacks, it would have been highly unusual for President Bush to ask for a declaration of war. An AUMF request was the president's best option.

In contrast with 2001, President Bush's justifications for the 2002 AUMF request remain consistent with historical AUMF requests. Iraq did not "thrust" a state of war against the United States. Instead, rationalization for American military action in Iraq centered on the risk Saddam Hussein's regime posed to regional stability. President Bush

¹⁷⁹ Wilson, Woodrow. "Address to a Joint Session of Congress Requesting a Declaration of War Against Germany." April 2, 1917. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=65366>.

¹⁸⁰ Roosevelt, Franklin D. "Message to Congress Requesting War Declarations with Germany and Italy", December 11, 1941. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=16058>.

said, “America intends to lead the way to make certain that the Saddam Hussein regime is not able to threaten anyone in the world with the world's most devastating weapons.”¹⁸¹ In fact, the body of AUMF requests describes conflicts that do not directly impact the homeland. While some conflicts may threaten the “great interests of the state,” they do not come with the same threat of malice as those hostile actions of the great wars and in 2001.

So has the nature of war changed since 1942? In examining executive rationale, we can make the case that it has. Aside from the 2001 attacks, focus has shifted to international alliances and regional stability for compelling the United States to pursue military actions. These are far more nebulous than a response to an attack, or declaration of war from a third party. Additionally, the aggressor has changed. The 2001 AUMF request is the first and only request against a non-state actor - the perpetrators of September 11. We could argue that al-Qaeda and affiliates thrust a state of war upon the United States during the attacks on the Pentagon and the World Trade Center. When we consider the further implications, we could ask: has a state of war been thrust upon the United States by the Islamic State?

The request for the 2001 AUMF only loosely describes an “enemy” without naming a nation, a leader or an organization. Yet, as explored in chapter one of this thesis, many believe that the enemy referenced in 2001 - later interpreted to be al-Qaeda and affiliates - is not the same as the present day enemy found in the Islamic State. Though known for its atrocities and acts of extreme violence, the Islamic State has yet to target Americans or American interests, making it difficult to argue that the Islamic State has

¹⁸¹ Bush, George W. “Bush Letter: ‘America Intends to Lead’” September 4, 2002. *CNN*. <http://www.cnn.com/2002/ALLPOLITICS/09/04/bush.letter/>

“thrust” a state of war upon the United States, as we have seen in so many previous requests. To this end, the request for the 2001 AUMF does not match the current enemy. Yet we can infer that presidents can use the AUMF as a mechanism for pursuing, and even going to war, with non-state actors. What has yet to be determined is if the next presidential administration is willing to request such authorities from Congress in order to defeat contemporary threats.

Final Conclusions

Though his words are from more than one hundred years ago, Baron de Jomini's observations on the reasons why nations go to war are still relevant today. Concepts like upholding alliances and defending independence echo within American legislation and executive branch rationale for embarking on a war path or conducting military activities. Jomini's nine "policies of war" have helped us categorize and distill the motivation for going to war, and illuminate trends throughout America's history.

Throughout this research, what stood out was that the 2001 AUMF – both the statute and presidential request – align more closely with the metrics associated with a declaration of war, than with those of similar AUMFs. We find that issues of "defending the threatened independence of the state" and "crushing out" political theories such as Communism and Islamic extremism, remain a constant theme in both the 2001 AUMF and previous war declarations. From this, we can further posit that the 2001 AUMF is in fact a modern day declaration of war.

This is a bold statement. But when we consider the statute and the presidential rationale, we are left with the sense that the 2001 AUMF is something more than a simple piece of legislation. Though a mere 60 words, the AUMF lacks a target, timeline or geographic boundary. This broad language has opened the door for three presidents to pursue authorities typically afforded to the executive in war time: the application of controversial detention and interrogation techniques, sweeping intelligence-gathering and surveillance programs, and global counterterrorism operations. And both Congress and the Supreme Court have in many cases seen fit to uphold these authorities. Though the

2002 AUMF does not follow the same pattern as the 2001 statute, but it too has been used to further executive prerogatives.

So where does this leave us? With AUMFs that are used to authorize war-like activities, but are not actually declarations of war. Today, it seems as though the executive branch ducks and weaves standing statutes in order to conduct war. To avoid the 60-day clock on the War Powers Resolution, the U.S. military is directed to carry out activities that are somehow not quite “hostilities.” The executive defends Americans and American interests under Article II powers by conducting airstrikes in Libya and Iraq, but does not seek congressional input via their Article I authorities. Congress has done little to contest the president’s actions, yet in a cynical sense, this idleness makes sense. A new vote on war or war-like activities would only threaten reelection prospects, and Congress remains content letting the executive take the heat for military actions that will inevitably head south. Those who support the new fight against the Islamic State mostly seek to maintain the status quo. As a single office, the president is empowered to make quick, bold moves. In this case it may be best to embrace the presidential initiative and allow the federal agencies to engage decisively.

Yet what does this say about the role of the president vis-a-vis Congress? Should the president be trusted with so much power? President Lincoln once cautioned, “The Constitution g[ave] the war making power to Congress ... and resolved ... that no one man should hold the power for bring this oppression upon us. But your view destroys the whole matter, and places our President where kings have always stood.”¹⁸² According to the Framers of the Constitution, it is Congress’s responsibility to balance against

¹⁸² Lincoln, Abraham as quoted in “Lincoln on Pre-Emptive War and the Presidency.” *The Atlantic*. February 12, 2007. <http://www.theatlantic.com/daily-dish/archive/2007/02/lincoln-on-pre-emptive-war-and-the-presidency/230900/>

presidential unilateralism, either via declaring war, rescinding legislation, or cutting defense appropriations. Renewed engagement, and even affirmation of, the president's current authorities would go a long way in shoring up national resolve for the fight ahead, while at the same time heeding the cautions of our nation's founders. Jomini observes, "War is always to be conducted according to the great principles of the art; but great discretion must be exercised in the nature of the operations to be undertaken, which should depend on the circumstances of the case."¹⁸³ A careful consideration of the operations to be undertaken - military actions to enable the defeat of the Islamic State - and the circumstances - the current AUMFs and the climate in Congress - will help us ensure that if and when we declare war next, we do so with understanding of how this sits within the broader context of American history and armed conflict.

¹⁸³ Jomini, 15.

Appendix 1: Jomini's Policies of War

The nine policies of war are as follows:

- To reclaim certain rights or to defend them;
- To protect and maintain the great interests of the state, as commerce, manufactures, or agriculture;
- To uphold neighboring states whose existence is necessary either for the safety of the government or the balance of power;
- To fulfill the obligations of offensive and defensive alliances;
- To propagate political or religious theories, to crush them out, or to defend them;
- To increase the influence and power of the state by acquisitions of territory;
- 7. To defend the threatened independence of the state;
- 8. To avenge insulted honor;
- 9. From a mania for conquest.¹⁸⁴

¹⁸⁴ Jomini, 14.

Appendix 2: AUMF Statues & Citations

AUMF Statues 1798 to 2002.

	Title	Date	Target
1	<i>Protection of the Commerce and Coasts of the United States</i>	May 28, 1798	France
2	<i>Protection of the Commerce of the United States</i>	July 9, 1798	France
3	<i>Protection of the Commerce and Seamen of the United States Against Tripolitan Cruisers</i>	February 6, 1802	Tripoli
4	<i>Protection of the Commerce and Seamen of the United States Against the Algerian Cruisers</i>	March 3, 1815	Algeria
5	<i>Suppression of Piracy</i>	1830s-1860s	Undefined
6	<i>Authorization for the President to Employ the Armed Forces of the United States for Protecting the Security of Formosa, the Pescadores, and Related Positions and Territories of That Area</i>	January 29, 1955	Formosa and the Pescadores
7	<i>Promotion of Peace and Stability in the Middle East</i>	March 9, 1957	Middle East
8	<i>Maintenance of International Peace and Security in Southeast Asia</i>	August 10, 1964	Southeast Asia
9	<i>Multinational Force in Lebanon</i>	October 12, 1983	Lebanon
10	<i>Authorization of the Use of U.S. Armed Forces Pursuant to U.N. Security Council Resolution 678 with Respect to Iraq</i>	January 14, 1991	Iraq
11	<i>Authorization of the Use of U.S. Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States</i>	September 18, 2001	Undefined
12	<i>Authorization of the Use of Force Against Iraq Resolution of 2002</i>	October 16, 2002	Iraq

AUMF Citations:

Act of May 28, 1798, “Protection of the Commerce and Coasts of the United States.” Ch. 48, 1 Stat. 561.

Act of July 9, 1798, "Protection of the Commerce of the United States." Ch. 68, 1 Stat. 578.

Act of February 6, 1802, "Protection of the Commerce and Seamen of the United States Against Tripolitan Cruisers." Ch. 4, 2 Stat. 129.

Act of March 3, 1815, "Protection of the Commerce and Seamen of the United States Against the Algerian Cruisers." Ch. 90, 3 Stat. 230.

33 U.S. C. § 7, "Regulations for the Suppression of Piracy." Various Acts, 1819 - 1861. Available at:

<http://uscode.house.gov/view.xhtml?path=/prelim@title33/chapter7&edition=prelim>

P.L. 84-4, "Authorization for the President to Employ the Armed Forces of the United States for Protecting the Security of Formosa, the Pescadores, and Related Positions and Territories of That Area." 69 Stat. 7, January 29, 1955.

P.L. 85-7, "Promotion of Peace and Stability in the Middle East." 71 Stat. 5 March 9, 1957 [H.J.Res. 117].

P.L. 88-408, "Maintenance of International Peace and Security in Southeast Asia." 78 Stat. 384, August 10, 1964

P.L. 98-43, "Multinational Force in Lebanon." 97 Stat. 214, June 27, 1983 [S. 639].

P.L. 102-1, "Authorization of the Use of U.S. Armed Forces Pursuant to U.N. Security Council Resolution 678 with Respect to Iraq." 105 Stat. 3, January 14, 1991.

P.L. 107-40, "Authorization of the Use of U.S. Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States." 115 Stat. 224, September 18, 2001.

P.L. 107-243, "Authorization of the Use of Force Against Iraq Resolution of 2002." 116 Stat. 1498, October 16, 2002.

Appendix 3: Declarations of War & Citations

American Declarations of War.

	Title	Date	War
1	War with Great Britain 1812	June 18, 1812	War of 1812
2	War with Mexico 1846	May 13, 1846	Mexican-American War
3	War with Spain	April 25, 1898	Spanish-American War
4	War with Germany	April 6, 1917	WWI
5	War with Austria-Hungary 1917	December 7, 1917	WWI
6	War with Japan 1941	December 8, 1941	WWII
7	War with Germany 1941	December 11, 1941	WWII
8	War with Italy 1941	December 11, 1941	WWII
9	War with Bulgaria 1942	June 5, 1942	WWII
10	War with Hungary 1942	June 5, 1942	WWII
11	War with Rumania 1942	June 5, 1942	WWII

War with Great Britain. Act of June 18, 1812, Ch. 102, 2 Stat. 755

War with Mexico. Act of May 13, 1846, Ch. 16, 9 Stat. 9

War with Spain. Act of April 25, 1898, Ch. 189, 30 Stat. 364

War with Germany. Act of April 6, Ch. 1, 40 Stat. 1

War with Austria-Hungary. Act of December 7, 1917, Ch. 1, 40 Stat. 429

War with Japan. Act of December 8, 1941. Ch. 561, 55 Stat. 795

War with Germany, Act of December 11, 1941. Ch. 564, 55 Stat. 796

War with Italy, Act of December 11, 1941. Ch. 564, 55 Stat. 797

War with Bulgaria. Act of June 5, 1942. Ch. 323, 56 Stat. 307

War with Hungary. Act of June 5, 1942. Ch. 324, 56 Stat. 307

War with Rumania. Act of June 5, 1942. Ch. 325, 56 Stat. 307

Appendix 4: Citations of Requests for Declarations of War & AUMF

List of Requests for Declarations of War

1. War of 1812 (1812): No formal request.
2. Algeria (1815): Madison, James. "Message to Congress." February 23, 1815. *Annals of Congress*. Senate, 13th Congress, 3rd Session, 269.
3. Mexican-American War (1846): Polk, James K. "Special Message to Congress on Mexican Relations." May 11, 1846. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=67907>.
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Appendix 5: AUMF, Declarations of War & Jomini Spreadsheet

Appendix 6: AUMF Requests, Declaration of War Requests & Jomini Spreadsheet

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Curriculum Vitae

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