

NEW PRESIDENTIAL WAR POWERS: AN ANALYSIS OF
PRESIDENT GEORGE W. BUSH

by

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A Thesis submitted to the

Graduate School-Newark

Rutgers, The State University of New Jersey

in partial fulfillment of the requirements

for the degree of

Master of Arts in Political Science

Graduate Program in

written under the direction of

Dr. Alison Howell

and approved by

Newark, New Jersey

May 2018

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ABSTRACT OF THE THESIS

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Thesis Director: Dr. Alison Howell

American foreign policy has drastically changed since September 11, 2001. In the decade before that date America was engaged in a series of smaller conflicts, but nothing sustained over a long period of time. The United States (U.S.) has fought its two longest wars, Operation Enduring Freedom (OEF) and Operation Iraqi Freedom (OIF), since then. Both wars were aided by the major shift in presidential war powers that occurred due to September 11, 2001. Within one week of the terror attacks that day the Authorization of Use of Military Force of 2001 (AUMF) was passed into law. This AUMF changed presidential war powers more than any authorization for war. It has also impacted many civil liberties issues, closing the gap between liberty and security

The purpose of my thesis is to prove that presidential war powers changed under President Bush more than any President. I specifically state that passing the AUMF of 2001 is the direct point in time where presidential war powers changed for the foreseeable future as my second argument. Lastly, I argue that President Bush was within his constitutional rights and acted within the precedents set by past Presidents while defending America.

There are many parts to this thesis that support my arguments. First, I try to interpret the intent of the Framers of the Constitution (Framers) regarding war powers in the Constitution of the U.S. (Constitution). This is important because it is what scholars and politicians use to base their positions on this topic. This is where I discuss both arguments of the war powers debate. One argument is that the President has war powers given in the Constitution. The other is that only Congress has the power to declare war. I also provide a history of Presidents using war powers, so we can compare them to President Bush. The bulk of my thesis discusses the AUMF of 2001 in many capacities. I discuss the overview, impact, debate, and framework of it to show evidence for my thesis statement and key arguments. Through my thesis I defend it from a historical perspective. Historical evidence supports all of my arguments and is the baseline of it.

ACKNOWLEDGMENTS

Through my time as a student in the Master of Arts in Political Science program at Rutgers-Newark many courses have honed my political interests. As a United States (U.S.) Marine Corps veteran with two combat deployments to Iraq and Afghanistan in support of OIF and OEF I have become obsessed with the Middle East. My “American Foreign Policy” class changed how I view America’s foreign engagements. That was my first formal introduction to presidential war powers. Two questions that arose when discussing the War on Terror (WOT) were, “Why does Congress not declare war anymore?” and “How is the U.S. involved in so many conflicts without congressional declaration?” Those questions stuck with me. They were never answered in class. It led me to this thesis. I have learned there are no clear answers.

I have taken many other classes in this program that have guided me towards this thesis. They include: “American Political Thought” taught by Dr. Antonio Vazquez-Arroyo, “American Grand Strategy in the Pacific” taught by Dr. Simon Reich, “Policy Making in America” taught by Dr. Domingo Morel, and “Ethical Issues in Public Policy” taught by Dr. Mary Segers. Each class I have studied has added value to my political understanding, but these courses drove me toward this thesis and understanding it most.

Thank you to every professor I have had the privilege of learning from at Rutgers. This program was my first journey into political understanding and formal education out of the business sphere. Your professionalism, passion for course content, and concern for student engagement and learning was a driving force and motivator to maximize my best efforts. I benefitted greatly from the class structure including continuous open dialogue, and most importantly learned how to discuss topics people find uncomfortable in a more

coherent way. Your understanding, compassion, and willingness to work with me on timelines when I was undergoing medical issues is appreciated more than I can express. On a personal level I owe great gratitude to Dr. Alison Howell for volunteering her personal time as my thesis sponsor and serving on my committee. Thank you to both Dr. Morel and Dr. Mara Sidney for serving on my committee as well.

If it were possible I would personally thank each President, especially those who serve America during times of war. Between my endless research for this thesis and courses I have taken I learned that their job is a thankless one. I have no doubt it impacts them on a personal level in ways the public will never know. I cannot imagine what challenging choices we do not know about that President George W. Bush faced after September 11, 2001, President F.D. Roosevelt had after Pearl Harbor, or President Lincoln viewed in preserving the Union. Regardless of one's political affiliation, these amazing leaders deserve the utmost respect and gratitude for guiding America to where the nation is today. They were not perfect men who made perfect choices, but did the best they could with the choices available.

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ACRONYM LIST

ACLU- American Civil Liberties Union

AOC- Articles of Confederation

AUMF of 2001- Authorization for Use of Military Force of 2001

CIA- Central Intelligence Agency

Constitution- Constitution of the United States of America

Costs of War- Costs of War Project by the Watson Institute International & Public

Affairs at Brown University

CSRT- Combat Status Review Tribunal

DHS- Department of Homeland Security

DOD- Department of Defense

EO- Executive Order

FAA- FISA Amendments Act

FBI- Federal Bureau of Investigation

FISA- Foreign Intelligence Surveillance Act

Framers- Framers of the Constitution

INS- Immigration & Naturalization Service

MCA- Military Commissions Act

NSA- National Security Agency

OEF- Operation Enduring Freedom

OIF- Operation Iraqi Freedom

Papers- The Federalist Papers

PATRIOT Act- United and Strengthening America by Providing Appropriate Tools
Required to Intercept and Obstruct Terrorism Act

TIA-Total Information Awareness Project

UCMJ- Uniform Code of Military Justice

UN- United Nations

U.S.- United States of America

VA- Department of Veterans Affairs

WOT- War on Terror

WPR- War Powers Resolution of 1973

WWI- World War I

WWII- World War II

CHAPTER 1: INTRODUCTION

On September 11, 2001 America, and the world, changed forever. That day Osama bin Laden was the mastermind behind the deadliest terror attack in history. 2,977 people immediately died (McCoy, 2015, “9/11 Death”). More than 9,000 claimants are eligible for compensation for medical bills and other expenses, and more than 6,000 have received compensation decisions (McCoy, 2015, “9/11 Death”) due to injuries suffered from the attacks. While catastrophic, the immediate impact of that day almost pales in comparison to the past sixteen years of war the U.S. has fought. Presidential war powers and American foreign policy both endured drastic changes that day. President Bush experienced the loosest use of presidential war powers of any President as a result.

President Bush immediately authorized many actions. He authorized military pilots to shoot suspect aircraft and grounded all flights. The Department of Defense (DOD) raised the defense level to Def.-Con 3. The President and his cabinet discussed measures to protect the country from further attacks and made plans for war against those responsible, including Al-Qaeda and the Taliban. Military jets patrolled over New York City and Washington, D.C. The Department of Justice requested that the Immigration and Naturalization Service (INS) arrest individuals of special interest for immigration violations, and delay their hearings or deny release bonds (Gonzales, 2016, 480).

On September 12, 2001 Congress began drafting the AUMF of 2001 upon President Bush’s request. They passed it nearly unanimously two days later. President Bush signed it within one week of the terror attack. On the contrary, it took the Framers four months to write the Constitution. A combination of fear, patriotism, and a desire for

vengeance expedited this law that would change American foreign policy and impact civil liberties of citizens and non-citizens more than any wartime laws in U.S. history.

A main reason why the AUMF of 2001 was passed so quickly is because of how President Bush framed the September 11, 2001 attacks as a problem. Thomas A. Birkland explains this concept. He says:

“Public policy is largely driven by arguments about whether something is a solvable problem, what the potential solutions are, what the costs of those solutions are, and whether the solutions will be wholly or more likely partially effective (Birkland, 2016, 11).”

America being attacked was clearly a problem that was discussed as an idea in intelligence briefings before September 11, 2001. The idea became a problem once the attack happened. President Bush’s solutions led to the AUMF of 2001 being passed.

It passed nearly unanimously. Though it was heavily contested only one person voted against it. The AUMF of 2001 was challenged in 2017 more than it has been over the past sixteen years for two reasons: the lack of boundaries in it and the excessive use with no end in sight. Presidents Obama and Trump have used it as justification for their military actions. Congress wanted President Trump to seek new authorization for strikes in Syria instead of invoking the AUMF of 2001, but he did not. The House Committee approved a repeal of it in June 2017, but Speaker of the House Paul Ryan stripped it.

My thesis statement is that presidential war powers changed under President Bush more than any other President. Furthermore, I state that the AUMF of 2001 is the specific law that changed presidential war powers forever. Lastly, I aim to prove that President Bush’s actions after September 11, 2001 were within his constitutional rights and aligned with precedents set by past Presidents during times of war. I focus on

President Bush's administration from 2001-2009. Brief mentions of the AUMF of 2001 may be made under President Obama's terms as President since it is impossible to fully separate his foreign policies from President Bush's since many overlap. I make all efforts to minimize them, so I do not detract from my main arguments.

I defend my thesis from a historical perspective. My arguments are supported by historical evidence. I compare President Bush's use of war powers to past Presidents to show presidential war powers changed more under him than any President. My statement that he acted within his constitutional rights is supported by evidence shown by viewing his predecessors' actions in similar situations. Lastly, my point that the AUMF of 2001 is the main law where presidential war powers changed how they are used for the foreseeable future is supported by comparing it to laws passed during previous wars.

My next chapter is the review of approaches. Here, I discuss the types of sources I use to write this thesis, while elaborating on my research questions. The main research of my thesis is broken down into two sections: presidential war powers before the AUMF of 2001 was passed and presidential war powers after the AUMF of 2001 was passed. These sections contain a total of six research questions I form my thesis on. The pre AUMF of 2001 questions include: "How did the Framers and founding documents impact presidential war powers?" and "What is the history of presidential war powers being exercised before the AUMF of 2001?" My post AUMF of 2001 questions include: "What is the AUMF of 2001?", "What is its impact?", "What is the debate over it?", and "What is its legal framework?" I provide the main concepts and perspectives I found to answer each question and include key authors that I agree and disagree with. At the end I note challenges I found in conducting my research on each question.

Next is a history of presidential war powers before the AUMF of 2001. The chapter has two sections. The first section discusses the Framers' and founding documents' impact on presidential war powers. Section two views how past Presidents used war powers. Here, I discuss the debate of the legality and constitutionality of presidential war powers. I explain the Framers' intent when writing the Constitution and what it says about war powers. We must understand this to gain perspective of if President Bush acted within his constitutional rights.

This leads into a discussion of America's entry into major military conflicts under past Presidents. I also discuss wartime impacts to civil liberties. You will see that only a few of President Bush's predecessors were war time Presidents, yet the U.S. has a long military history. It is vital to understand how ex-Presidents led the nation during war, so we have a baseline to compare President Bush to. As the philosopher George Santayana says, "Those who cannot remember the past are doomed to repeat it." Concurrently, by viewing the past we can fairly judge President Bush's actions in comparison to his predecessors. I argue that he acted in accordance with precedents set during wars in U.S. history. This part of the thesis helps support that argument.

Chapter four is the main part of this thesis. It explains how and why the AUMF of 2001 changed presidential war powers as much as it did. The first section is an overview of what the AUMF of 2001 is. I explain who wrote it, why it was written, and the rules and boundaries that guide it. This is important as it explains the authorization that Congress provided in the aftermath of September 11, 2001. We will see that many parameters of this law were left broad and open ended. My goal is to prove that Congress did give President Bush authorization to take military action to defend America.

That leads into the impact of the AUMF of 2001. I discuss the law's impact on American foreign policy and civil liberties, as we cannot separate them. Here I offer research that explains how presidential war powers changed under President Bush's presidency. I give examples of President Bush referencing the AUMF of 2001 in leading military action. I also note where he references it in signing Executive Orders (EO) and other key legislature. Though it is impossible to provide a full quantitative analysis of the AUMF of 2001's impact, I provide the most comprehensive statistics I found here. I also discuss key changes to civil liberties impacting U.S. citizens and non-citizens. We must understand this information to comprehend the impact the of the AUMF of 2001.

The next two sections discuss the debate over the legality, constitutionality, and legal framework of the AUMF of 2001. Many key points and resources intermingle in these sections. I aim to provide both sides of this debate. One side believes the AUMF of 2001 is Congress' authorization for President Bush to take military action after September 11, 2001. The other side believes President Bush exceeded his boundaries as commander in chief. There is no middle ground. Which side of the debate scholars are on reflects their interpretation of the law, Constitution, and support of President Bush. We must understand both sides of the debate because it gives full perspective of the arguments. The legal framework section includes the landmark Supreme Court rulings that had large impacts on President Bush's war powers due to the AUMF of 2001. My last chapter is the conclusion. Here I provide a synopsis of my thesis and reiterate my thesis and key arguments. I also reflect on how my thesis and research open new questions or lines of research that can be conducted in the future.

CHAPTER 2: REVIEW OF APPROACHES

Introduction

Debates over presidential war powers have been ongoing since before the Constitution was ratified, as the Framers disputed how much war power the President would wield. They agreed on two main points. First, the President would bear minimal resemblance to the British monarch. Second, the President needed authority to act swiftly if America were attacked. That debate lives 230 years later between those who believe the President has war powers and those who believe only Congress does. Many Presidents have flexed their perceived war powers, even without declarations of war.

The purpose of this chapter is to give an overview of approaches and key research concepts I used. I structured this chapter like I did my thesis. This introduction describes the thesis layout. Then I review key concepts pertaining to presidential war powers before the AUMF of 2001. I then move to vital approaches pertaining to presidential war powers after the AUMF of 2001. The chapter ends with a conclusion that explains the key theoretical concepts, researchers, and scholarly literature trends I agree and disagree with most. Here, I note areas that lack research and can be improved upon.

This thesis is founded on the six questions I mention in the introduction broken into two chapters. Chapter three discusses presidential war powers before the AUMF of 2001 with the associated questions. Chapter four is about presidential war powers after the AUMF of 2001 and my research questions for this period. Here lies the bulk of my thesis. Most of my research is on President Bush's use of presidential war powers from September 11, 2001 through 2009 when he left office. I structured my thesis this way so

my research clearly supports my thesis statement. My thesis statement is that presidential war powers changed under President Bush more than any President. Most notably, I pinpoint the AUMF of 2001 as the law that changed presidential war powers forever.

Pre AUMF of 2001 Approaches

Key scholarly approaches and concepts important to understanding presidential war powers before the AUMF of 2001 are discussed here. My first question is “How did the Framers and founding documents impact presidential war powers?” We must understand what the Constitution says about the distribution of war powers to understand why they changed under President Bush. This gives insight into how the Framers envisioned war powers being handled. The best way to comprehend their intent is to view the founding documents, which are the Constitution and Federalist Papers.

The Constitution was written in 1787. Prior to it the governing document of America was the Articles of Confederation (AOC). The AOC had some major shortcomings that the Continental Congress knew had to be fixed. The result of this change is the Constitution due to political compromise by delegates of each state. It is the supreme law of the U.S. and established America’s national government and fundamental laws while guaranteeing basic citizens’ rights.

Two Articles regarding war powers are written in the Constitution. Each article is interpreted differently depending on your view of if the President or Congress has war powers. Article I, Section 8 grants Congress authority to provide for common defense, declare war, raise and support armies, provide and maintain a navy, make rules for the government, and regulation of land and naval forces (Rogers, 1971, 1195). Congress is

responsible for making laws to carry out the powers of the Constitution, and are the sole body allowed to appropriate funds. Article II, Section 2 lists the President's war powers. The President is vested with executive power of the government, he is named commander in chief of the army and navy, and is required to take care that laws be faithfully executed (Rogers, 1971, 1195). Constitutional authority gives the President power to make treaties while conducting foreign relations business in the U.S.' interest.

The Federalist Papers (Papers) are a series of 85 essays written to garner support for the Constitution. They are one of the most important sources for interpreting the Framers' intent. Alexander Hamilton, James Madison, and John Jay wrote them. Madison and Hamilton discuss executive power in relation to national defense and the military. It is important to understand the Papers' contribution to explain the need for executive power to extend to the military, as they aided in the Constitution's ratification.

We can evaluate President Bush's actions in support of my thesis that presidential war powers changed more during his presidency than others if we understand what the Framers say about war power. In Federalist No. 70 Hamilton says:

“Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and anarchy (Hamilton et al, 2001, 362).”

This is one of the many Papers that show the Framers wanted a strong and empowered President. They used John Locke's view of executive power to write the Constitution.

My sources are from 1971-2008. This gives an interesting research perspective over the course time. Most are published in political and law journals. A key trend is

most writers follow a set pattern. They give a historical perspective and aim to interpret the Framers' intent, then use that to support their writings. I found many sources that support the President having war powers. William P. Rogers argues that war powers are shared by Congress and the President and believes the Constitution states cooperation between both is needed. Cyrus R. Vance is the first scholar I saw acknowledge the world the Framers lived in is different than today. This is important to understand when we evaluate Presidents at war. Vance disputes the effectiveness of the War Powers Resolution (WPR) of 1973. He gives foresight for the post-AUMF of 2001 world:

“I trust we will see increasing congressional participation in future decisions relating to deployments of troops overseas. But if the past is any indication of the future, it is likely that unless the WPR is strengthened, future Presidents of both parties will only reluctantly exercise the necessary collective judgment with Congress (Vance, 1984, 95).”

Two sources I found interesting on the WPR contrast each other. James Nathan argues that Congress must strengthen its intent in upholding it after U.S. interventions in Somalia and Operation Desert Storm. Louis Fisher and David Grey Adler advocate that the WPR lost its effectiveness and was a tool for Presidents to manipulate Congress to act as they need. Christopher Paul supports this theory. These sources all show valuable perspective of how Presidents used war powers and interpret the Framers' intent.

My next question is “What is the history of presidential war powers being used?” This is important because we need a baseline to view President Bush's conduct against. We can see precedents for executive action by viewing how past Presidents defended America. One of the biggest arguments opponents of President Bush have is that he exceeded and abused war powers. Concurrently, his supporters say that previous

Presidents acted similarly. The only way we can accurately determine if President Bush acted out of line is to review how his predecessors acted.

Most of my vital sources for this question were written after 2000 and fall in two categories. First are historical pieces on specific wars that fit within a set timeframe. These follow a similar pattern. The writer begins with a description of the conflict, then details the events leading up to it, and elaborates on the impact of the conflict or war. These source types resemble many history papers in academia, and are informative about a specific war and point in U.S. history. Many of these sources help answer this question.

One example is Bruce Miroff's historical piece on President Adams that aims to reconstruct his conception of the executive branch and executive power. He shows how President Adams used his position to manipulate Congress leading to the 1798 Quasi War with France. Robert Turner wrote one of my favorite articles. He explains how America dealt with the Barbary Pirates, the first major non-state actor threat the nation faced almost 200 years before September 11, 2001. Turner states:

“Today as America faces asymmetric threats to its security often characterized by the tactics of terrorism, there is wisdom to be found in the writings of one of America's greatest Founding Fathers, Thomas Jefferson. He foresaw the principle of nonintervention in the internal affairs of other states, the utility of multilateralism and collective security agreements, and the importance of dealing with acts of aggression or terrorism, lest they become parents to others (Turner, 2003, 121).”

Conceptual pieces about challenges to Americans' civil liberties are the next source type I use. Most are similar as they cover large periods of history and detail what led to executive decisions made to impact Americans' civil liberties. Much of the data use is effective where there is not too much or too little. Most writers find ways to tie their research to President Bush's post-AUMF of 2001 decision making.

These sources were useful when researching Presidents precedents using power to impact civil liberties during war comparable to how President Bush did after the AUMF of 2001 was passed. Wendell Bird explains the impact of President Adams passing the Alien and Sedition Acts during the XYZ Quasi War with France. Civil liberties impacts authorized by President Lincoln during the Civil War are wrote about often. Detlav F. Vagts converses on the authorization of military commissions. James A. Dueholm covers the suspension of habeas corpus. Peter Connolly-Smith writes about President Wilson passing the Espionage and Trading with the Enemy Acts during World War I (WWI).

Post AUMF of 2001 Approaches

This section reviews scholarly literature I found most valuable when reviewing presidential war powers after the AUMF of 2001. My most basic question on this is “What is the AUMF of 2001?” The purpose of researching this is to fully understand what this law is that changed American foreign policy forever. The key findings I needed to know are: who passed it, who it is authorized to be used against, what the purpose of it is, where it is authorized to be used, why it was passed, and when it was passed.

I also wanted to know how long the authorization was valid for. Understanding what this law is and why it was passed gives us a look inside the thought process of both Congress and President Bush in the immediate aftermath of the September 11, 2001 terror attacks. Being able to do this is important because it supports my second main argument of this thesis. That argument is that the AUMF of 2001 changed presidential war powers more than any other bill passed in defense of America.

There is an abundance of writing on the WOT, specifically the AUMF of 2001. Since every aspect of the WOT falls back to the AUMF of 2001, it was hard to find quality sources that had what I needed to know. Nancy Kassop explains how President Bush used his influence over Congress in the aftermath of September 11, 2001. She says:

“By characterizing the September 2001 attacks as acts of war, where war had been declared upon the U.S. by Al-Qaeda terrorists, he termed himself a wartime President, and looked to the authority that flows to Presidents in such periods. In defining that war as a continuing threat, he set in place a network of laws and policies of expansive scope and uncertain duration (Kassop, 2003, 510).”

She continues to explain that there is a major concern over the lack of limits on the AUMF of 2001 and acknowledges that war is not kind to liberties.

Articles by Alberto R. Gonzales and Curtis A. Bradley and Jack L. Goldsmith are similar. Both provide information on the AUMF of 2001 through both Presidents Bush and Obama’s terms. While this thesis only covers President Bush’s terms, it helped me understand the impact of this law more by being able to review what happened during both terms. They also compare the AUMF of 2001 to the Constitution. These authors provide some of the foundational information I needed on the AUMF of 2001.

Course books offered conceptual understanding of why events happened. Stephen E. Ambrose and Douglas G. Brinkley give insight into the White House after September 11, 2001. Birkland explains policy making to reveal how the AUMF of 2001 was drafted and passed. Dennis Merrill and Thomas G. Paterson explain President Bush’s strategy to defend America through the AUMF of 2001. These were essential to understand what the AUMF of 2001 is and comparing President Bush to his predecessors.

One of the most important parts of my thesis revolves around the question of “What is the impact of the AUMF of 2001?” My objective was to figure out what the

result of this law is. I focused on researching military actions America took under this AUMF and civil liberties issues that have been challenged since 2001. These issues include warrantless surveillance, detention, and rendition. This section provides the most support and substance to defend my statements.

To repeat my thesis statement, presidential war powers changed more during President Bush's presidency than any President. The AUMF of 2001 changed presidential war powers more than any war law. We must know the impact to understand how presidential war powers changed. We gain understanding by comparing the impact of this to the impact of previous laws passed in war.

Since it is impossible to ignore the quantitative cost of the AUMF of 2001 I include research from the "Costs of War" Project (Costs of War). This project is sponsored by the Watson Institute of International and Public Affairs at Brown University and provides the most comprehensive data I found on the AUMF of 2001's impact. Some reports from it have information on different countries, but the main focus is on OIF and OEF. While these are the biggest two wars the AUMF of 2001 guided, they are not the only conflicts America was involved in under this law. The project shows a total cost analysis including direct and indirect financial costs. They also include a human cost of the law. It is imperative that we realize the quantitative aspect of this as it puts the effect of the AUMF of 2001 in perspective.

I also reference government documents. These include EO's 13425 and 13440 which impacted the civil liberties of unlawful enemy combatants. Congressional Research Service reports clarify how many and what military actions, EO's, and civil liberties changes President Bush referenced the AUMF of 2001 for. There are many

resources available with differing opinions on the AUMF of 2001's impact. This is good as it gave me both sides of the debate over if this law is constitutional and legal. One of my biggest challenges was narrowing down the best sources to use due to the overwhelming amount of research available. Most of my sources were written after President Bush left office. Concurrently, most focused on civil liberties impacts of the AUMF of 2001. There were plenty that discuss Iraq and Afghanistan, but they all lead to the many civil liberties challenges the Bush administration pushed.

Many of these writings share similar styles to the sources I found on presidential use of war powers before the AUMF of 2001 that focus on civil liberties impacts. They often start by describing the civil liberties issue, dive into the topic's history including events leading to the law change, and elaborate on their opinion of the impact. No one can conclusively say what the impacts are since the law is still used today.

Fisher gives perspective on detention and commissions under the AUMF of 2001. He provides constitutional justification for the processes and historical perspective to show what precedence existed previously, while discussing many of the key Supreme Court cases decided that the AUMF of 2001 impacted. The legal framework of those cases is a large part of his writing. Detention and rendition both have many sources written on them. Jamal Barnes writes about the global reach of the extraordinary rendition program the Bush administration relied on for intelligence during the WOT. Jakub Zahora aids in discussing some more interrogation process America used during the WOT besides the extraordinary rendition program.

I realized it was essential to understand the controversy behind the AUMF of 2001. This led to my question of "What is the debate over the AUMF of 2001?" There

are two different perspectives. One, is that the AUMF of 2001 was Congress' authorization to let President Bush wage war. This means that everything President Bush did under the guidance of this AUMF is within his rights and approved by Congress. The other is that President Bush exceeded and abused his rights under the AUMF of 2001.

I noticed many writings on the debate of the AUMF of 2001 also discuss its impact, therefore answering multiple questions. The fascinating part about some of these is they discuss the presidencies of both Presidents Bush and Obama, giving a thorough understanding of the law. We cannot fully separate both Presidents' actions since their policies overlap. Some articles offer recommendations for creating a new AUMF to handle the WOT. It is intriguing to view how some academics think about changing this AUMF. Lastly, most of the sources I use provide historical context on what the authors believe the Framers meant when writing the Constitution.

Many authors argue the President has authority to make war, supporting my argument that President Bush acted within his rights. William S. Castle says:

“The Constitution does not spell out the President’s war powers. Therefore, these war powers must inhere in the commander in chief clause and the judicial and executive glosses on it (Castle 513).”

Bradley and Goldsmith state:

“There were numerous undeclared wars in the years leading up to the Constitution, and the Federalist Papers specifically noted that the ceremony of a formal denunciation of war has of late fallen into disuse. It therefore seems unlikely that the Founders believed that a congressional declaration of war was a constitutional prerequisite for U.S. war making (Bradley and Goldsmith, 2005, 2058-2059).”

Furthermore, based on post World War II (WWII) congressional trends the AUMF of 2001 served as congressional authorization for military action. Michael D. Ramsey argues:

“President Bush honored the constitutional limit on the initiation of war. He sought and received approval from Congress to use military use in the WOT, even though it was not entirely clear that the President needed approval to respond to an attack on the U.S (Ramsey, 2011, 866).”

David B. Rivkin, Jr. believes that President Bush’s actions under the AUMF of 2001 have precedent. He claims:

“There is often serious historical blindness involved. Some people claim that the Bush administration is asserting and exerting unprecedented powers. Yet, these critics rarely acknowledge a broad array of aberrant actions by the U.S. government throughout American history (Rivkin, 2009, 486).”

Most opposition to President Bush’s actions under the AUMF of 2001 relate to civil liberties challenges. Some scholars believe the AUMF of 2001 granted President Bush too much judicial authority to pass laws and Orders, and that the checks and balances of government did not happen. Kassop opposes President Bush’s actions stating, “President Bush did not commit U.S. forces to some foreign venture without first obtaining authorization from Congress (Kassop, 2003, 528).” Michael Stokes Paulsen further argues against the AUMF of 2001 writing:

“Congress, in enacting the AUMF sweepingly-and in separation-of-powers terms somewhat surprisingly, declared its acceptance of unilateral presidential military action to deter and prevent acts of terrorism against the U.S., and the claim of unilateral presidential constitutional authority to do so. All of this is extraordinary. The AUMF marks a stunning, landmark paradigm shift in the constitutional practice of war powers, light years distant in tone and attitude from the WPR of 1973 (Paulsen 122).”

The last research question I used to form my thesis is “What is the legal framework of the AUMF of 2001? Understanding this is important because it shows how

the government and courts shaped the execution of executive branch led initiatives under the AUMF of 2001. If we understand how and why the courts upheld executive desires, we see why events unfolded how they did. Furthermore, it also shows that presidential war powers did drastically change after the AUMF of 2001 was passed. My research focused on legal framework surrounding the AUMF and other directives led by President Bush and six vital Supreme Court rulings resulting from this AUMF.

Many sources that answer other questions were answer this question. Common authors I previously mention include: Kassop, Castle, Bradley and Goldsmith, Malone, Fisher, and Gonzales. Whether I agree with them or not these sources offer respected perspective on many questions. There was not much differing information. Since the cases are decided events a lot of information is indisputable.

I could not find many sources on the legal framework of the AUMF itself. There are plenty of sources for court rulings. I use a speech Stephen W. Preston gives in 2015 at the annual meeting of the American Society of International Law in Washington, D.C. to understand the AUMF of 2001's framework. Preston dedicates the first quarter of his speech to this. The rest of it discusses legal framework for handling ISIS, ending the war in Afghanistan, and future counterterrorism operations which I do not write about.

There are many sources that discuss the legal framework of cases the Supreme Court ruled on pertaining to the AUMF of 2001. These include the author's opinion of whether the Supreme Court and President act constitutionally. Like every debate in my research there are two distinct arguments: one supports the decisions made by President Bush and the courts and the other doesn't. Castle supports President Bush and the courts.

David. L. Sloss argues against the court ruling in the case *Rasul v. Bush* saying:

“The inescapable conclusion is the Taliban detainees are protected by the Fourth Geneva Convention, which applies to those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict, in the hands of a party to the conflict of which they are not nationals. In its internal deliberations on these issues, the administration did not address the application of the Fourth Convention to the Taliban detainees, apparently because administration lawyers assumed that the Convention applies to civilian non-combatants (Sloss, 2004, 796).”

Other class materials explain concepts President Bush used to govern under the AUMF of 2001. An article written by Michael Walzer teaches concepts of dirty hands and morality in politics. This offers insight into challenging situations all Presidents find themselves in. I use another book by Walzer to refer to some debates on the AUMF of 2001. Nicolo Machiavelli’s lessons aid in understanding the mindset of Presidents when they find themselves having to make hard choices that are extremely unpopular, but designed for the greater good. Lastly, I rely on a book written by Frank Fischer, Gerald J. Miller, and Mara S. Sidney that discusses political morality in public policy. This brings insight into moral approaches Presidents are faced with.

Conclusion

In conclusion, I noticed two trends. First, is research on pre AUMF of 2001 information was easier to find detailed information on. Next, is a lot of post AUMF of 2001 information appeared to be impacted by variables related to the writer including their views on the AUMF of 2001, views on President Bush, and political affiliation.

One of my biggest challenges was finding quantitative data for my post AUMF of 2001 questions. I think the main reason for this is because we are still living in a time where this law is guiding American foreign policy. Additionally, many authors only

provided partial data. The Costs of War Project was vital in my ability to provide statistical context on the AUMF of 2001 due to its total cost analysis. It was not complete in covering the total AUMF of 2001 statistical impact, but was thorough. This is an area of opportunity scholars can enhance going forward.

I found many perspectives I agree with. Vance's article is one that had many points I support. These include: the future of the WPR, Congress' patterns of Presidential wartime support, and how we have to realize the Constitution should not be purely interpreted applying the U.S.' role in the world from 1787 today as it is completely different. I agree with Hamilton's views on executive power in Federalist's 69 and 70. Ramsey's support and interpretation of President Bush's request of war authorization from Congress aligns with my thinking. Turner's article on President Jefferson was one of my favorite since it has practical application with America's threats today.

I found valuable insight in many sources I disagree with also. Kassop's article falls in this category. I disagree with many of her points. She offers good insight in some areas. She says that President Bush did not solicit congressional authorization before sending U.S. troops to war. This is not true. I do not agree with all of her concerns on centralized policy making. She states that the AUMF of 2001 leads a political war with a military component. I do not agree that is true. I also disagree with most of Paulsen's article and points that unilateral presidential authority exists. It will be interesting to see the research conducted on the AUMF of 2001 in the future once the impacts can be fully evaluated. Nobody knows when that will be since the AUMF of 2001 is still being used. Until the AUMF of 2001 is no longer used a total cost and impact analysis cannot be provided. This is an opportunity for researchers to maximize.

CHAPTER 3: PRESIDENTIAL WAR POWERS BEFORE THE AUMF OF 2001

Introduction

War powers are one of the most debated constitutional issues. Two Articles are interpreted differently regarding this. Both feed arguments for each side of the war powers debate. Scholars cannot definitively answer “Does the President have the constitutional right to declare war, or is Congress the sole body that can?” This chapter discusses the impact the Founding Fathers and Founding Documents had on presidential war powers and give a history of Presidents using them. This is done over seven sections total. I discuss the debate over the constitutionality of Presidents using war powers, along with scholars’ interpretations of the Framers’ intent for war powers distribution.

Next, I cover America’s entry into major conflicts from 1789-2000. This is broken down into three sections covering different timeframes. It is important to understand these parts before diving into my thesis statement that presidential war powers changed during President Bush’s administration more than any other President. To understand the present and why things are how they are, we must understand the past. This gives us a reference to view events in context and provide a fair judgement of President Bush. I end this chapter with a conclusion that ties everything together.

Founding Fathers’ & Documents’ Impact on Presidential War Powers

My intent here is to offer an overview of the Framers’ and Founding Documents’ impact on presidential war powers. I give a view of what they wanted war powers distribution to look like. The Constitution established America’s national government, fundamental laws, and guaranteed basic rights. It provides a system of checks and

balances between the three government branches, so no branch has too much power. A problem with it is its vague writing. The discussion of war powers is one area like this. Interpretation of the Framers intent over who has war powers is heavily debated due to the lack of detailed war declaring roles written in the Constitution.

Articles I and II provide conflicting interpretations of this. Supporters of Congress having war powers believe that Article I explicitly gives them that right. Advocates of Presidents having war powers opine that Article II gives them that right. I then attempt to interpret the Framers' intent in writing the Constitution and their objectives. Next, I discuss the impact the Federalist Papers have on presidential war powers. Lastly, I provide the arguments in favor of and against presidential war powers.

The objective of the 1787 Constitutional Convention was to strengthen the central government and decide how America should be governed while replacing the AOC. One of the main parts of the AOC they needed to change was the federal procedure regarding war powers. The legislative branch had sole and exclusive war making rights under the AOC. The Framers recognized the President needed executive power to repeal attacks in emergencies. The Convention created a system of checks and balances between the branches of government. Each branch was designed to perform different functions, but they were designed to work collaboratively. The legislative branch would make laws, the executive branch would enforce them, and the judicial branch would interpret them.

The system of checks and balances regarding war powers mirrors other constitutional powers. A major concern of the Framers was avoiding giving one person the ability to go to war unilaterally without reason. The Framers wanted to avoid a British like monarchy. They understood that the federal government had to have

substantial power to govern the people, but they also wanted to grant the President the authority to use executive power as needed to defend America.

The world, and America's role in it, was much different in 1787 than in 2001. Realizing this makes me question if it is practical or safe to apply statutes written when America was simply trying to survive as a nation and not serve as a world power with endless global threats. More importantly, is the government the Framers desired the best one to defend America in a time where non-state actors pose great threats?

The Constitution gives the President executive power as commander in chief. The powers are broad and undefined, and the lack of clarity gives researchers uncertainty when determining the Framers' intent regarding war powers. They experienced the drawbacks of a weak central government without a strong independent executive under the AOC. Furthermore, they understood that wars, emergencies, and crises would need to be dealt with by strong and decisive executive power.

Many authors support the President's war powers. Fisher and Adler offer insight into the Framers' intent. They note Hamilton, in favor of a strong presidency, proposed Senate would have power of declaring war and the President would be authorized to have the direction of war when authorized or begun (Fisher and Adler, 1998, 7). Charles Pinckney opposed placing the power in the full Congress since he deemed their processes too slow. The draft proposal to vest the legislature with the power to make war proved unsatisfactory and the word declare was replaced by make giving Congress the power to make war (Fisher and Adler, 1998, 8). Rogers gives a thorough explanation saying:

“The division of the war powers between the legislative and executive branches is typical of the constitutional concept of shared powers and checks and balances.

They wished to take advantage of executive speed, efficiency, secrecy, and relative isolation from public passions. At the same time, they wished to avoid the dangers to democratic government exemplified by the British monarch who, as Hamilton noted, had supreme authority not only to command the military and naval forces, but also to declare war and to raise and regulate fleets and armies. Mindful of the hardships which war can impose on the citizens of a country and fearful of vesting too much power in any individual, the Framers intended that decisions regarding the initiation of hostilities be made not by the President alone, nor by the House or Senate alone, but by the entire Congress and the President together. Yet it is also clear that the framers intended to leave the President certain indispensable emergency powers (Rogers, 1971, 1196).”

Locke’s imprint is on the Constitution and American government as the Framers looked to him for aid in constructing it. He says, “Executive power involves enforcing society’s laws on all members and, it must necessarily be left to the prudence and wisdom of those who have power to use it for the public good (Locke, 1869, 47).” His reason is that some governments are too slow to execute vital matters quickly to defend the public.

After reading the Constitution we cannot fully determine whether Congress or the President has the sole right to make war. Scholars have attempted to use the Federalist Papers to interpret the Constitution since they were vital in getting support for the Constitution. Like the Constitution, some of the Papers provide contrasting views of war powers creating more room for misinterpreting the Framers’ intent. Hamilton states that the common defense of the Union’s members is a principle purpose of the Union in Federalist 23. He says it is questionable if the federal government should be responsible for common defense. However, when it is deemed responsible for it that:

“Government ought to be clothed with all the powers requisite to complete execution of its trust. And unless it can be shown that the circumstances which may affect the public safety are reducible within certain determinate limits; unless the contrary of this position can be fairly and rationally disputed, it must be admitted, as a necessary consequence, that there can be no limitation of that authority which is to provide for the defense and protection of the community, in any matter essential to its efficacy that is, in any matter essential to the formation, direction, or support of the national forces (Hamilton et al, 2001, 113).”

Hamilton says the federal government should have indefinite power providing for emergencies as they arise in Federalist 34. In Federalist 41 Madison says:

“Security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union. The powers requisite for attaining it must be effectually confided to the federal councils. Is the power of declaring war necessary? No man will answer this question in the negative. It would be superfluous, therefore, to enter into a proof of the affirmative. The existing Confederation establishes this power in the most ample form (Hamilton et al, 2001, 208).”

In Federalist 69 Hamilton explains executive power of the President to eliminate fears that the President would act as a monarch. He states:

“The President is to be commander in chief of the Army and Navy of the U.S. In this respect, his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. 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 (Hamilton et al, 2001, 357).”

In Federalist 70 Hamilton says there is a need for a unitary executive, and in Federalist 74 he justifies the President’s status as militia commander. He declares that energy is needed in the executive branch since it is essential to protection against foreign attacks. In his opinion, the executive needs to exercise decision, secrecy, and dispatch. Here we can see the layout of the different functions of the branches of government. Whereas the legislative branch is needed to be deliberate and process oriented, Hamilton states there is a need for executive action to be taken promptly and uninhibited as needed.

I believe the Framers wanted the President to defend America as needed. They knew the legislative branch is incapable of quick action if they work as they were designed. They understood that a weak President without executive power would leave America vulnerable. I think that they wrote the Constitution how they did strategically.

They could not have foreseen the current world we live in, but based on these interpretations I think that their writing was purposeful. Therefore, this left the door open for President Bush to act as he did in the aftermath of September 11, 2001.

The other side of this debate states that the President should preserve civilian supremacy over the military and not be able to fight wars without Congress' approval. As James Madison says, "In no part of the Constitution is more wisdom to be found, than in the clause which confides the question of peace and war to the legislature, and not to the executive branch." Under this argument people state that the President's war powers are only valid after Congress declares war. The only exception is if America is under imminent attack. If that happens, the President can unilaterally declare war but only act defensively. A major argument against presidential war powers is that they enhance the President's authority over domestic civilian affairs that are not given in the Constitution.

This dilemma is from the lack of clarity and descriptive roles by the Framers. It can be interpreted that the Framers intended for a proper balance between the legislative and executive branches regarding foreign policy. Concurrently, the Constitution does not expressly grant the President additional powers in times of national emergency. Despite this, many Presidents have made claims for emergency powers during time of war.

20th Century Changes in Congress' Approach to War Powers

Around the start of the 20th century we see America taking on a new global role. The nation shifted from a young surviving country to a strong global partner to Europe. As America's global role changed, bringing on a change in national interests, Presidents used more war powers than their predecessors. This led to a change in Congress'

approach to war powers, which is the focus of this section. Many scholars acknowledge that times and the global structure have changed since the Constitution was written, which in effect changes threats to America and needs to defend them. Vance says:

“It is worth noting that the Framers lived in a very different world. At that time the U.S. was a small nation with limited capability for projecting its forces beyond its shores and without the daily and diverse contacts with the outside world that now affect our daily lives and security. The constitutional allocation of powers relating to foreign policy and national security, which today strikes us as piecemeal, was probably adequate to meet the needs of our nascent Republic. In today's complex world, however, this will no longer do (Vance, 1984, 84).”

He wrote this in 1984. This was truer in 2001 and more so today. If we apply this understanding to America's state after September 11, 2001 we can attempt to understand what President Bush was trying to do in a time of major uncertainty, hysteria, fear.

Furthermore, Congress has not declared war since 1942. Since then they have supported and approved presidential requests taken without congressional approval. Additionally, the judicial branch has supported any claims of unconstitutionality against the executive branch in time of war. At least 199 U.S. military engagements overseas between 1798 and 1972 occurred without a declaration of war (Vance, 1984, 79-80).

Julian Zeilzer claims Congress's lack of participation in initial discussions of using military force create three main problems. First, the U.S. now tends to go to war without having a substantive debate about the human and financial costs that could result. The second cost of Presidents going to war rather than Congress doing so is that major mistakes result when decisions are made so quickly. The third cost has been the cheapening of the decision about using military force. (Zeilzer, 2011, “War Powers”).

Though Congress has not declared war over the past 75 years, they acted to restrict the President's war making ability by passing the WPR in 1973. Nathan pinpoints the Vietnam War as the main reason why this got passed stating:

“By the mid-1960s the Executive claims were very broad, including the power to deploy American broad and commit them to military operations when the President deems such actions necessary to maintain the security and defense of the U.S. (Nathan, 1993, 238).”

This resulted in high levels of distrust of the President, and combined with the failing war policy led Congress to act.

The President must meet four requirements under the WPR. First, a requirement for the President to consult with Congress would alert the latter that force had been used or was expected in a given context. Second, the reasons and justifications for action were to be reported to Congress. Third, Congress would have 60 days to debate the President's action and decide on its legitimacy and legality. Fourth, Congress retained the power through the passage of a concurrent resolution, to direct the President to remove military forces at any time during the 60-day period (Boylan and Phillips, 2001, 110). Rules to be used when interpreting the WPR are stated in part five. Part six states that if the courts rule a ruling invalid that the rest of the WPR is not to be deemed invalid.

I believe President Bush acted accordingly under the WPR after September 11, 2001. He requested that Congress provide an AUMF before acting and Congress did. Those who oppose President Bush argue he overstepped his boundaries and coerced or guided Congress in how to draft it. I support his actions and think he acted as his predecessors did when America was threatened. I offer examples where President Bush's predecessors acted similarly to get Congress' approval for war times shortly.

President Nixon vetoed the WPR because he regarded it as impractical and dangerous. He believed the legislation encroached upon the President's constitutional responsibilities as commander in chief. The Bill got passed, and a battle between the executive and legislative branches has constantly ensued. Since then Presidents have declared the WPR an unconstitutional infringement on the power of the executive branch.

The WPR has been a recurring issue due to the global commitment of American forces. Opponents of it argue that it is useless for its intended purpose and detrimental to national security. There are times the President must act secretly and the WPR prohibits that. Concurrently, the bureaucracy involved leaves U.S. troops at risk. The most notable example of this was in 1983 when President Reagan sent U.S. Marines to Lebanon on a peacekeeping mission. Nathan details what happened:

“Here the Reagan administration's definitions of objectives went through three distinct permutations: peace keeping and helping the Palestinians find safe harbor, assisting the Government of Lebanon, and blocking the advance of the Syrians and Soviets. Congress could only respond to the White House's Lebanon initiative with a febrile extension of the automatic WPR's clock. Congress gave the Executive 180 days, or until after the next election, to figure out what it was doing in Lebanon. Some 20 days after the WPR's clock had been reset by Congress, 241 U.S. Marines were killed while they slept when a truck bomb slammed into their barracks. (Nathan, 1993, 241).”

Effectiveness and content of the WPR has been debated since its inception. Paul states Congress aimed to balance between leaving the President as commander in chief and forcing the President to accept congressional authority to declare war. Many drafts were created that took a long time to reach a final compromise. He claims the WPR has not been effective at accomplishing its intent of ensuring the collective judgment of both Congress and the President are used when U.S. forces are used (Paul, 2008, 673).

Opponents of the WPR deem Congress hypocritical for passing it, as they could have used their constitutional powers to stop Vietnam if they chose to. They view this as a reactive policy implemented to attack the weakness of the presidency when President Nixon was in office. Some people view the WPR as an intermingling of government branch rights where the executive branch is involved in the legislative and vice versa.

It is easy to see where the debate over the President's war powers comes from. There is no clear scope definition with assigned roles and responsibilities for declaring and making war in the Constitution. Many interpretations can be made for both sides of this debate. One can wonder if the Framers deliberately crafted the Constitution to be as vague regarding war power as it is. They wanted to avoid a monarchy in America with the focus on the legislative branch. They had the foresight to realize that the President should be able to command the military as needed to defend America. They also fully understood the strengths and weaknesses between each branch.

The lack of clear role definition of the branches in terms of war power could be deliberate so the legislative process would not leave America unsafe if attacked while protecting the integrity of each branch. If this is the case, then it validates my thesis statement that presidential war powers changed during President Bush's administration more than any other President. It was vital for national security in a post September 11, 2001 world that presidential war powers changed due to the new threat America faced.

Presidential War Powers 1789-1811

Through American history the nation has been in many military conflicts. Some were declared wars. Others were not and became sustained engagements. They began

small in scale and focused mostly on protecting American interests. As globalization shrunk the world America's global interests increased. Differing circumstances and situational contexts applying to America decided how the U.S. became involved in each conflict. Since President Washington was inaugurated as the first President in 1789 Congress has only declared war against eleven nations through the duration of five wars.

This section discusses America's entry into major military conflicts from 1789 through 1811. I focus on presidential war powers leading up to and during them. I substitute the words conflict and engagement interchangeably to mean military action. I do not use the word war each time since most of the engagements were not declared wars. Some are generally viewed as wars, so I use the term in those instances. I aim to keep the discussion on American entry in the engagements, but many important outcomes resulted from them that impact future engagements and must be noted. A key takeaway here is that none of the engagements I discuss here were declared wars by Congress.

I clarify when and where Congress declared war, what conflicts Congress approved without declaring war, and where the President acted unilaterally here and in the following sections. I also discuss civil liberties challenges that Presidents made to show precedents set before 2001. Understanding the context of each conflict puts them in perspective, as the Framers could not have seen globalization and the technological advances that have occurred since 1787. Factoring context changes how we view events.

If we understand the actions President Bush's predecessors took to defend America, we can compare what they did to what President Bush did. We will see that history does repeat itself. I attempt to show that past Presidents took liberties that they deemed necessary to defend America when the country was at war. My goal is to show

that what President Bush did was not isolated from prior Presidents, but that presidential war powers changed under President Bush more than any President out of necessity.

War powers are used by Presidents to handle domestic and foreign threats. President Washington commanded militia to quell the Whiskey Rebellions of 1794. Citizens grew angry at the government for taxing whiskey beginning in 1791. Discontent led to violent rebellions by 1794. This led to the militia arresting rebels, trying them in courts under military direction. The importance of this was that it showed that the new American government had the will and ability to suppress violence against it.

A few years later America was in the 1798 XYZ Quasi War with France. President Adams led a naval war with France, undeclared by Congress, over a diplomatic incident between the two nations. France began seizing U.S. merchant ships to aid in financing their European wars in the mid 1790's. Three American envoys were sent to negotiate with France. France's Foreign Minister Marquis de Talleyrand delayed negotiations for two reasons. One, he wanted more ships to be seized to increase his personal wealth. Next, he wanted to change the terms of a loan America gave them and threatened to invade the U.S. if they did not agree.

American entry into the war was complicated. Fisher says, "In the Quasi-War with France Congress enacted two dozen statutes authorizing the use of force. Adams made no assertion of a Presidential power to initiate hostilities." (Adler, 2013, 508). Despite the statutes, no formal declaration of war was made on France by Congress nor President Adams. Miroff provides context leading to U.S. involvement:

"Initially, Adams' view of the French threat largely coincided with the position of the High Federalists. After the brazen insult to the U.S. of the XYZ affair, Adams

appeared to rule out further efforts at negotiation and to rally the American people for a confrontation with France. Indeed, on several occasions he considered asking Congress for a declaration of war. Yet, for many reasons, he hesitated. Instead of all-out war, there would be the Alien and Sedition Acts, a rapid build-up of the army and navy, and a state of "quasi-war" on the seas between the United States and France (Miroff, 1987, 375)."

The Alien and Sedition Acts criminalized writing, printing, or publishing false, scandalous, or malicious writing against the government. The controversy involved whether the First Amendment's protections were narrow or broad, and brought into conflict two contradictory views of freedoms of press and speech (Bird, 2016, 541-542). These laws empowered the President to deport aliens suspected of siding with France and any non-citizen that was deemed dangerous to the peace and safety to the U.S. Anyone who publicly opposed his policies toward France could be prosecuted. Political dissent was criminalized. The total number of prosecutions is unclear. Bird estimates:

"Republican newspaper articles in late 1799 referred to twenty-two prosecutions without identifying most. Frank Anderson, in the earliest study of the Sedition Act, after noting between fifteen and seventeen indictments, said that there were "about 24 or 25 persons arrested" also without identifying the additional ones, an estimate that is periodically quoted although the additional arrestees are still not identified (Bird, 2016, 545-546)."

American merchant vessels were captured by the Barbary pirates in exchange for ransom at the same time as the Quasi War with France. The U.S. pursued a path of appeasement with the pirates that offered them financial reward and appeased terrorism since America lacked a large Navy in the 1790's. The regime change from President Adams to President Jefferson brought a new willingness of America to fight the pirates.

In May 1801, Jefferson sent a squadron of 2/3 of the navy to protect U.S. merchant ships in the Mediterranean from pirates. Attempts to pacify the Bashaw of Tripoli, Yusuf Karamanli, to stop attacking the ships with money and bribes had failed.

The cabinet unanimously concurred the expedition was needed. They ordered Captain Dale that if war had been declared on the U.S. he was to “distribute his forces so as best to protect our commerce & chastise their insolence by sinking, burning, or destroying their ships & vessels wherever you shall find them.” (Turner, 2003, 129).

Karamanli declared war on America while the squadron was en route to the Mediterranean. Turner discusses the initiatives taken by the executive branch to protect U.S. ships under attack:

“The consensus view of Jefferson’s cabinet was that the President needed no specific statutory authority to fight a war initiated or declared by a foreign state. Congress does not appear to have even been formally notified of the dispatch of 2/3 of the nation’s navy into harm’s way for more than six months, though there is no evidence of any effort to keep the mission a secret as it was widely reported in the press (Turner, 2003, 130).”

President Jefferson requested that Congress enact a variety of statutes authorizing the use of force. Congress did, but no declaration of war was issued. 200 years before September 11, 2001 America found itself engaged in a military conflict with non-state actors who threatened U.S. interests for the first time on a grand scale. It is intriguing that President Jefferson’s stance on negotiating with pirates is comparable to President Bush’s on negotiating with terrorists. President Jefferson understood that paying pirates ransom money would embolden them and create more problems. This caused him to halt the practice. This same mindset was rampant in President Bush’s Administration when he kept proclaiming that America does not negotiate with terrorists.

Presidential War Powers 1812-1948

In this section I discuss America’s entry into military engagements from 1812-1948. I use the same parameters described in the last section. The main difference is that

this time period covers the only instances Congress declared war. Not every conflict I discuss here is a declared war, but the only declared wars happened in this time period.

The first official congressional declaration of war was against Britain for the War of 1812. Economics were partly to blame in part due to President Jefferson upholding the Embargo Act, prohibiting trade with Britain. Violators were charged with treason, but charges were overturned by the federal courts. At the outset of the 19th century, Great Britain was locked in a long and bitter conflict with France. To cut off supplies from reaching the enemy, both sides attempted to block the U.S. from trading with the other.

A few factors led to the war. Britain passed the Orders in Council in 1807, requiring neutral countries to obtain a license from its authorities before trading with France or French colonies. The Royal Navy impressed many U.S. merchant seamen, forcing them to serve in their navy. The British also encouraged Native American hostility toward American Westward expansion. This led President Madison to sign a declaration of war Congress approved in June 1812. President Madison also authorized the arrest of civilian newspaper writers for inciting mutiny among U.S. military forces.

President Monroe authorized military action against Native Americans in Florida without congressional approval a few years later. Indian cross-border raids occurred frequently. As a response the raiders were pursued, their towns seized by the American military, and Spanish officials were displaced in favor of American officials. The Transcontinental Treaty of 1819 resulted from this and Spain gave Florida to America.

The Mexican-American War is the second congressional declaration of war, however the circumstances leading to it are controversial. Many people believe President

Polk provoked the war. Tensions between the U.S. and Mexico intensified by the 1840's as America attempted to buy parts of Mexico in their pursuit of Manifest Destiny.

Mexico declined fearing the U.S. would not be satisfied and keep pursuing more land.

Both sides viewed the other as a threat and distrust grew between them.

In 1846 President Polk ordered U.S. troops to Texas. Mexico viewed this as an invasion of disputed territory, and both nations declared war when a skirmish broke out between them. President Polk used military force to resolve this. He declared "Mexico had passed the boundary of the U.S., invaded our territory, and shed American blood on American soil" in a carefully worded statement to Congress on May 11, 1846 (King, 2000, 65-66). Congress immediately declared war after this. Here we see the power of a carefully framed presentation and how Presidents prior to President Bush used their influence over congressional authorizations for war.

The Civil War consisted of what many argue were the most complex use of presidential war powers. Some instances are viewed as civil liberties violations, however the executive branch deemed them necessary to preserve the Union. President Lincoln unilaterally ordered naval blockades of Southern ports and seizure of Southern ships before the war. Congress supported this though they were not consulted prior.

President Lincoln took measures that impacted Americans' civil liberties to preserve the Union. After the South seceded the only lines for communication and military use through Washington, D.C. were in Maryland. Out of military necessity he authorized General Winfield Scott to suspend the writ of habeas corpus, at or near any military line between Philadelphia and Washington if the public safety required it in 1861. President Lincoln issued his order pursuant to the provision in Article I, Section 9

of the Constitution stating that the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion and invasion the public safety may require it, generally called the suspension clause (Dueholm, 2008, 48). He also authorized the Union Army to arrest Southern legislators in favor of succession and revoked the use of the U.S. Postal Service to publications against the Union war effort.

Trials by military commissions were authorized by President Lincoln. In 1862 U.S. Marshals were authorized to arrest and imprison anyone who may be engaged by act, speech, or writing, in discouraging volunteer enlistments, or in any way giving aid and comfort to the enemy, or in any other disloyal practice against the U.S. This was supported by a public proclamation by President Lincoln. Furthermore, Southern sympathizers were banished from Union territory or arrested and imprisoned by 1863.

Military tribunals piled up thousands of cases through the war. It is estimated that at least 4,271 of these were heard by commissions (Vagts, 2007, 38). Many involved bushwhackers, or irregular bands of pro-Confederate fighters who did not wear military uniforms and were not organized regularly. Whereas regular Confederate soldiers were treated as prisoners of war and given protections that accorded that status, bushwhackers were dealt with summarily and often executed. Additional cases concerned spying and other forms of giving aid and comfort to the enemy (Vagts, 2007, 38-39).

No declaration of war was issued to begin the Civil War as the Confederacy was not seen as a legal state or entity, but as a part of the U.S. Therefore, this was viewed as a rebellion within the U.S. and not a war. This is important to understand when determining the legality of the use of presidential war powers here. The viewing of the Confederacy's actions as a rebellion was reinforced when they attacked the Union held

Fort Sumter in South Carolina. This framing of the Confederacy's actions as a rebellion alleviated the need of a congressional war declaration. President Lincoln was squashing a rebellion much in the same way President Washington handled the Whiskey Rebellion.

Many of President Bush's decisions regarding civil liberties under the AUMF of 2001 have roots to President Lincoln's handling of the Civil War. Here we have an example of a President suspending habeas corpus and enforcing military tribunals by commission. Just as President Lincoln acted out of necessity to preserve the Union, President Bush acted out of necessity to protect America.

Congress declared war on Spain to begin the Spanish-American War in 1898. It was a short conflict, but occurred to a series of events in the decade prior. Spain provoked brutality in Cuba, and Cuba was an interest of the U.S. An independent Cuba was one of President McKinley's platforms that got him elected. The tipping point was in February 1898 when the USS Maine sank in Havana Harbor. America immediately blamed Spain for the ship sinking, though no evidence has proven this.

In April 1898 the U.S. went to war with Spain. President McKinley asked Congress for authority to use force against both Spain and Cuba to end the strife and establish a stable Cuban government that would maintain order and observe international obligations. Many variables led to this including: congressional politics, economic and business concerns, religious and moral views, deeply rooted cultural biases, inflamed patriotism, U.S. interests in Cuba, and failed negotiations with Spain (Offner, 2004, 50).

He obtained a joint resolution from Congress declaring Cuba independent and demanded a withdrawal of Spanish forces. It also included an amendment that disavowed

any U.S. plan to permanently occupy Cuba. The resolution was then sent to Spanish authorities with unconditional compliance to occur by April 23, 1898. Spain declared war on April 24. Here we can see that Presidents began to conceive of defensive war powers more broadly. As globalization became more rampant they interpreted this to mean they had the authority to protect American interests wherever they were threatened.

Congress declared war on Germany and Austria-Hungary in 1917 launching America into WWI. America was able to stay neutral in the first few years of the war, but many events dragged the U.S. in. The U.S. public was appalled at the atrocities Germany committed to citizens in countries they invaded. U.S. banks loaned large amounts of money to the Allied Powers and would be unable to repay them if they lost the war. The sinking of the Lusitania, which killed over 120 Americans, made the war personal for many Americans. The Zimmerman telegram was the straw that broke the camel's back and forced America into the war. German Foreign Secretary Arthur Zimmerman offered Mexico their lost territories in Texas, New Mexico, and Arizona along with military and financial support in exchange for joining the German cause. This led President Wilson to ask Congress to declare war on Germany, which they did.

Shortly after entering the war President Wilson signed the Espionage and Trading with the Enemy Acts. The Espionage Act called for a fine of up to \$10,000.00 and imprisonment for up to 20 years for anyone found guilty of having willfully obstructed the U.S. war effort or supported those of its enemies in speech or print. Furthermore, every publication, matter, or thing of any kind, containing any matter advocating or urging treason, insurrection, or forcible resistance to any law of the U.S. was officially deemed unmailable under the Trading with the Enemy Act (Connolly-Smith, 2009, 9).

Violators were up to \$5,000.00 and imprisoned for up to five years. Of 2,168 individuals charged with violating these Acts, 1,055 were convicted, an approximately 50% success rate that probably cowed many additional potential dissenters into silence (Connolly-Smith, 2009, 12). The Supreme Court upheld convictions from lower courts that reached them under these Acts. President Wilson also asked Congress to censor the press, but Congress denied that request. This is another circumstance where the President impacted Americans' civil liberties during time of war to protect the war effort.

The last congressional declaration of war was WWII. In 1941 Congress declared war on Japan, Germany, and Italy. In 1942 they declared war on Bulgaria, Hungary, and Romania. Like WWI, the U.S. population wanted to remain neutral since WWI was still fresh in the minds of the public. Leading up to WWII President F.D. Roosevelt's administration took great efforts to maintain neutrality by learning from pre-WWI mistakes. They passed laws restricting the sale of war making goods to nations at war. This limited America's financial interest in the outcome, but sacrificed profit the nation could have earned during the Great Depression.

These sanctions and other diplomatic attempts failed, resulting with Japan attacking Pearl Harbor on December 7, 1941. President Roosevelt asked Congress to declare war on Japan on December 8 and they unanimously did. Three days later Congress unanimously declared war on Germany after Germany did on the U.S. in support of Japan. Unanimous congressional declarations of war against Bulgaria, Hungary, and Rumania were approved six months later.

Although America did not enter WWII until being attacked in 1941 President Roosevelt prepared for it years in advance. He authorized the U.S. Navy to conduct

offensive operations against German submarines about a year before Pearl Harbor. In 1940, he authorized warrantless wiretapping of American citizens which violated the Communications Act of 1934. This is a precedent for the President invading the liberty of U.S. citizens in the name of security prior to President Bush became President. President Roosevelt issued EO's forcing the mass relocation of over 120,000 Japanese Americans to internment camps after Pearl Harbor. The Supreme Court supported and upheld his decisions. He also established military commissions to try Nazi saboteurs as war criminals and seized over 60 plants deemed to be detrimental to the war effort.

Presidential War Powers 1949-2000

American entry into military engagements from 1949-2000 are written about here. None of these conflicts were declared wars by Congress, and in many of these instances their involvement was minimal. After WWII, many Presidents took unilateral action against communism and the Soviet Union beginning with the Korean War.

In 1949 President Truman ordered military aid to South Korea. This happened without congressional approval after North Korea crossed the 38th parallel into South Korea. American officials almost unanimously viewed this as an attempt by the Soviets to expand their global influence after learning of the invasion. The Soviet acquisition of nuclear weaponry in August 1949, the fall of Chiang Kai-Shek's government to a communist regime, and the alliance treaty between Mao and Stalin all seemed to place America in a defensive position against Moscow on a global scale (Ovodenko, 2007, 273). U.S. intelligence showed Soviet officers were advising and equipping North Korean and Chinese Communists. President Truman unofficially declared war on communism, and seized steel plants so the provision of war goods would not stop.

In 1958 President Eisenhower sent 15,000 troops to Lebanon without congressional approval. This was a part of his Eisenhower Doctrine and showed a major U.S. commitment to secure and stabilize the Middle East. Peter Hahn explains what the doctrine was and why it was important. Hahn says it declared America would use economic and military aid to stop the spread of communism in the region. After WWII, U.S. security experts had come to consider the Middle East vital for security, political, and economic reasons and they monitored both the declining capabilities of Britain, the traditional protector of Western interests in the region, and the rising interest in the region of the Soviet Union (Hahn, 2006, 38). Under the Eisenhower Doctrine, a country could request American economic assistance or aid from U.S. forces if it was threatened by armed aggression from another state. Like President Truman did, President Eisenhower singled out the Soviet threat, as this was an extension of the war on communism.

The Bay of Pigs invasion was a collaborative exercise of presidential war power between Presidents Eisenhower and Kennedy. Two events led to this. First, Cuban President Castro led attacks on U.S. interests in Cuba. Second, U.S. intelligence discovered nuclear missiles on Cuba. This led President Eisenhower to authorize the Central Intelligence Agency (CIA) to train over 1,200 displaced Cuban nationals to invade Cuba on America's behalf. President Kennedy carried this out in 1961 and authorized a naval blockade of Cuba in 1962 without congressional approval.

The Vietnam War is an example of the use of presidential war powers with many administrations involved. No declaration of war was issued against Vietnam. American involvement began when President Truman sent 500 military advisors to aid France in 1950. By 1963 under President Kennedy 15,000 advisors were there. This became a war

due to the Gulf of Tonkin Resolution via a cloud of deception. On August 2, 1964, a U.S. destroyer was attacked by a North Vietnamese torpedo boat. Another destroyer was sent in to defend it and they were said to be under attack. President Johnson launched air strikes against North Vietnam to retaliate without congressional approval.

He asked Congress to approve an authorization of force to retaliate against the communist aggression. Congress approved the resolution unanimously, under the impression U.S. ships were attacked. Ship commanders could not confirm with absolute certainty they were attacked, but word of the presumed attack reached the public quickly. President Johnson was given the right to take all necessary measures to repel any armed attack against the forces of the U.S. to prevent further aggression. Congress also gave advance sanction for all necessary steps taken by the President to help any nation covered by the Southeast Asia collective defense treaty that requests assistance in defense of its freedom (Kenworthy, 1964, "Congress Backs President"). The war continued under President Nixon until 1973 under this resolution with no formal declaration of war by anyone against Vietnam. When challenged about the war's constitutionality the Supreme Court rejected it and deferred to the legislative and executive branches' decisions.

Over the next 25 years many Presidents used war powers to use the military as it fit their plans. President Nixon had troops on high alert and on the brink of aiding Israel in their fight against the Soviets in the name of fighting Communism. He tried censoring the press from publishing the Pentagon Papers which were stolen and contained secret information on U.S. military strategy. The Supreme Court denied his request.

President Carter unilaterally launched Operation Eagle Claw to free captives during the Iran Hostage Crisis in 1980. He also declared that America would use military

force to ensure oil flowed freely from the Persian Gulf. President Reagan invaded Grenada in 1983 and sent troops to Lebanon and Libya without Congress' approval.

Late in the decade President George H.W. Bush invaded Panama and pre-positioned a massive military force in Saudi Arabia to prepare for war without congressional authorization. This was after diplomatic attempts to negotiate with Iraqi President Saddam Hussein. When negotiations failed and Saddam invaded Kuwait President Bush froze Iraqi assets in the U.S. He then waged the first Iraq War. Congress supported the actions but did not declare war. All of President Clinton's military interventions in the 1990's were without Congressional approval.

Conclusion

As you can see the scope and breadth of Presidential war powers has exponentially grown as globalization has increased America's interests since 1789. When people debate the use and constitutionality of presidential war powers they look to the Constitution as a guide. How the Constitution is written provides definition of roles that can be open to interpretation. Presidents have deferred to the commander in chief clause of the Constitution to justify their actions. Concurrently, we must consider the fact that Congress has not declared war since 1942. Did the Framers foresee circumstances where the legislative branch would fail to respond timely to threats to America and purposely leave the door open for executive war power to be waged?

President Roosevelt's Attorney General Francis Biddle said, "The Constitution has never greatly bothered any wartime president." (Greenberg et al, 2007, "Stretching Executive Power"). A more simplistic view of this debate of presidential war powers is:

“There is an old legal maxim that in time of war the laws are silent: *Inter arma silent leges*. But the crucial issue is the extent to which the nation is threatened. In the cases of Lincoln and Roosevelt, the survival of the U.S. hung in the balance. A President will be forgiven by his contemporaries, though not necessarily by later generations, for acting outside the law when that is the case. As more than one Supreme Court justice has said, the Constitution is not a suicide pact. When national survival is not threatened, however, it is essential for a chief executive to resist an unwarranted enlargement of his powers (Greenberg et al, 2007, “Stretching Executive Power”).”

There is a lot to consider when debating if the President has the right to wage war.

The Constitution’s writing leaves a lot that can be interpreted in different ways. There is great danger in granting one side of the debate definitive victory. Giving the President too much power leaves America vulnerable to resembling a monarchy, which is something the Framers wanted to avoid. Giving the legislative branch too much power leaves America vulnerable to external attacks.

A safe interpretation is the Framers wanted the legislative branch to have the bulk of war power, but had the foresight to know the President needed to be able to act decisively if the nation were attacked. This is something that Congress is not designed to do. It is revealing that the only times Congress has declared war are when America was attacked, or was perceived to be. These instances are: The War of 1812 with Britain, The Mexican-American War, The Spanish-American War, WWI, and WWII. Yet, there are numerous other military engagements Presidents authorized military action for that have shaped America and the entire world.

I have shown how Presidents acted as President Bush did after September 11, 2001. President Adams passed the Alien & Sedition Acts, punishing citizens against the U.S. war effort. President Polk used his power to carefully frame the situation with Mexico to get Congress to declare war. President Lincoln suspended habeas corpus and

authorized military tribunals by commission. President Wilson passed the Espionage & Trading with the Enemy Acts which punished citizens for impeding the U.S. War effort. President Roosevelt authorized warrantless wiretapping before America entered WWII. Based on this I believe President Bush acted within his rights based on set precedents.

This understanding, and history, can be viewed as Congress not wanting to have the power to declare war or only being willing to when America is directly threatened. If we judge American history on Congress's actions it would be viewed as isolationist. This is far from reality as America has embraced its role as the global leader. Viewing the history of America's entry into engagements and conflicts we see that the President often has their finger prints all over the military intervention and it aligns with their policies. This has become truer as globalization and technology have shrunk the world. It is safe to assume that if Presidents didn't exercise war powers and relied solely on congressional declarations of war that America, and the world, would look drastically different today. This is important to consider when projecting how America will act going forward in the complex global environment that exists today.

TABLE 1: PRESIDENTIAL WAR POWERS' MILITARY IMPACTS

<u>PRESIDENT</u>	<u>YEARS</u>	<u>PRESIDENTIAL WAR POWER USE</u>	<u>CONGRESS' ROLE</u>	<u>MAJOR OUTCOME</u>
Washington	1794	Commanded his militia to quell the Whiskey Rebellions.	None.	Rebels were arrested and tried in military courts.
Adams	1798	Authorized a naval war with France.	None.	XYZ Quasi War with France.
Jefferson	1801	Sent U.S. Navy to Mediterranean to protect U.S. merchant ships from pirates. Requested Congress to enact statutes authorizing force against Barbary pirates.	Congress enacted requested statutes. No declaration of war.	Barbary Wars.
Madison	1812	Requested Congress to declare war on Britain.	Declared war on Britain.	War of 1812.
Monroe	1818	Authorized military action against Native Americans in Florida without congressional approval.	None.	Transcontinental Treaty of 1819.
Polk	1846	Ordered U.S. troops into Texas. Used military to fight Mexican Army. Convinced Congress to declare war on Mexico.	Declared war on Mexico.	Mexican-American War.
Lincoln	1861-1865	Unilaterally ordered naval blockades of Southern ports and seizure of Southern ships before Civil War. Authorized Union Army to arrest Southern legislators in favor of succession.	Approved these actions. No declaration of war.	Civil War.
McKinley	1898	Asked Congress for authority to use force against Spain & Cuba.	Declared war on Spain.	Spanish-American War.
Wilson	1917-1918	Asked Congress to declare war on	Declared war on Germany	WWI.

		Germany.	and Austria-Hungary.	
Roosevelt	1940-1945	Authorized offensive naval operations against Germany in 1940. Asked Congress to declare war on Japan in 1941.	Declared war on Japan and Germany in 1941. Declared war on Bulgaria, Hungary, and Romania in 1942.	WWII.
Truman	1949-1950	Ordered military aid to South Korea without Congressional approval. Sent 500 military advisors to aid France in Vietnam.	Approved these actions. No declaration of war.	Korean War.
Eisenhower	1958	Ordered U.S. troops to Lebanon without congressional approval. Authorized CIA to train displaced Cuban nationals to invade Cuba.	None.	Military aid to Middle East.
Kennedy	1961-1963	Bay of Pigs invasion in Cuba. Authorized a naval blockade of Cuba without congressional approval. Sent 15,000 military advisors to Vietnam.	None.	Cuban Missile Crisis.
Johnson	1964	Launched air strikes against North Vietnam without congressional approval. Asked Congress to authorize force against North Vietnam.	Approved Gulf of Tonkin Resolution. No declaration of war. Gave President advance sanction to help any nation against	Vietnam War.

			Communism.	
Carter	1980	Authorized an operation to free captives in Iran Hostage Crisis.	None.	Operation Eagle Claw
Reagan	1983	Invaded Grenada. Sent troops to Lebanon and Libya without congressional approval.	Enforced WPR to go in effect.	Short and ineffective conflicts.
Bush	1989-1991	Authorized an invasion of Panama in 1989. Sent U.S. troops to Saudi Arabia for war with Iraq without congressional approval.	Authorized military force for Gulf War.	Operation Desert Storm.
Clinton	1993-2000	Authorized many air strikes and military actions without congressional approval in many locations globally.	Minimal. Funded some campaigns supported by U.N.	Many small conflicts in size and duration.

TABLE 2: PRESIDENTIAL WAR POWERS' CIVIL LIBERTIES IMPACTS

<u>PRESIDENT</u>	<u>YEARS</u>	<u>CIVIL LIBERTIES IMPACT</u>	<u>OUTCOME</u>
Adams	1798	Passed the Alien and Sedition Acts.	Criminalized writing, printing, or publishing false or malicious writing against government. Let President deport aliens suspected of siding with France and non-citizens deemed dangerous to U.S. Anyone who publicly opposed U.S. policies towards France could be prosecuted. Political dissent was criminalized.
Madison	1812	Authorized arrest of civilian newspaper writers for inciting mutiny among military.	Political dissent was criminalized. Censorship of the press.
Lincoln	1861-1865	Suspended writ of habeas corpus at or near military lines in strategic locations. Revoked use of U.S. Postal Service to publications against the Union. Authorized trials by military commissions and tribunals. Authorized U.S. Marshals to arrest and imprison anyone conducting practices disloyal to the U.S. Banished Southern sympathizers from Union territory.	Any Southern sympathizers or conspirators were arrested or banished from the Union. Limitations placed on freedom of speech. Anyone against the Union was treated as a rebel. Confederacy viewed as a rebellion, not an Army.
Wilson	1917	Passed Espionage and Trading with the Enemy Acts.	Fined and imprisoned anyone guilty of obstructing the U.S. war effort or supporting U.S. enemies in speech or print. Any publication advocating treason, insurrection, or resistance to U.S. law was deemed unmailable.
Roosevelt	1940-1945	Authorized warrantless wiretapping in 1940. Signed EO 9066. Established military commissions to try as Nazi saboteurs. Seized plants needed for war effort.	Violated Communications Act of 1934. Forced mass relocation of Japanese Americans to internment camps.
Truman	1949	Seized plants needed for war effort.	

CHAPTER 4: PRESIDENTIAL WAR POWERS AFTER THE AUMF OF 2001

Introduction

Ambrose and Brinkley describe President Bush's attitude after September 11, 2001. They say:

“In the aftermath of 9/11, Bush's attitude toward all things related to the Middle East stiffened. His stock character became that of an exterminator. A newfound vulnerability rose up in him. Claiming America had been thrust into a global war, Bush put America on alert for another attack. Foreign affairs and domestic security became the administration's top priorities (Ambrose and Brinkley, 2011, 471).”

A combination of fear of the unknown, patriotism, and a desire for vengeance expedited the AUMF of 2001 being passed. The lack of clarity and definition written made this AUMF unique. Many argue Congress gave the President a blank check to go to war because of the attacks.

The key to this is how President Bush framed the situation. He framed his presidency as a wartime one and himself a wartime President by declaring September 11, 2001 as an act of war declared by Al-Qaeda. He looked to the authority Presidents are granted during war. This framing set the tone for most events America has been involved with since as foreign policy and civil liberties underwent a paradigm shift.

This chapter will discuss how the AUMF of 2001 gave way to a change in war powers that President Bush was granted and explain my thesis statement. I claim that presidential war powers changed during President Bush's presidency more than any other

President. Furthermore, I directly point to the AUMF of 2001 as the law that changed Presidential war powers out of necessity due to the events of September 11, 2001.

I begin with an overview of the AUMF of 2001. Then I discuss the military, civil liberties, and warrantless surveillance impacts of the AUMF of 2001 in three different sections. Following is the debate of those who believe President Bush was within the boundaries of his constitutional war powers and those who think he worked outside those boundaries. I explain the legal framework of the AUMF of 2001 and discuss the major cases decided during President Bush's terms connected to this AUMF. My conclusion aims to tie the chapter together as it does in my previous chapters.

It is important to understand this as it explains where America is regarding foreign policy, mostly in the Middle East, today. If we understand what the AUMF of 2001 is and the ensuing debate of if President Bush acted within his boundaries during his two terms in office, we can fairly compare him to his predecessors. My goal is to prove that President Bush acted as needed in an uncertain time to protect America, and furthermore show how his decisions were impacted by past Presidents to show that he is not the first or last President to make unpopular choices when America is threatened.

Main Overview of the AUMF of 2001

Presidential war powers changed under President Bush more than any President. The signing of the AUMF of 2001 is the most important law the U.S. government has passed regarding foreign policy since September 11, 2001. Almost every military engagement America has been in since is connected to this. This section will provide an overview of the AUMF of 2001. I will discuss what it says, why and how it was created,

what it does, and when it was signed. By understanding this we can attempt to understand the mindset of Congress and President Bush on September 11, 2001.

Congress passed the AUMF of 2001, Pub. L. No. 107-40, 115 Stat. 224, on September 14, 2001 in response to the September 11, 2001 attacks, to justify and undertake military and other action (Weed, 2016, 1). The Joint Resolution was signed by President Bush on September 18, 2001. Each President since has used it as legal justification of their war powers. There is a lot of controversy surrounding its scope, use, and interpretations. However, the passing of the AUMF of 2001 served as congressional authorization of war. This was the first time Congress authorized the President to act militarily since the AUMF of 1991 against Iraq. Section 2(a) of the AUMF of 2001 states:

“That 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 (Weed 1).”

The AUMF of 2001 does not include a specified congressional reporting requirement, but states that the authorization is not intended to supersede the WPR (Weed, 2016, 1).

The lack of definitive rules the President is required to follow in this statement leaves plenty of room for interpretation. Bradley and Goldsmith state how the broad interpretation of the AUMF of 2001 was implemented. It invoked it as an authority for military detention and trial by military commission. It also authorized warrantless surveillance of international communications of people linked to Al-Qaeda or related terrorist organizations to and from the U.S, despite the restrictions of the Foreign

Intelligence Surveillance Act (FISA). In addition, it argued that the AUMF authorized military detention of some U.S. citizens and residents, including at least two who were captured inside the U.S (Bradley and Goldsmith, 2016, 630).

One can wonder if Congress intentionally excluded limits on presidential war powers. It can be challenged Congress willingly gave President Bush a blank check of war power. They have not declared war on Iraq or Afghanistan since we have been at war. It can be argued that by passing AUMF in 2001 Congress was passing responsibility, and blame, for the WOT from the legislative to the executive branch.

The AUMF of 2001 was a reaction to September 11, 2001 and gave President Bush the ability to fight back against anyone behind the attacks. Many consider it the broadest, most sweeping, embracing, legal declaration of war in American history, possibly surpassing war powers used in the Civil War. John Bellinger III said, “The law is like a Christmas tree. All sorts of things have been hung off of those 60 words.” (Johnson, 2014, “60 Words”). It has no geographical or military restrictions, no end date, or way to assess when it is not needed. Opponents of this fear that without restrictions, there is nothing keeping the President from striking anyone, anywhere, at any time.

A main driver of the AUMF of 2001 was fear. There is evidence that Congress was wary of giving President Bush too much war power. Their main objective was to ensure the WPR was abided by. The initial draft of the AUMF of 2001 let the President to deter and pre-empt any future acts of terrorism or aggression against the U.S. Congress did not pass this for two reasons. First, for Congress to authorize the President to take preemptive action would run contrary to the understanding of the Framers as well as the United Nations (U.N.) Charter that the President had authority to act defensively,

but not offensively (Kassop, 2003, 513). The second reason is that Congress believed by authorizing preemption as a part of the AUMF it would provide the President with the ability to avoid pursuing congressional authorization to act against any force involving terrorism. This would include potential threats that were not involved in the September 11, 2001 attacks. The word pre-empt was changed to prevent in the final draft.

Congressional lawyers noted the clause would give the President unprecedented power. One argued that without scope definition the President might never have to seek congressional authorization to combat terrorism. He could target anyone considered a threat and say he was preempting terrorism. Paulsen elaborates saying:

“Combining the links in the chain of legal authorization, the President has plenary power to wage war against anyone connected in any active or even passively supportive way with the organizations or responsible for the September 11 attacks. He chooses the targets; he determines the enemies, including not just nations but individual persons and groups; he chooses the timing; he chooses the means; he chooses the ends (Paulsen, 2009, 122).”

Though aware of these dangers and unaware of possible implications, only one member of Congress or Senate voted against the law.

The consensus was that war needed to be waged, but no one could define when it would end and what would determine success. Congress’ goal was to let President Bush do what he had to do, not what he wanted to do, with the general understanding that the President’s authority was only extended to participants in the September 11, 2001 terror attacks. President Bush’s strategy became known as the Bush Doctrine. This said that the U.S. will identify and eliminate terrorists wherever they are, together with the regimes that sustain them. Respecting sovereignty was no longer sufficient because that implies a game in which the players understand and respect the rules (Merrill and Patterson, 2010,

579). The non-state actors that attacked America on September 11, 2001 were not an organization that plays by rules. Within one week of America being attacked the nation's foreign policy would be changed for the unforeseeable future.

Almost any military engagement the U.S. has been involved with since 2001 can be tied to the AUMF of 2001. Its purpose was to serve as congressional authorization to let President Bush defend America from those involved in the terror attacks of September 11, 2001. This bill was written very broadly and can be viewed as a fear driven reaction by Congress in the aftermath of the unprecedented and unforeseen events of September 11, 2001.

As stated in my last chapter, past Presidents have used their power to manipulate Congress when they needed in times of duress. President Polk is one example leading up to the Mexican-American War. After the Japanese attacked Pearl Harbor Congress was in a similar panic like Congress was after September 11, 2001. Based on President Bush's actions after the terror attacks it is fair to say that he did wait for congressional authorization before taking military action. He is not the first or last President to exert their influence to manipulate Congress to act as they need.

Military Impact of the AUMF of 2001

The AUMF of 2001's impact cannot be fully quantified. Every President since 2001 has used this as their legal basis for military engagements. Since there is no end date or definition of success tied to this no one knows when this will cease to guide American foreign policy. This section will discuss the military impact and actions of the AUMF of 2001. By understanding the military actions launched under this law we can

see the impact and footprint of it. I try to limit the impact to just President Bush's administration but there are not specific studies available that tight in scope for this so the data I found encompasses through 2016.

Jennifer K. Elsea and Richard F. Grimmett explain how U.S. foreign policy and presidential war powers changed after the AUMF of 2001. They proclaim:

“It is considered groundbreaking as it empowered the President to target non-state actors, even to the individual level, and states. It did not specify which states and non-state actors were included. This is unprecedented with the scope of its reach yet to be determined (Elsea and Grimmett, 2011, 15).”

They view the authorization of use of force against unnamed states consistent with prior instances where authority was given to act against unnamed states as appropriate when they became aggressors or acted against the U.S. or its citizens.

President Bush cited the AUMF of 2001 when defending military interventions 89 times. Many were repeat references, but the impact of this law cannot be understated when viewing U.S. war making since 2001. America became engaged in global affairs with varying severity between 2001 and 2009. Some were with states, others were with non-state actors. The lesser known U.S. interventions with foreign states under AUMF of 2001 include the following (years referenced in brackets): the Philippines (2002-2003), Georgia (2002-2004), Yemen (2002-2005), Djibouti (2004-2006), Kenya (2004-2005), Ethiopia (2004-2005), Eritrea (2004-2005), the Horn of Africa (2007-2008), and Somalia (2007). He also referenced interventions of non-state actors under AUMF of 2001. These include: the Taliban (2001), Al-Qaeda and other terrorist organizations (2001), engaging terrorists on the High Seas (2004-2008), and tackling Global Counterterrorism (2007-2008) (Weed, 2016, 4-16, 35-36). These instances are harder to quantify than OIF

and OEF, which are the main focus of scholars' studies due to their scope and duration. Iraq was referenced five times under this AUMF (2004-2008).

President Bush also referenced civil liberties issues under the AUMF of 2001. I discuss these later, but some were repeat references also. In 2001 President Bush referenced the military detention and trial of terrorist suspects. Guantanamo Bay was a repeat reference from 2003-2008. He passed two EO's, 13425 and 13440, under this.

On September 24, 2001 President Bush made his first reference of military action under AUMF of 2001 by referencing Afghanistan and the Taliban. Afghanistan would be referenced under this every year he was in office and is the longest war in U.S. history. The lasting impacts of OEF are still being felt sixteen years after the first U.S. troops went there on October 7, 2001. By viewing the amount of references to the AUMF of 2001 we see that it is the most vital law impacting U.S. foreign policy since 2001.

Costs and impacts of the AUMF of 2001 are still felt today. Scholars have tried to quantify the total cost of this, but have been unsuccessful in tracking total economic and human costs. Understanding the costs in a quantified state helps put the impact of the AUMF of 2001 in perspective so I attempt to provide that perspective here. One of the most thorough studies I found is the Costs of War Project. Neta C. Crawford says:

“As of August 2016, the U.S. has already spent, appropriated, or taken on obligations to spend more than \$3.6 trillion in current dollars on the wars in Iraq, Afghanistan, Pakistan, and Syria and on Homeland Security since 2001. To this total should be added the approximately \$65 billion in dedicated war spending the DOD and State Department have requested for the next fiscal year, with an additional nearly \$32 billion requested for the Department of Homeland Security (DHS) in 2017, and estimated spending on veterans in future years. When those are included, the total U.S. budgetary cost of the wars reaches \$4.79 trillion (Crawford, 2016, “U.S. Budgetary Costs” 1).”

Many of these costs are indirect costs and may change. This makes it impossible for scholars to define the cost with full certainty.

Human costs are also severe. Over 6,800 U.S. troops and 7,000 civilian contractors were killed in Iraq and Afghanistan due to the AUMF of 2001 (Daulatzai et al, 2015, “U.S. and Allied Killed and Wounded”). More than 43,000 members of Afghani, Iraqi, and other coalition forces have been killed also (Lutz and MacLeish, 2015, “U.S. and Allied Killed”). Greater than 52,010 counts of U.S. troops wounded in action have been reported by the DOD in both wars (Hautzinger et al, 2015, “U.S. and Allied Wounded”). Of the 2.7 million troops that have deployed in support of OIF and OEF, 970,000 have a disability claim with the Department of Veteran Affairs (VA) (Hautzinger et al, 2015, “U.S. Veterans and Military Families”).

While the American cost of this war is tremendous, costs to Iraq and Afghanistan are greater. Roughly 165,000 Iraqi civilians have been directly killed due to the war, though the Cost of War study confirms that number is conservative due to the lack of proper reporting of civilian deaths (Crawford, 2015, “Iraqi Civilians”). At least twice as many Iraqi civilians may have died from damage to systems that provide food, health care, and clean water. This caused massive illness, disease, and malnutrition that could have been avoided or treated (Crawford, 2015, “Iraqi Civilians”). Despite more than \$100 billion committed to aiding and reconstructing Iraq, many parts of the country still suffer from lack of access to clean water and housing (Crawford, 2015, “Iraqi Civilians”).

About 104,000 Afghans have been killed in the war since 2001 (Crawford, 2016, “Afghan Civilians”). More than 31,000 of them have been civilians (Crawford, 2016, “Afghans Civilians”). An additional 41,000 civilians have been injured since 2001

(Crawford, 2016, “Afghan Civilians”). Many Afghans with ill health and war wounds find it difficult to get to hospitals and clinics because violence makes roads unsafe. Concurrently, the war has exacerbated the effects of poverty, malnutrition, poor sanitation, lack of access to health care, and environmental degradation on Afghans’ health (Crawford, 2016, “Afghan Civilians”). By understanding this study, we can view the impact of the AUMF of 2001 in statistical perspective.

Impact of the AUMF of 2001 on Civil Liberties

Next, I discuss civil liberties issues that arose under the AUMF of 2001. I argue that civil liberties were challenged under President Bush more than any President. I specifically discuss the impact of this law on detention and rendition laws put in place from 2001 through 2009. Understanding this is important as it supports my thesis statement that presidential war powers changed more during President Bush’s presidency than any other President, most specifically due to the AUMF of 2001. Like past Presidents, including Presidents Lincoln and F.D. Roosevelt, President Bush used war powers to impact civil liberties. His decisions have reshaped the balance between liberty and security. He signed two EO’s in 2007 under the AUMF of 2001 that changed how civil liberties rights were handled towards deemed threats to America.

President Bush signed EO 13425 on February 14, 2007. This established military commissions to try alien unlawful enemy combatants for offenses triable by military commission as provided in chapter 47A of title 10 of the U.S. Code (“EO 13425”, 2007). Alien is defined as a non-U.S. citizen. This EO faced instant controversy and opposition. It empowered the President to determine that a non-citizen should be tried by military commission without affording judicial review by writ of habeas corpus or appeal. Vice

President Cheney pointed out that those subject to it were not American citizens and were persons believed to have engaged in or be participating in terror attacks designed to kill Americans, or have provided sanctuary to those who are conducting terrorist operations against Americans (Goldstein, 2010, 119). The Bush administration's belief was that someone entering America illegally with intent to kill or harm U.S. citizens did not deserve the same rights and safeguards as American citizens.

Three main provisions were listed. First, implementation is in accordance with applicable laws and appropriations availability. Second, is executive department heads were forced to provide information and aid to the Secretary of Defense as needed. Finally, anyone who worked for the U.S. government was protected from issuing benefits to anyone impacted. Like the AUMF of 2001, the writing of this is vague and open to interpretation which complicates challenging its authority.

EO 13440 was signed on July 20, 2007, allowing the CIA to employ unorthodox interrogation techniques. Zahora says it is the result of Supreme Court challenges to Guantanamo Bay detainees being held indefinitely without charges. The legality of the CIA's interrogations was investigated, and shut down investigations. The Bush administration began drafting a legal basis for the adoption of harsh techniques. This legal basis was led by documents drafted by White House aides since 2002. The goal was to substantiate arguments to classify harsh interrogation tactics used to gain information from Al-Qaeda suspects as being outside what is legally defined as torture (Zahora, 2014, 96). The Order is not explicit about what it allows and may sidestep protections in the Geneva Convention against humiliating and degrading treatment.

This interprets the meaning and application of the text of Common Article 3 of the Geneva Convention with respect to detentions and interrogations, and shall be treated as authoritative for all purposes as a matter of U.S. law, including satisfaction of the international obligations of the U.S (“EO 13440”, 2007). Limited compliance with the Geneva Convention was required when the CIA held captives deemed to be connected to the September 11, 2001 attacks. This EO reaffirms unlawful enemy combatants, including al-Qaeda and the Taliban, are not entitled to Geneva Convention protections.

Section 3.b.i. lists confinement practices and procedures. The following practices were condoned: torture, murder, maiming, sexual abuse, hostage taking, performing biological experiments, humiliation, degradation, and anything considered cruel and unusual punishment. Cruel, inhuman, or degrading treatment or punishment is defined as cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution (“EO 13440”, 2007). While some practices were condoned, permissible practices were not clearly defined.

Section 3.b. ii. states the CIA Director determines alien detainees. The first characteristic of an alien detainee is any member or supporter of Al-Qaeda, the Taliban, or associated organizations. The second is vulnerable to the CIA Director’s discretion. It includes anyone likely to have information to help detect, mitigate, or prevent terrorist attacks. This includes attacks in the U.S. and against its forces, personnel, citizens, or facilities. It also includes attacks against allies cooperating in the WOT under the same criteria as attacks on the U.S. Anyone who could assist in locating senior leadership of Al-Qaeda, the Taliban, or associated forces is included also (“EO 13440”, 2007).

Detention of suspected terrorists was prioritized for President Bush as early as 2001. On November 13, 2001, he signed the Military Order on Detention and Tribunals.

Fisher explains the Order:

“This provided for the detention and trial by military commission of non-U.S. citizens the President determines there is reason to believe that the individual is or was a member of the organization known as Al-Qaeda, has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the U.S., its citizens, national security, foreign policy, or economy, or has knowingly harbored one or more individuals described in subparagraphs (Fisher, 2006, 19).”

It was designed to resemble President F.D. Roosevelt’s Proclamation 2561 from WWII.

Key similarities are that conviction and sentencing only require two thirds of the members of the military commission’s vote and they both aimed to avoid judicial review.

The Order focused primarily on non-citizens, but the administration also could detain citizens if the President designated them enemy combatants. This order covered approximately 18 million resident non-citizens and an indeterminate number of other non-citizens who could have been taken into custody (Fisher, 2006, 20). Through this process the administration claimed the right to make, execute, and adjudicate law.

On October 17, 2006 President Bush signed the Military Commissions Act (MCA) of 2006. Carlos Manuel Vazquez explains its purpose:

“The MCA sidelines Article 21 by providing separate statutory authority for the establishment of military commissions. In place of that article’s incorporation of the laws of war, the MCA includes provisions that appear less receptive to judicial enforcement of the Geneva Conventions (Vazquez, 2007, 76).”

The purpose of it was to authorize trial by military commission for violations of the law of war, and for other purposes. This was a reaction to the Supreme Court ruling of a case “Hamdan vs. Rumsfeld” which will be discussed in the next section.

Provisions and omissions of the MCA included policies for handling people suspected of conspiring to commit or facilitating acts of terrorism directed at the U.S. or its allies. Commissions were criminal courts run by the U.S. armed forces to try alien unlawful enemy combatants. Tom Ferrer gives two definitions of an unlawful enemy combatant. One is a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the U.S. or its co-belligerents (Farer, 2007, 366). Next is anyone who has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal (CSRT) or another competent tribunal established under the authority of the President or the Secretary of Defense (Farer, 2007, 366).

The MCA's provisions include: authorizing the President to establish military commissions to prosecute offenses committed by alien unlawful combatants, amending the U.S. War Crimes Act to specify criminal violations, eliminating habeas corpus rights for alien enemy combatants detainees, limiting the ability of individuals to invoke the Geneva Conventions as a source of rights, and purporting to authoritatively interpret the Geneva Conventions and delegate further interpretive authority to the executive branch.

The combination of the AUMF of 2001, military orders and acts, and EO's have drastically changed how America handles detaining people deemed threats to the nation. They are similar in that they are written vaguely and leave room for framing ideas how leaders see fit to work within the laws guidelines. The result is that the President's authority to detain people as enemy combatants is one of America's most controversial issues. When we compare President Bush's actions with past Presidents we see similarities. Presidents Adams, Lincoln, Wilson, and Roosevelt are all Presidents who

made choices like President Bush's when leading America in war time. Based on set precedents I believe President Bush acted within his rights and executive expectations.

Controversy grew out of the American practice of rendition after September 11, 2001. Rendition is the legal practice of transferring people from one jurisdiction to another. This was used by previous Presidents, but the purpose of it changed drastically after the terror attacks. In late September 2001 President Bush signed a classified presidential directive to help initiate extraordinary renditions, which is conducted outside the law. A major difference in this rendition program existed from those of past administrations. Previously a detainee could only be sent to a country that had a warrant for their arrest. After September 11, 2001 they could be sent to any country participating in the program regardless of if a warrant for their arrest existed or not. A conservative estimate is that over 130 people were extraordinarily rendered in this program.

This became known as sending suspected terrorists to foreign countries for interrogation and detention. Though publicly shunned, this was possible by the active approval and assistance of many states to aid America. Up to 54 countries have been known to be complicit in transferring detainees for the CIA for interrogation, allowing rendition flights to pass through their territory, agreeing to hold black sites or receive U.S. detainees for interrogation (Barnes, 2016, 202). Participants include states with a history of torture, European nations, and NATO partners. None have acknowledged participation, compensated victims, or held abusers of the program accountable.

The CIA took the lead in this practice also since the military was ill-equipped to handle detaining suspects, giving them unprecedented power. The presidential directive transformed their mandate by giving them power to detain and interrogate suspects and

operate detention facilities of its own. The new mandate let the CIA to conduct renditions without approval from either the White House or the Departments of Justice or State. According to Amnesty International the change in powers given to the CIA was part of the reason for establishing the rendition program in the first place. It let the CIA, and other intelligence agencies, to capture suspects and ship them off to client states without having to produce the evidence that would justify detention or trial (Barnes, 2016, 200-201). Black sites, secret detention facilities where the CIA detained and interrogated high value suspects, grew rapidly in size and use. These sites let the CIA conduct interrogations free from the outside world and human rights organizations.

The impact of the detention and rendition program since September 11, 2001 cannot be quantified. The biggest reason is the secrecy in which the program was run was designed to prevent the outside world from knowing what really happened. Concurrently many foreign states who aided America are not required to abide by human rights organizations that the U.S. is and so information from those countries is incomplete. Numbers and ranges vary so I try to give perspective based on my research, however multiple sources say these numbers are estimates. Some numbers listed include President Obama's terms, as research has been unable to fully separate the full impact of the rendition program under each President separately.

As of 2011 the Associated Press used freedom of information queries, law enforcement data and hundreds of interviews to identify 119,044 anti-terror arrests and 35,117 convictions in 66 countries, accounting for 70 percent of the world's population. (Mendoza, 2011, "Rightly or Wrongly"). America led the way in these categories with 2,934 arrests and 2,568 convictions (Mendoza, 2011, "Rightly or Wrongly").

Guantanamo Bay became the most known American prison for detainees suspected as terrorists in the WOT. Over 700 detainees were housed there since 2002 with at least nine deaths being reported. An estimated 537 detainees were transferred by President Bush (Malone, 2012, 360). As of October 2010, 81 were confirmed and 69 suspected of terrorist or insurgent activities of the 598 detainees transferred (Malone, 2012, 360).

Impact of the AUMF of 2001 on Warrantless Surveillance

Warrantless surveillance is one of the most scrutinized areas of civil liberties changed under President Bush because of the AUMF of 2001. My goal in this section is to describe the impact this law had on warrantless surveillance. Within three weeks of the AUMF of 2001 being passed President Bush remodeled existing surveillance laws set by the 1978 FISA Act. FISA prohibited the government from eavesdropping in America without a warrant from the FISA court. On October 4, 2001 President Bush secretly authorized the National Security Agency (NSA) to track suspected terrorists' domestic communications without a warrant. He authorized the NSA to collect two different types of bulk information: metadata and content. The former gave the agency the ability to identify terrorist-related activity through contact chaining. The latter provided raw intelligence. The NSA focused on telephony and internet sources for each kind of information, with four categories resulting: telephony metadata, internet metadata, telephony content, and internet content (Donahue, 2015, 125-126). Some people viewed this a violation of the FISA Act. He secretly signed an EO authorizing this in early 2002.

President Bush signed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (PATRIOT Act) on October 26, 2001. Like the AUMF of 2001, this law was drafted quickly as a reactionary

measure in the aftermath of the September 11, 2001 terror attacks. Both the Senate and the House supported this nearly unanimously before it was passed into law.

This is the most important law impacting surveillance and intelligence since FISA. It gave the President and Congress the power to combat terrorism without prior wiretap approval. It expands the ability of law enforcement to conduct wiretaps, intercepts computer transmissions, and redefines computer hacking laws. The bill amended over 15 federal statutes, including the laws governing criminal procedure, computer fraud and abuse, foreign intelligence, wiretapping, immigration, and laws governing the privacy of student records. The amendments expanded the authority of the FBI and law enforcement to gain access to business records, medical records, educational records, and library records, including stored electronic data and communications (Kravitz, 2003, 446). The main goals are to strengthen domestic security and broaden the powers of law enforcement agencies regarding identifying and stopping terrorists. This was originally intended to be implemented consistently with the 1978 FISA Act.

The PATRIOT Act changed law enforcement in America by expanding the ability of law enforcement agents to investigate and prosecute people engage in acts of terrorism. It also superseded state laws. This let them detain hundreds of people without charges for an extended period, while evidence was sought for connection to the September 11, 2001 attacks. Next, it authorized new forms of surveillance of citizens. Lastly, it expanded law enforcement's investigative powers under the FISA Act (Lygutis, 2009, 148). The four main objectives of this were: investigators could use existing tools to investigate organized crime that supports terrorism, information sharing

was facilitated among different agencies, laws were updated to reflect new technologies and threats, and penalties for terrorist crimes were increased.

Congress extended the bill twice. President Bush signed the reauthorization on March 9, 2006. Most of the 2001 law was reauthorized, including key components of more controversial provisions, such as roving wiretaps and sneak-and-peak laws. Three changes were designed to answer civil liberties complaints. One altered the library clause exempting libraries from receiving national security letters. Second, the reauthorization required law enforcement officials to specifically describe records they sought. Third, recipients of the letters were given the right to challenge subpoenas. Though most of the provisions of the original PATRIOT Act were made permanent, provisions allowing roving wiretaps and requiring the production of the Federal Bureau of Investigation's (FBI) business records under the FISA were set to expire in four years (Lygutus, 2009, 151). Changes limiting the amount of time the FBI can hold records or force officials to explain reasons for requesting warrants, surveillance, or subpoenas were made.

In November 2002, the media revealed that the Pentagon was working on the Total Information Awareness (TIA) Project. This was known as a vast electronic dragnet that would sort through commercial and government databases worldwide to track down information on terrorist plans. The government position on it was that it is a tool to help intelligence and law enforcement agencies combat domestic terrorism in America. Pete Aldridge, the DOD undersecretary for acquisition, explains:

"You're looking for trends in transactions that are associated with some potential terrorist act, and you're trying to put those pieces together. This is an important research project to determine the feasibility of using certain transactions and events to discover and respond to terrorists before they act (Webb, 2002, "Someone to Watch")."

Concurrently, opposing legislators and civil liberties groups were concerned this was a severe infringement on Americans' privacy, leading to legislation being drafted to ensure privacy rights were not violated. By September 2003 this project was defunded and shut down due to the civil liberties concerns. Then in March 2004 the program was scaled back after Attorney General James Comey declared parts of the program illegal and refused to sign a renewal order of surveillance laws without modifications.

The New York Times unmasked the warrantless surveillance program in December 2005. By May 2006 it was revealed that the NSA was monitoring and logging emails, phone calls, and other communications of millions of people since October 2001. It was also discovered that other military intelligence agencies assisted in this effort directed at U.S. citizens immediately after and since September 11, 2001.

President Bush acknowledged that the program was reviewed often and that he reauthorized it over 30 times. Furthermore, he defended the program:

"The nature of communications has changed quite dramatically. The terrorists who want to harm America can now buy disposable cellphones and open anonymous e-mail messages. Our laws need to change to take these changes into account (Asthana and DeYoung, 2006, "Bush Calls")."

He stated his administration filled many of the security gaps September 11, 2001 exposed, but asked for greater authority to fix more of them. He references the September 11, 2001 attacks as a reason for the program, stating two of the plane hijackers communicated with foreign al-Qaeda agents while in America before the attacks.

Those who support the program claim it was vital to preventing further terror attacks in America. Many details about the program remain secret. Because of this I was

unable to find much quantifiable data to enhance the scope of this program. Lauren Regan provides an example of the breadth and accuracy of the program:

“The Guardian threat tracking system is an automated system that records, stores, and assigns responsibility for follow up on counterterrorism threats and suspicious incidents. A 2007 internal audit found that between July 2004 and November 2007 108,000 potential terrorism related threats, reports of suspicious incidents, and terrorist watchlist encounters were recorded. The audit notes that the overwhelming majority of the threat information documented in Guardian had no nexus of terrorism (Regan, 2014, 38).”

Officials said the NSA eavesdrops without warrants on over 1,000 people in the U.S. at any time. Overseas, about 5,000 to 7,000 people suspected of terrorist ties are monitored.

Estimates state that the NSA eavesdrops on billions of communications globally.

It must be noted that most people subjected to the program have never been charged with a crime. Senator Russ Feingold opposed the program stating:

"He's trying to claim somehow that the authorization for the Afghanistan attack after 9/11 permitted this, and that's just absurd. There is not a single senator or member of Congress who thought we were authorizing wiretaps. If he needs a wiretap, the authority is already there. The FISA Act. They can ask for a warrant to do that, and even if there is an emergency situation, they can go for 72 hours as long as they give notice at the end of 72 hours (Arena, 2005, “Bush Says”).”

The Justice Department transferred oversight of surveillance to FISA in January 2007. In August 2007 President Bush signed a FISA update into law that expands government eavesdropping power without warrants on suspected terrorists. On July 10, 2008 he signed the FISA Amendments Act (FAA). This revolutionized the FISA regime by permitting the mass acquisition, without individualized judicial oversight or supervision, of Americans' international communications. Under the FAA, the Attorney General and Director of National Intelligence can authorize jointly, for a period of up to 1 year the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information. The government was prohibited from

intentionally targeting anyone known at the time to be in the U.S., but an acquisition authorized under the FAA may nonetheless sweep up the international communications of U.S. citizens and residents (“House Judiciary Subcommittee”, 2012).

The law gives legal immunity to the companies that had participated in the NSA’s warrantless wiretapping program. Google, AT&T, and Yahoo are three of the main one’s subject to this law. This Act was met with a lawsuit by the American Civil Liberties Union (ACLU) within hours, who contended that the expanded spying power violates the Constitution’s prohibition on unreasonable searches and seizures. In August 2008, the FISA Court ruled that companies must cooperate with federal requests to monitor international communications of suspected American terrorists. As stated in the last chapter, President F.D. Roosevelt authorized warrantless surveillance before America was at war. Once America was attacked and he was granted the AUMF of 2001, President Bush had every right to authorize the PATRIOT Act.

The impact of the AUMF of 2001 has a large footprint globally via American foreign policy. Virtually every military engagement during President Bush’s presidency cites the AUMF of 2001 and uses it as congressional authorization of war. Concurrently, the civil liberties impacts of this AUMF are noticeable. Under the AUMF of 2001 President Bush passed two EO’s and other relevant Military Orders and Acts that enabled the U.S. to detain and interrogate enemy combatants to America as they needed to, mainly supported by extraordinary rendition. Changes in the government’s ability to monitor communications in America under the PATRIOT Act have forever shifted the balance of security and liberty more to the security side. The debate of if the government

should be allowed to invade the civil liberties of its citizens how it does since the passing of the AUMF of 2001 probably will not end in the foreseeable future.

Debate Over the AUMF of 2001

The debate over the legality and Constitutionality of the AUMF of 2001 is like the ongoing debate of if the President has legitimate war powers given in the Constitution. One side feels the AUMF of 2001 is Congress' declaration of war giving the President power to wage war, and that President Bush was within his rights to act as he did once the law was passed. The other side believes the AUMF of 2001 is unconstitutional giving the President too much power, and that President Bush usurped Congress of their war powers. I will discuss both arguments here, specifically relating to the AUMF of 2001. It is important to understand both debates and arguments to gain full perspective of the situation. By doing this we can comprehend how Americans feel about the post September 11, 2001 events especially regarding liberty and security, and gives us insight into the political process of the time this was happening.

AUMF's have two main purposes. First, to show America's resolve and that the military actions are in the nation's best interests. Next, is to provide legitimacy for America to go to war. AUMF's aid in determining who, including U.S. citizens, can be detained during the conflict. By passing the AUMF of 2001 these objectives were achieved. A supporter of this is Deputy Assistant Secretary of Defense Charles Stimson:

“The 2001 AUMF has served the country well. It has enabled our warfighters, intelligence professionals, and other stakeholders to carry out their work, knowing that Congress has given express authorization for the use of appropriate and proportional force to confront an enemy (Castle, 2015, 522).”

One of the most supportive sources I found in support of President Bush's decision making within legal and constitutional boundaries is written by Ramsey. He compares the administrations of Presidents Bush and Obama. Ramsey states that President Bush honored the Constitution's limit on initiating war by asking Congress to declare it, although he did not have to since America was attacked:

“The President, in my view, has significant independent authority to respond to such an attack. But by seeking Congressional approval, rather than relying on a contested version of the executive's independent powers, President Bush assured that his military responses to the attacks of September 11, 2001, in particular the subsequent intervention in Afghanistan, did not transgress the separation of powers. In addition, although some advisors suggested that Congressional authority to invade Iraq was unnecessary, President Bush sought and obtained Congressional approval for that operation as well (Ramsey, 2011, 866).”

The separate congressional authority Ramsey refers to is the AUMF Against Iraq Resolution of 2002. He defends President Bush's use of the AUMF of 2001 by noting he did not attack Iran in 2007 and 2008 under speculation of Iran having nuclear weapons.

The legitimacy the AUMF of 2001 provides pairs with the President's war powers under the commander in chief clause of the Constitution to show solidarity in the WOT. Supporters advocate this is not open ended like opponents say. They clarify it is only against groups, people, or associated forces with a link to the September 11, 2001 attacks.

The framing of the AUMF of 2001 was immediately contested. The word preempt was in the first draft but replaced by the word prevent. This AUMF raised scores of unanswered interpretive questions, including the meaning of force, geographical scope, requisite nexus to 9/11, and the duration (Bradley and Goldsmith, 2016, 629). Civil liberties contesting of the AUMF of 2001 regarding detention and surveillance rely

on the Fourth Amendment, which provides citizens protection from unwarranted searches and seizures by requiring a warrant be issued as justification, as a precedent.

Three other issues were contested prior to the signing of this AUMF: inclusion of a reference to specific authorization under the WPR, prior certification to Congress before any use of force that there was specific and credible evidence that the targeted country, organization, or person was responsible for the September 11, 2001 attacks, and reporting requirements beyond those in the WPR. Only the reference to the WPR was resolved. This meant that the President did not have to periodically report to Congress.

Many people view this as a deliberate omission by the Bush administration as a reflection of their view of Congress' war powers. Kassop says one provision in the White House proposal was noteworthy for its usurpation of Congress' appropriation of power. This was a request for appropriations from Congress in the amount that the President deemed necessary and a demand the funds be available freely to him until expended. Congress rebelled on this and no appropriations were provided in the final copy (Kassop, 2003, 513-514). The hysteria, fear, and subsequent threats caused by September 11 led to a sweeping vote passing the AUMF. Only one person voted against it, Barbara Lee a Congresswoman from California. She said, "This is still a blank check. Let us take a step back. We do not know what the implications of our actions will be." (Johnson, 2014, "60 Words"). A few people agreed, but final vote was 420-1.

By the end of President Bush's second term some members of Congress were beginning to discuss a change in policy. The AUMF of 2001 is the longest issued AUMF with no end in sight. They feared that the state of America in 2008 would become the new normal state. A main driver of the change in approach was mission creep and the

broadness of the AUMF was showing itself. The associated forces to the September 11, 2001 attacks was becoming a main enemy of America, but were not defined. This let the President frame associated forces as he interpreted them. Some believe this AUMF transformed from an authorization to use force against participants of September 11, 2001 to a foundation of indefinite war against terrorist organizations globally.

Opponents of the AUMF of 2001 state it was open ended with unclear and undefined parameters that give the President too many war powers. The collection of electronic intelligence about the enemy is not included in the AUMF of 2001 they debate. They also claim that Americans' civil liberties are unnecessarily impacted by this, and that the mix of liberty and public safety was proper before September 11, 2001.

One argument that opponents of the AUMF of 2001 have is that any information the government seeks does not provide extra safety but instead provides the government with what amounts to be useless data due to their inability to properly analyze and interpret it. The counter argument to this is that President Bush's opponents fail to acknowledge every other civil liberties aberration a President has exercised under his war powers. These include: President Franklin Roosevelt's internment of Japanese Americans, President Lincoln's imprisonment of political opponents without habeas corpus, President Wilson denying use of the postal service to opponents of the WWI war effort, and President Adams's passing of the Alien and Sedition Acts.

Critics of President Bush and of the 2001 AUMF declare he exercised unprecedented war powers. In their opinion, this has marginalized the checks and balances function of government and centralized most war making decisions in the executive branch. An interesting dynamic exists among the debate of the legality and

constitutionality of the AUMF of 2001. Congress' ability to execute foreign policy is questioned. Historically Presidents receive congressional support during war, even if Congress has not been informed of the course of the conflict.

Paulsen explains his opinion that he believes the AUMF of 2001 gives the President too much war power. He elaborates on the main points opponents of the AUMF and President Bush have regarding the President having unmatched war powers. He states Congress can initiate war, the President can execute war, and that neither has the power to perform the opposite function. His interpretation of the whereas clause is that it embraces the pro-presidential view of constitutional war power to initiate war, including pre-emptive war, against terrorism. Paulsen says:

“Congress, in enacting the AUMF, sweepingly and in separation of powers terms somewhat surprisingly, declared its acceptance of unilateral presidential military action to deter and prevent acts of terrorism against the U.S., and of the claim of unilateral presidential constitutional authority to do so (Paulsen, 2009, 122).”

It should be noted that this whereas clause was negotiated into the final draft by executive branch lawyers. He views this as a paradigm shift from the WPR, but does admit the circumstances of September 11, 2001 overwhelmed the WPR.

Congressional critics undercut Congress' powers, as the only way Congress can legislate is using general standards. If Congress takes the position that anything short of a narrow and specific authorization to do every aspect of warfighting is no authorization at all, they are devaluing their own authorizations and rendering themselves irrelevant, as well as trenching upon the President's constitutional authority as commander in chief (Rivkin, 2009, 489-490). This raises the question of if the Framers' Congress was incapable of making foreign policy decisions.

Kassop lists three main causes for concern about centralized policy making on large scales across multiple military areas including the AUMF of 2001. First, this is a war with no easily identifiable foe nor any agreed understanding of what would constitute decisive defeat and threat termination. Second, the campaign against terrorism is a comprehensive one collapsing foreign and domestic policy into a seamless whole in an unprecedented way. Third, the war characterization is primarily political that happens to include a military component to it, when and where the President deems it necessary to use force although it is not a war in the traditional sense (Kassop, 2003, 527).

Both arguments of whether the AUMF of 2001 is legal and constitutional are strong. It can be viewed as partisan support or lack of: Republicans generally supported the AUMF while President Bush was in office, whereas Democrats generally challenged aspects of it. There are anomalies that support the other side of the argument and feel that President Bush was acting within his presidential powers, and many feel he exercised them too strongly.

What makes this debate unique is that the conflict is still going almost sixteen years after the AUMF was passed. Unlike past wars, President Bush went through extreme public criticism while the war was being waged. In the past Presidents typically received the benefit of the doubt and had general bipartisan support. I keep asking “Did Congress knowingly give President Bush this much power purposely to minimize responsibility and liability of potential outcomes from them?” If the answer is yes it should be viewed that President Bush acted within his rights.

Legal Framework of the AUMF of 2001

It is fascinating to think how almost everything that has happened in American foreign policy, at least in the Middle East, since 2001 is directly tied one law. Politicians, academics, and even the public frequently ask if actions taken under the AUMF of 2001 are legal and constitutional. The key to understanding this is to understand the framework in which the AUMF of 2001 was written. During President Bush's administration, there were six major cases tried by the Supreme Court directly tied to this. This section will discuss the legal framework in which the AUMF of 2001 was written and review the six major AUMF of 2001 court cases.

By understanding the framework of these cases, we learn how the government and courts view civil liberties under the AUMF of 2001. Most importantly, we see the courts rely on precedent cases. In some instances, they attempt to rely on cases from past wars to interpret the AUMF of 2001. This supports that the judicial branch is not likely to rule against a President during war unless the President is committing an impeachable offense. Knowing that supports my statement that President Bush acted within his rights. It must be noted that courts lack the expertise and information needed to aid in foreign policy making, and the nature of judicial power requires that courts view cases as stand-alone instances. Understanding this is vital to understanding Supreme Court rulings.

The debate over the legality of the AUMF of 2001 is ongoing. Many unanswered questions deemed interpretive were raised. These include: What is the meaning of force? What is the geographical scope of location? What is the requisite nexus to September 11, 2001? What is the duration of authorization? None of these questions were clearly answered or defined in the final copy of the AUMF of 2001.

One explanation of the legal framework in which this was drafted is given in a speech by Stephen Preston. He acknowledges both sides of the debate and gives information regarding America's state when this was passed. By passing the AUMF of 2001 Congress gave President Bush authority to attack Osama bin Laden. Legal measures were taken consistent with Article 51 of the UN Charter to declare the U.S. acted in self-defense of the September 11, 2001 attacks.

Preston says the AUMF was necessarily drafted in broad terms, but was not open ended. Specific to the concept of associated forces he says:

“Consistent with international law principles, an associated force must be both an organized, armed group that has entered the fight alongside al-Qaida, and a co-belligerent with al-Qaida in hostilities against the U.S. or its coalition. This means that not every group that commits terrorist acts is an associated force. Nor is a group an associated force simply because it aligns with al-Qaida. Rather, a group must have also entered al-Qaida's fight against the U.S. or its coalition (Preston, 2015, “Legal Framework”).”

While America was militarily engaged in many states during President Bush's Administration, the bulk of the targets were Al-Qaeda cells. Preston further elaborates on the lack of unlimited flexibility President Bush had to define the scope of his statutory authority, and that a group deemed an associated force is done so by senior government officials after reviews from their lawyers and intelligence departments. He confirms that Congress is regularly briefed about operations against groups in this realm.

The Military Order on Detentions and Tribunals was formed directly from the AUMF of 2001. It had a framework that was as challenging as the AUMF itself. It addressed the detention of non-citizen terrorist suspects and designation of defendants to be tried before military tribunals. President Bush used the executive lawmaking tool of a military order, relied partially on his commander in chief designation for authority,

provided final decision-making authority for the tribunals in the President or Secretary of Defense, and sought no input from Congress (Kassop, 2003, 517-518).

As complex as the framework for this Order is, the legal questions that arose were even more challenging to answer and resulted in more questions. The Courts would attempt to answer two main questions: Does the President have the constitutional authority to issue the Order on his own authority and without congressional delegation? Does this Order amount to a suspension of habeas corpus by the President alone?

Military lawyers challenged whether the state of armed conflict cited in the order referring to the September 11, 2001 attacks was accurate. Academic professors also joined in the debate trying to simplify the circumstances of September 11, 2001. They question whether the terror attacks are a law of war violation since it cannot be determined with certainty America was in a period of armed conflict when they occurred. Some state the attacks were international law violations, in which case Congress defines and punishes offenses of international law under Article I, Section 8, Clause 10 of the Constitution. If that is the case, then the legal question is whether military commissions created by the President unilaterally are binding and legal.

These questions were not answered due to the uniqueness and context of the events. The only historical precedents Courts could refer to, *Ex-parte Milligan* in 1866 and *Ex-parte Quirin* in 1942, were not comparable since no declared war was made after September 11, 2001. Fears existed that even if the questions could be answered there could be negative political impacts that could risk Americans' lives globally.

Hamdi v. Rumsfeld was decided by the Supreme Court in 2004. This would be the Supreme Court's most important decision regarding the AUMF of 2001, as it was the only case to offer an interpretation of it. The case question was "Did the AUMF of 2001 give authorization for detainees to be held for the duration of the conflict, including U.S. citizens?" The Court ruled that those who fought against the U.S. in Afghanistan in support of the Taliban are the group of people Congress targeted when passing the AUMF of 2001. It should be noted that the Court did not require that the AUMF specifically mention a power to detain. As an American citizen, Hamdi was not subject to the Military Order on Tribunals and Detention. Justice O'Connor wrote:

"The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution. We do not reach the question whether Article II provides such authority, however, because we agree with the Government's alternative position, the Congress has in fact authorized Hamdi's detention, through the AUMF (Castle, 2015, 521-522)."

Furthermore, he said Congress' authorization of force included the authority to detain enemy fighters for the duration of the conflict, a conclusion based on longstanding law of war principles, executive branch practice, judicial precedent, and the need to prevent enemy combatants from returning to battle (Bradley and Goldsmith, 2016, 630-631).

Majority opinion was not achieved. The result was the plurality opinion decision held that a U.S. citizen detained in Afghanistan could be militarily detained based on the AUMF of 2001. The Court clarified that the plurality ruling only answered the specific question of if the government could detain a person who is alleged to be a part of or supporting forces hostile to the U.S. and coalition in Afghanistan and is engaged in armed conflict with the U.S. there.

Future cases would be viewed independently of this case, and going forward the judicial branch would act as a check to the executive branch in cases like this. This set the tone for future detention practices for the duration of the WOT. Ruling this way ensured that the Supreme Court stayed aligned with their historical treatment of detention during war time: as important to the conduct and waging of war designed to keep captured individuals from taking up arms again.

Jose Padilla, a U.S. citizen, was arrested at O'Hare Airport in Chicago, IL in May 2002 arriving from Pakistan on a material witness warrant to testify before a grand jury investigating the September 11, 2001 attacks. In June 2002 President Bush declared him an enemy combatant. Padilla was then detained in military prison under the DOD. No charges were made for three and a half years, when he was charged with minor offenses. In June 2004 Padilla signed his habeas petition and disputed every charge against him.

Padilla v. Bush presented the Supreme Court the question of "Does the AUMF of 2001 authorize the President to detain a U.S. citizen based on a determination he is an enemy combatant, or is that power precluded by the Non-Detention Act?" The Supreme Court used jurisdiction to decide against Padilla. Chief Justice William Rehnquist ruled that Padilla had filed his case in the wrong court. The majority declined to speculate on the merits of Padilla's constitutional claims or the expansive claims of inherent Article II presidential detention power made by the Bush administration.

Their second trial was like the first, but they declined to review it. They concluded that when Padilla was transferred to civilian custody he was no longer an enemy combatant and his claims became moot. This is telling because we see the limitations of the Court challenging presidential detention power. Serious constitutional

issues were raised, yet the Court focused on narrow, technical procedural issues. His failure to overcome these issues doomed his case each time (Wheeler, 2009, 688).

Rasul v. Bush was a case the Supreme Court judged in 2004 involving two separate cases consolidated in District Courts. In *Al Odah v. U.S.* twelve Kuwaiti nationals sought injunction ordering that they be informed of any charges against them and requiring that they be permitted to consult with counsel and meet with their families. They did not seek habeas corpus relief and disclaimed any desire to be released from confinement. In contrast, the petitioners in *Rasul*, two British and two Australian citizens, filed their action as a writ of habeas corpus requesting the court to order their release from unlawful custody and raised conditions of confinement claims (Sloss, 2004, 788). The legal question was “Do U.S. Courts have jurisdiction to consider legal appeals filed on behalf of foreign citizens held by the U.S. military on Guantanamo Bay?”

It was determined habeas corpus rights were not dependent on citizenship, and detainees were free to challenge their detention as unconstitutional. The precedent used was 17th century English jurisprudence. The Court held that the U.S. had jurisdiction and control over Guantanamo Bay under the federal habeas statute for habeas to be available to detainees to challenge their detention. After this, President Bush established CSRT to evaluate if a detainee is an enemy combatant, with military commissions to conduct war crime trials of unlawful enemy combatants (Malone, 2012, 349).

Salim Ahmed Hamdan, a former chauffer for Osama bin Laden, was captured and turned over the U.S. in 2001. He was imprisoned on Guantanamo Bay for one year without charges. President Bush declared he committed acts triable by a military commission which designated him an enemy combatant. Hamdan filed a petition for

habeas corpus. The Supreme Court had to decide if Hamdan committed a crime triable by military commission, and if the commission is constitutional.

Hamdan v. Rumsfeld was decided in 2006. The Court's decision concerned whether the Bush administration could set up military commissions to try detainees at Guantanamo Bay without congressional authorization. President Bush argued he had powers in Article II of the Constitution including authority to create military commissions and felt he did not have to consult Congress. Presidential power under Article II includes authority to create military commissions in the absence of statutory authorization, as that is a necessary and longstanding component of war powers. Through history, Presidents have exercised their authority to establish military commissions without authorization from Congress (Fisher, 2006, 39-40).

The Court held the administration was not authorized to set up military commissions without congressional authorization. Doing so would violate the Uniform Code of Military Justice (UCMJ) and Geneva Convention, thus the President would need congressional permission. (Gonzales, 2016, 482-483). By doing this the Court recognized Congress's powers under the Constitution. As a result, the MCA was passed.

Lakhar Boumedine was captured with five Algerian natives under suspicion they were plotting an attack on the U.S. Embassy in Bosnia in 2002. They were deemed enemy combatants and detained on Guantanamo Bay. Boumedine filed a petition for habeas corpus. *Boumedine v. Bush* became a landmark decision made in 2008 consolidating many cases like this. The Supreme Court held that Guantanamo Bay detainees have habeas corpus rights in U.S. courts. This was consistent with their reversal on *Rasul v. Bush*, which held that non-citizen detainees on Guantanamo had

habeas corpus rights. Section 7 of the MCA was deemed unconstitutional as no suspension was allowed unless it were a rebellion or an invasion of public safety.

The Court did not restrict the detention, treatment, or trial of detainees. They did criticize the President and Congress for attempting to declare that the Constitution didn't apply here since Guantanamo Bay is outside of America's sovereign territory. Some interpret this ruling as the Courts simply preserving their role and less about preventing the President from exercising statutorily conferred authority. Many vital questions went unresolved after this ruling. No Court ruling or clarification was provided for the following: the statutory or constitutional validity of the CSRT procedure, the statutory or constitutional validity of military commissions as set up under the MCA or their compliance with the Geneva Convention, what must be demonstrated by the government or the detainee at a habeas proceeding, or what procedures are necessary to satisfy the due process requirements for habeas review (Malone, 2012, 350-351).

Ali Saleh Kahlah Al-Marri entered America legally on September 10, 2001. Shortly after he was arrested for fraud and held in civilian prison until criminal proceedings stalled. In 2003 President Bush alleged he was an Al-Qaeda agent planning terror attacks after September 11, 2001. Al-Marri was then placed in military custody. He is the only known person detained as an enemy combatant on American soil.

The Court determined the executive branch could detain al-Marri, but had to provide a process for him to challenge the labeling as an enemy combatant. They rejected the government claim that the AUMF of 2001 authorized detention, limiting the President's authority to designate a person detained on U.S. soil an enemy combatant.

They also explained that he could argue his detention via a two-stage burden-shifting procedure announced during *Hamdi v. Rumsfeld*. The process listed in *Hamdi* states:

“Once the Government has offered evidence in support of its continued detention of an alleged enemy combatant, the detainee must be permitted to present his own factual case to rebut the Government’s return argument. In so doing, the detainee must present more persuasive evidence to overcome the facts offered by the Government (Shill, 2007, 396).”

Al-Marri argued that to find congressional authorization for the military detention, courts should insist on a clear statement that Congress supports the executive’s action. The Bush administration argued that the AUMF of 2001 gave it rights to detain Al-Marri. Their defense was the plurality in *Hamdi* construed the AUMF to authorize the military detention of enemy forces as a fundamental incident of war, and because Al-Marri was alleged to be an Al-Qaeda agent, the AUMF of 2001 authorized his detention (Bradley, 2010, 140-141). Al-Marri’s counter argument was the requisite clear statement was lacking. In 2009 the Supreme Court dismissed the Fourth Circuit Court’s case as moot, and declared that people cannot be imprisoned indefinitely for suspected wrongdoing without being charged with a crime before a jury.

Conclusion

In conclusion, we see the legal framework in which the AUMF of 2001 was written was to give President Bush the authority to defend America after September 11, 2001. Like the Constitution, the AUMF of 2001 is written in vague terms and is open to interpretation for the President to frame issues as he sees fit. With no guidance in duration, global boundaries, or definitions of success we can wonder if this was intentionally written this way. If so, why? It is revealing how the Supreme Court ruled

cases. They did rule with integrity, but even when ruling against President Bush they gave guidance where he could proceed in a way that would be deemed constitutional.

As I have argued, there is a clear difference in presidential war powers before and after September 11, 2001. Past Presidents have taken special liberties during war to protect America in foreign policy and civil liberties. It is obvious that presidential war powers changed more under President Bush than any President. The AUMF of 2001 is the cutoff point when comparing past and present terms of presidential war powers.

Four major factors allowed for changes in presidential war powers under President Bush: fear of the uncertainty of what could happen next, nationwide hysteria, patriotism, and President Bush's successful framing of the terror attacks as an act of war. It is undeniable these factors expedited the passing of the AUMF of 2001. The AUMF of 2001 has had, and continues to have, major implications that cannot be quantified today. Furthermore, the lack of end game parameters to define the use of this AUMF show that we cannot predict when it will not be used. American foreign policy, namely towards the Middle East, and civil liberties were forever changed after the passing of the AUMF of 2001.

Strong debate over whether President Bush acted within constitutional boundaries continue today. We see how the framework of the AUMF of 2001 set the precedent for some of the most vital Supreme Court decisions since 2001. There is a parallel between some of the Supreme Court cases as precedents for others, along with their reliance on interpreting the Constitution. It may be decades before we can fully understand the impact the AUMF of 2001 has had, but it is indisputable that presidential war powers as they existed changed under President Bush than any other President in history.

CHAPTER 5: CONCLUSION

This thesis aims to explain how presidential war powers changed under President Bush. I have argued two main supporting statements. First, the AUMF of 2001 is the most impactful authorization of war Congress has authorized. The passing of it is the specific law and time point where presidential war powers expanded due to the September 11, 2001 terror attacks. This is when presidential war powers changed for the unforeseeable future. My second supporting statement is that President Bush acted in accordance with his predecessors when America was at war. I provide many examples of past Presidents acting as President Bush did. I defend my thesis from a historical perspective with arguments supported by historical evidence. Two things make President Bush's use of war powers so drastic: the duration of the wars America has been fighting and the accumulation of his decisions that impacted foreign policy and civil liberties.

Presidential war powers must be viewed without historical blindness. When we judge President Bush we must consider the actions of past Presidents. This is done by viewing facts about what happened in the past. The most important, and challenging, factor we must consider is the type of organization America was threatened by.

On September 11, 2001 America was not attacked by a uniformed state or country. The nation was attacked by a group of idealistic non-state actors that swore no allegiance to any country and did not operate within borders. This was the first attack America suffered of this magnitude by this type of organization. It resembled a drastic change in how America must fight wars. Past Congressional declarations of war were on states: The War of 1812 (Britain), The Mexican-American War (Mexico), The Spanish-American War (Spain), WWI (Germany and Austria-Hungary), and WWII (Japan,

Germany, Italy, Bulgaria, Hungary, and Romania). The AUMF of 2001 was the first authorization of war without a state as the target. Some of the typical specific information included in prior declarations of war could not be defined as a result.

September 11, 2001 falls under Michael Walzer's category of supreme emergency. Walzer defines this as a rare moment when the negative value we assign a disaster that looms before us devalues morality itself and leaves us free to do whatever is militarily necessary to avoid disaster, so long as what we do does not produce an even worse disaster (Walzer, 2004, 40). He explains the mindset terrorism brings:

“When our community is threatened, not just in its present territorial extension or governmental structure or prestige or honor, but in what we might think of as its ongoingness, we face a loss greater than any we can imagine, except for the destruction of humanity itself (Walzer, 2004, 43).”

The change in media coverage from past Presidents through the post September 11, 2001 world is another context we must consider. This is important to consider when viewing research and debates over Presidents' actions. An example is when comparing media coverage between President F.D. Roosevelt's presidency during WWII and President Bush's. The availability of instant access to information today was not possible during President Roosevelt's presidency. Access to information in real time opens Presidents up to more, and often harsher, instant criticism while they are in office than previous executives. While this helps keep them honest to an extent, it also makes their job harder. Social media helps spread news much quicker than anything possible in past presidencies. This instant access to news presents opportunities for historical blindness where people act based on emotion and do not fully consider all facts.

While President Bush's decisions impacted the civil liberties of Americans and some people did suffer unnecessarily, many of the arguments against him do not note that his predecessors did similar things like I have noted in my thesis. Examples I have stated include: President Adams passed the Alien and Sedition Acts which criminalized speaking against the U.S. government during the XYZ Quasi War with France. President Polk used his executive power to manipulate Congress into declaring war on Mexico. President Lincoln suspended habeas corpus and authorized trials by military commission which challenged civil liberties during the Civil War. President Wilson passed the Espionage and Trading with the Enemy Acts which punished people for speaking against the government, or challenging the war effort, during WWI. President Franklin Roosevelt authorized warrantless surveillance before America entered WWII, and authorized what some consider to be the worst violation of civil liberties violations in U.S. history by ordering the forced relocation of Japanese Americans after Pearl Harbor was attacked. These examples clearly provide precedent for many of President Bush's decisions and show that he in fact was not acting out of order set by his predecessors.

My arguments serve a few purposes. First, my main goal was to show the severity of the change in presidential war powers under President Bush. I did this by noting military actions authorized by the AUMF of 2001 and impact of the AUMF both militaristically and regarding civil liberties. I gave information on key Supreme Court rulings decided regarding the AUMF of 2001. I also attempted to provide quantitative impact of the AUMF of 2001. This was done with support from the Costs of War project. By doing this I also hope to have accomplished my second main purpose, to display the impact of the AUMF of 2001. Additionally, by explaining the debate and

legal framework of the AUMF of 2001 I hope I gave a sense of the polarizing political climate this law brought to America. This is still heavily contested today as Congress is taking their most aggressive defense against the executive branch since the WPR of 1973.

My next purpose is to prove that President Bush acted within his constitutional rights. Most importantly, I believe I prove that precedents set by his predecessors show that he was aligned with prior Presidents in a time of war. I offer many examples of key points in American history where Presidents were challenged with the task of defending the nation and had to make hard and unpopular choices. These examples show that President Bush was not the first, and will not be the last, President to take executive matters into his own hands and have his morality questioned while defending America.

Several authors explain morality in politics. I use these sources to try and understand the challenges President Bush faced in this area. Walzer states:

“A particular act of government may be exactly the right thing to do in utilitarian terms and yet leave the man who does it guilty of a moral wrong. Most often of course, political leaders accept the utilitarian calculation. The notion of dirty hands derives from an effort to refuse absolutism without denying the reality of the moral dilemma (Walzer, 1973, 161-163).”

His approach references Machiavelli saying, “It is necessary for a prince wishing to hold his own to know how to do wrong, and to make use of it or not according to necessity.”

(Machiavelli, 1532, 71). This is like the consequentialist theory of morality. This is defined by Frank Fischer, Gerald J. Miller, and Mara S. Sidney:

“Consequentialism emphasizes good results as the basis for evaluating human actions. The core idea of consequentialism is that what makes an action or policy right is that it brings about better consequences than any of its alternatives (Fischer et al, 2007, 10).”

They argue that consequentialism is the ethical approach taken by most public officials.

The framework I used resembled a history paper. A lot of time was spent researching U.S. history from a political perspective to understand challenges past Presidents faced when leading America during war. Even events since 2001 were viewed from a historical perspective to understand the dynamic of what President Bush was facing at this critical time. My goal was to provide as much historical data as possible and explain both sides of the key debates, so the reader can understand the passion behind the vital arguments. I believe I did this while clearly stating my positions.

As stated, this thesis only discusses President Bush's administration of 2001-2009. The main part discussed the AUMF of 2001 including its impact, debate, and legal framework. The pre AUMF of 2001 section is designed to explain the historical context of presidential war powers and support my statement that presidential war powers changed under President Bush more than any President. I briefly mention President Obama's and President Trump's presidencies. It is impossible to fully separate them as they all use the AUMF of 2001 as justification for their military actions.

I do not elaborate on anything after President Bush's presidency. There are three reasons for this. First, it would deduct from my main arguments. Second, I would need to write a whole other thesis if I were to include President Obama's use of war powers. Finally, President Trump was elected in 2016 and there is minimal, if any, scholarly research on his use of war powers. A key omission is the use of detailed statistics. Few scholars have given statistical information that is all encompassing and accurate to detail the impact of the AUMF of 2001. I presume this is probably because the AUMF of 2001 is still being used and a total cost analysis cannot be provided in totality.

I am interested to see what future research on the AUMF of 2001 provides. This area will be impacted if Congress is able to end the AUMF. My main question going forward is “Should the AUMF of 2001 be changed or ended and replaced with a new AUMF for future operations?” I believe in separation of powers and checks and balances between the branches of government. I am also certain that America and its interests are more at risk with the existence of more extreme terrorist groups like the Islamic State of Iraq and Syria (ISIS) in addition to Al-Qaeda and the Taliban. I do not think that the President should have an open check book to do what he wants militarily, but I am a strong believer that America needs a strong executive with authority to defend America.

Furthermore, I think the Framers fully understood the legislative branches shortcomings, and knew they were not going to be able to act quick enough to defend America if attacked. I do not think the Framers could have foreseen today’s world. I do think they understood the possibility that America would be vulnerable with a weak President and purposely wrote the Constitution how they did. They were the most educated men in America and it took them four months to write the Constitution. In perspective, it took Congress four days to draft the AUMF of 2001 and pass it. This shows the need for quick government action after September 11, 2001. America’s emotional state at the time needed a President with authority to defend its citizens.

I do not think the Framers accidentally left room for interpretation of war powers, but purposely left room for the President to act as needed. I do not think the AUMF of 2001 will be ended or drastically changed soon. Both Republican and Democratic Presidents have benefitted from it. For that reason, I do not see it changing as long as non-state actors are a threat.

A major opportunity for researchers going forward is providing quantitative data to explain the impact of the AUMF of 2001. Statistics help tell a full story and make situations more realistic for people. I think this will be able to be done on a case by case basis if researchers research each military conflict the U.S. enters under the AUMF of 2001. Understanding the full cost from the AUMF of 2001 under President Obama will enhance the information added to the knowledge provided on President Bush's use of it.

Enhancing existing information will answer questions of what the impact of the AUMF of 2001 is. If researchers can provide data on civil liberties impacts under the AUMF of 2001, that will provide more information to be used going forward. If the government can understand the future data, they will realize how effective their civil liberties practices are. This will let them improve laws for future generations. I do think research to be conducted in the coming years will be vital to understand this time and help the government fix their flaws for dealing with threats going forward.

My thesis has provided extensive historical background that does two things. One, it shows presidential war powers changed under President Bush more than any President. This was due to the necessity to defend America and the nature of the new threat type to the nation. Second, it shows there is precedent for many of President Bush's actions and that he was not acting on his own to exceed the limits of presidential war powers but acting upon past precedents. It also gives a detailed description of the impact, debate, and legal framework of the AUMF of 2001. I am intrigued to see how this research holds up on this kinetic time in U.S. history over the upcoming decades as more information is provided with the 20/20 vision history allows.

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