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Authorization For Use Of Military Force in Response to the 9/11 Attacks (P.L. 107-40): Legislative History

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Summary

In response to the terrorist attacks against the United States on September 11, 2001, the Congress passed legislation, S.J.Res. 23, on September 14, 2001, authorizing the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons....” The President signed this legislation into law on September 18, 2001 (P.L. 107-40, 115 Stat. 224 (2001)). This report provides a legislative history of this statute, the “Authorization for Use of Military Force” (AUMF), which, as Congress stated in its text, constitutes the legislative authorization for the use of U.S. military force contemplated by the War Powers Resolution. It also is the statute which the President and his attorneys have subsequently cited as an authority for him to engage in electronic surveillance against possible terrorists without obtaining authorization of the special Court created by the Foreign Intelligence Surveillance Act (FISA) of 1978, as amended. This report will only be updated if events warrant.

On September 11, 2001, terrorists linked to Islamic militant Usama bin Laden hijacked four U.S. commercial airliners, crashing two into the twin towers of the World Trade Center in New York City, and another into the Pentagon building in Arlington, Virginia. The fourth plane crashed in Shanksville, Pennsylvania near Pittsburgh, after passengers struggled with the hijackers for control of the aircraft. The collective death toll resulting from these incidents was nearly 3,000. President George W. Bush characterized these attacks as more than acts of terror. “They were acts of war,” he said. He added that “freedom and democracy are under attack,” and he asserted that the United States would use “all of our resources to conquer this enemy.”¹

¹ Presidential remarks of September 12, 2001. Public Papers of the Presidents of the United States, George W. Bush, 2001, II, Washington, D.C. U.S. Government Printing Office, 2003, p. 1100.

In the days immediately after the September 11 attacks, the President consulted with the leaders of Congress on appropriate steps to take to deal with the situation confronting the United States. These discussions produced the concept of a joint resolution of the Congress authorizing the President to take military steps to deal with the parties responsible for the attacks on the United States. The leaders of the Senate and the House decided at the outset that the discussions and negotiations with the President and White House officials over the specific language of the joint resolution would be conducted by them, and not through the formal committee legislation review process.² Consequently, no formal reports on this legislation were made by any committee of either the House or the Senate. As a result, it is necessary to rely on the texts of the original draft proposal by the President for a use of military force resolution, and the final bill, S.J.Res. 23, as enacted, together with the public statements of those involved in drafting the bill, to construct the legislative history of this statute. Between September 12 and 14, 2001, draft language of a joint resolution was discussed and negotiated by the White House Counsel's Office, and the Senate and House leaders of both parties. Other members of both Houses of Congress suggested language for consideration through their respective party leaders.³

On Wednesday, September 12, 2001, the White House gave a draft joint resolution to the leaders of the Senate and the House. This White House draft legislation, if it had been enacted, would have authorized the President (1) to take military action against those involved in some notable way with the September 11 attacks on the U.S., but it also would have granted him (2) statutory authority "to deter and pre-empt any future acts of terrorism or aggression against the United States."⁴ This language would have seemingly authorized the President, without durational limitation, and at his sole discretion, to take military action against any nation, terrorist group or individuals in the world without having to seek further authority from the Congress. It would have granted the President open-ended authority to act against all terrorism and terrorists or potential aggressors against the United States anywhere, not just the authority to act against the terrorists involved in the September 11, 2001 attacks, and those nations, organizations and persons

² In September 2001, the Speaker of the House was Dennis Hastert (R-Ill.) and the Minority Leader of the House was Richard Gephardt (D-Mo.). The Senate Majority Leader was Thomas Daschle (D-SD), and the Senate Minority Leader was Trent Lott (R-Miss.).

³ The background details and time line provided in this report regarding the discussions between the White House and the Congress on the joint resolution are based on the following public sources: *Washington Post*, September 13, 2001, p.A3; *Congress Daily/AM*, September 13, 2001; *CQ Daily Monitor*, September 13, 2001, p.2, 6; *The Wall Street Journal*, September 13, 2001, p. A1; *CQ Daily Monitor*, September 14, 2001, p.2; *Washington Post*, September 14, 2001, p. A30; *The New York Times*, September 14, 2001, p.A19; *Baltimore Sun*, September 14, 2001, pp. A1, A16; *The Wall Street Journal*, September 14, 2001, p. A12; *Roll Call*, September 20, 2001, p.17. The complete debate on S.J.Res. 23 is found in U.S. Congress. Congressional Record, 107th Congress, 1st session, September 14, 2001, pp.S9411-S9430 [daily edition](Senate); pp. H5638-H5683 [daily edition](House). Abramowitz, David. "The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing use of Force against International Terrorism." *Harvard International Law Journal*. Winter 2002, pp. 71-81. See also *Washington Post*, December 23, 2005, p. A21 and *The New York Times*, December 24, 2005, p. A12.

⁴ The complete text of this original White House draft joint resolution of September 12, 2001 is provided at the end of this report and can also be found in U.S. Congress. Congressional Record, 107th Congress, 1st session, October 1, 2001, pp. S9949-S9951[daily edition].

who had aided or harbored the terrorists. As a consequence, this portion of the language in the proposed White House draft resolution was strongly opposed by key legislators in Congress and was not included in the final version of the legislation that was passed.

The floor debates in the Senate and House on S.J.Res. 23 make clear that the focus of the military force legislation was on the **extent** of the authorization that Congress would provide to the President for use of U.S. military force against the international terrorists who attacked the U.S. on September 11, 2001 and those who directly and materially assisted them in carrying out their actions. The language of the enacted legislation, on its face, makes clear — especially in contrast to the White House’s draft joint resolution of September 12, 2001 — the degree to which Congress limited the scope of the President’s authorization to use U.S. military force through P.L. 107-40 to military actions against only those international terrorists and other parties directly involved in aiding or materially supporting the September 11, 2001 attacks on the United States. The authorization was not framed in terms of use of military action against terrorists generally.

On Friday, September 14, 2001, after the conclusion of the meetings of their respective party caucuses from 9:15 a.m. to 10:15 a.m., where the final text of the draft bill was discussed, S.J. Res. 23, jointly sponsored by Senators Thomas Daschle and Trent Lott, the Senate Majority and Minority leaders respectively, was called up for quick consideration under the terms of a unanimous consent agreement. S.J.Res. 23 was then considered and passed by the Senate by a vote of 98-0.⁵ As part of the Senate’s unanimous consent agreement that set the stage for the rapid consideration and vote on S.J.Res. 23, the Senate agreed to adjourn and to have no additional votes until after the following Wednesday. That action effectively meant that if the House amended S.J.Res. 23, no further legislative action on it would occur until the middle of the following week. After the House of Representatives received S.J.Res. 23 from the Senate, on Friday, September 14, 2001, the House passed it late that evening, after several hours of debate, by a vote of 420-1, clearing it for the President. Prior to passing S.J.Res. 23, the House considered, and then tabled an identically worded joint resolution, H.J.Res. 64, and rejected a motion to recommit by Rep. John Tierney (D-Mass.), that would have had the effect, if passed and enacted, of requiring a report from the President on his actions under the joint resolution every 60 days after it entered into force.

S.J.Res. 23, formally titled in Section 1 as the “Authorization for Use of Military Force,” was thus passed by Congress on September 14, 2001, and was signed into law by the President on September 18, 2001.⁶ The enacted bill contains five “Whereas clauses” in its preamble, expressing opinions regarding why the joint resolution is necessary. Four

⁵ In a December 23, 2005 op-ed article, former Senate Majority Leader, Thomas Daschle (D-SD) stated that “Literally minutes before the Senate cast its vote [on S.J.Res. 23] the administration sought to add the words “in the United States and” after “appropriate force” in the agreed-upon text [of the bill].” Senator Daschle wrote that this change would have given the President “broad authority to exercise expansive powers not just overseas — where we all understood he wanted authority to act — but right here in the United States, potentially against American citizens.” Senator Daschle stated that he refused to accede to this request. Tom Daschle. “Power We Didn’t Grant,” *Washington Post*, December 23, 2005, p. A21. This account is not reflected in the official record of the legislative debate on S.J. Res. 23.

⁶ P.L. 107-40, 115 Stat. 224 (2001) [S.J.Res. 23].

of these are identical to the “Whereas clauses” contained in the White House draft joint resolution of September 12, 2001. The fifth, which was not in the original White House draft, reads as follows: “Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States....” This statement, and all of the other Whereas clauses in P.L. 107-40, are not part of the language after the Resolving clause of the Act, and, as such, it is not clear how a Court would treat such provisions in interpreting the scope of the authority granted in the law.⁷

Section 2(a) of the joint resolution, authorizes the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, 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.” The joint resolution further states, in Section 2(b)(1), Congressional intent that it “constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.” Finally, Section 2(b)(2) of the joint resolution states that “[n]othing in this resolution supercedes any requirement of the War Powers Resolution.”

A notable feature of S.J.Res. 23 is that unlike all other major legislation authorizing the use of military force by the President, this joint resolution authorizes military force against “organizations and persons” linked to the September 11, 2001 attacks on the United States. In its past authorizations for use of U.S. military force, Congress has permitted action against unnamed nations in specific regions of the world, or against named individual nations, but never against “organizations or persons.” The authorization of use of force against unnamed nations is consistent with some previous instances where authority was given to act against unnamed states when they became aggressors or took military action against the United States or its citizens.⁸

President George W. Bush in signing S.J.Res. 23 into law on September 18, 2001, noted the Congress had acted “wisely, decisively, and in the finest traditions of our country.” He thanked the “leadership of both Houses for their role in expeditiously passing this historic joint resolution.” He noted that he had had the “benefit of meaningful consultations with members of the Congress” since the September 11 attacks, and that he would “continue to consult closely with them as our Nation responds to this threat to our peace and security.” President Bush also asserted that S.J.Res. 23 “recognized the authority of the President under the Constitution to take action to deter and prevent acts of terrorism against the United States.” He also stated that “In signing

⁷ The United States Supreme Court has ruled directly on the distinction between language **in the preamble** of a legislative act and **in the act itself**. Chief Justice Melville Fuller writing an opinion for a unanimous U.S. Supreme Court stated: “But as the preamble is no part of the act, and cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous, the necessity of resorting to it to assist in ascertaining the true intent and meaning of the legislature is in itself fatal to the claim set up.” *Yazoo and Mississippi Valley Railroad Company v. Thomas* 132 U.S. 174, 188(1889).

⁸ For a detailed discussion of authorizations of the use of U.S. military force see CRS Report RL31133, *Declarations of War and Authorizations of Use of Military Force: Historical Background and Legal Implications*, by David M. Ackerman and Richard F. Grimmett.

this resolution, I maintain the longstanding position of the executive branch regarding the President's constitutional authority to use force, including the Armed Forces of the United States and regarding the constitutionality of the War Powers Resolution.”⁹

It is important to note here that Presidents frequently sign bills into law that contain provisions or language with which they disagree. Presidents sometimes draw attention to these disagreements in a formal statement at the time they sign a bill into law. While Presidential “signing statements” may indicate that the President views certain provisions to be unconstitutional, they do not themselves have the force of law, nor do they modify the language of the enacted statute. Should the President strongly object to the language of any bill presented to him, he has the option to veto it, and compel the Congress to enact it through voting to override his veto. Once a bill is enacted into law, however, every President, in accordance with Article II, section 3 of the U.S. Constitution, is obligated to “take care that the laws be faithfully executed...” Thus, unless its current language, is changed through enactment of a new statute that amends it, or its effect is modified by opinions of the Federal Courts, the “Authorization for Use of Military Force” statute, P.L. 107-40, retains the legal force it has had since its enactment on September 18, 2001.

Text of Original Draft of Proposed White House Joint Resolution ¹⁰
(September 12, 2001)
 Joint Resolution

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

Whereas in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States,

Now, therefore be it

Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled —

⁹ Statement of the President of September 18, 2001 on signing the Authorization for the Use of Military Force. Public Papers of the Presidents of the United States, George W. Bush, 2001, II, Washington, D.C. U.S. Government Printing Office, 2003, pp. 1124-1125.

¹⁰ This text of the original draft of the White House's proposed joint resolution was printed in *CQ Daily Monitor* of Friday, September 14, 2001 on page 2. Subsequently, on October 1, 2001, Senator Robert C. Byrd, President pro tempore of the Senate, read this text into the record, noting that the White House draft joint resolution had been submitted to the Senate leadership on September 12, 2001. U.S. Congress. Congressional Record. 107th Congress, 1st session, Senate. pp. S9949-S9951[daily edition].

That the President is authorized to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, harbored, committed, or aided in the planning or commission of the attacks against the United States that occurred on September 11, 2001, and to deter and pre-empt any future acts of terrorism or aggression against the United States.

Text of S.J. Res. 23 as passed September 14, 2001, and signed into law¹¹
Joint Resolution

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens;

Whereas such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad;

Whereas in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence;

Whereas such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States; Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the “Authorization for Use of Military Force.”

SECTION 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) **IN GENERAL.** — 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.

(b) **WAR POWERS RESOLUTION REQUIREMENTS** —

(1) **SPECIFIC STATUTORY AUTHORIZATION** — Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) **APPLICABILITY OF OTHER REQUIREMENTS**- Nothing in this resolution supercedes any requirement of the War Powers Resolution.

¹¹ The Senate passed S.J.Res. 23, before 11:00 a.m. on Friday, September 14, 2001. The House passed it late Friday evening, September 14, 2001. The President signed it into law on Tuesday, September 18, 2001 as P.L. 107-40, 115 Stat. 224 (2001).