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The "Legal Grounds" of American Counterterrorism Policy Against the Islamic State: The Case of Smith v. Obama and Trump

"الأسس القانونية " للسياسة الأمريكية في مكافحة الإرهاب ضد تنظيم الدولة الإسلامية: دراسة حالة قضية سميث ضد أوباما وترامب

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Abstract

Since 9/11 events, many controversial questions have been raised over the constitutionality of American counterterrorism policies. Some American politicians criticized the U.S. intervention in the crisis of the Islamic State in Syria and Iraq (ISIS). By examining *Smith v. Trump* case, initially named *Smith v. Obama*, this paper aims at discussing whether these policies constitute a legal fight against ISIS during the Obama and Trump administrations. In an attempt to achieve that, a document-based method is approached by analyzing legal and historical literature. The research's results suggest that the absence of legal challenges to similar strategies in former administration precedents, mainly the War on Terror, weakens the legal arguments that condemn counterterrorism practices against ISIS in the Obama and Trump administrations.

Keywords: American Counterterrorism Policy; Islamic State; *Smith v. Trump*; War on Terror

ملخّص

أثارت أحداث 11/9 الجدل حول السياسات الأمريكية المتبعة في مكافحة الإرهاب، فقد انتقد بعض السياسيين الأمريكين تدخل حكومة الولايات المتحدة الأمريكية في أزمة تنظيم الدولة الإسلامية في العراق والشام (داعش). من هنا تهدف هذه الورقة البحثية إلى دراسة مدى شرعية المعركة التي خاضتها السياسات الأمريكية -بموجب القانون الأمريكي- ضد تنظيم الدولة الإسلامية لا سيما تلك المتعلقة بقضية سميث ضد ترامب المعروفة سابقا بقضية سميث ضد أوباما. وبغية تحقيق الهدف المنشود، يستند هذا البحث إلى المنهج التحليلي الوصفي لمدونة تشمل مراجع قانونية وأخرى تاريخية. وتشير نتائج البحث إلى أن غياب سوابق قانونية تدين استراتيجيات مماثلة في العهدات الرئاسية السابقة، لا سيما ما تعلق منها بسياسة الحرب على الإرهاب، يضعف الحجج القانونية التي تدين ممارسات مكافحة الإرهاب ضد داعش خلال عهدتي أوباما وترامب.

الكلمات المفتاحية: السياسة الأمريكية لمكافحة الإرهاب؛ تنظيم الدولة الإسلامية؛ سميث ضد ترامب؛ سياسة الحرب على الإرهاب

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Introduction

The U.S. counterterrorism conduct is rooted in a complex combination of domestic, foreign, and international legal sources. The decision on how to react to terrorist threats is made in reference to U.S. criminal law, war and covert action laws, specialized authorities, and international law. Although the nature of each factor is different from the others, many of them serve as solid arguments for the American bold counterterrorism policy practices.

Many scholars criticize the extent to which the American counterterrorist covert action in the Middle East has gone through successive Republican and Democratic administrations. Scahill (2014) condemns the consistent American standpoint that views the world as a 'battlefield' and the abusive use of executive powers, state secrets, and elite military units. The Supreme Court is perceived as another key participant in promoting the 'unconstitutional' conduct of giving exclusive powers to the executive through its rulings from *Curtiss-Wright* in 1936 to *Zivotofsky v. Kerry* in 2015 (Fisher, 2017). During his second-term inauguration speech, the U.S. President declared, "A decade of war is now ending… We, the people, still believe that enduring security and lasting peace do not require perpetual war" (Obama, 2013, 11:09). While the President was pledging to shift American foreign policy toward a more peaceful direction, an American drone strike hit Yemen. This conflicting situation symbolizes the American foreign policy's paradoxical reality where the preceding War on Terror has become a 'self-fulfilling prophecy' in the succeeding American presidencies (Scahill, 2014).

Other political views denounce the differences in legal reactions to counterterrorist practices between Bush and Obama's presidencies. The Justice Department argues that, in spite of the provisions of the War Powers Resolution (WPR), almost all American presidents executed military operations in foreign countries unilaterally (Smith v. Obama: Defendant's Motion to Dismiss, 2016). The most significant feature that might distinguish the U.S. assault against ISIS is its longer duration. Opponents of the double standard reaction to the American counterterrorist acts also note that all lawsuits questioning war powers between the Executive and the Legislative have been dismissed (Smith v. Obama: Defendant's Motion to Dismiss, 2016).

In 2016, Nathan Smith, a U.S. captain who performed military operations in Kuwait, sued the U.S. President and his administration for conducting military operations against ISIS in Iraq and Syria. In light of the legally unquestionable authorization granted to the Executive Branch to wage the "War on Terror" in Iraq and Afghanistan, this paper aims at exploring the following question: Are the U.S. hostilities against ISIS during the Obama and Trump administrations legal on constitutional grounds? In other words, the present research attempts to determine whether the fight against ISIS constitutes a presidential breach of Congress's power, under the WPR, by examining *Smith v. Trump*[1], an appeal from the United States District Court for the District of Columbia in 2017.

[1] *Smith v. Obama* and *Smith v. Trump* refer to the same lawsuit.

The political and legal discussions on the case are often supported by addressing the War on Terror policies in response to the terrorist attacks of September 11, 2001 as a precedent. For instance, people who are in favor of the constitutionality of the U.S. involvement in ISIS stipulate that the broad language of the 2001 and 2002 Authorizations for Use of Military Force (AUMF), which authorized the U.S. President to use military force against those responsible for the 9/11 attacks, apply to all similar threats.

In this context, the research's hypothesis adopts the defense's arguments in *Smith v. Trump*, not to argue in favor of the U.S. involvement in the Middle East's insurgencies in general, but to shed light on the absence of constitutional grounds that deny hostilities against ISIS while endorsing them in the "War on Terror" against Al-Qaeda in the administration of George W. Bush.

The importance of the case lies in the questions raised on the presidential acts in the two regions during the Obama and Trump administrations. In a broader scope, the main factor that sparked interest in the subject matter of this paper is the old and continuous debate over whether the American governmental system practically boycotted the traditional British model that placed all powers in the hands of the monarch. In other words, the political freedom given to the U.S. presidents in matters of counterterrorism, mainly the War on Terror and the fight against ISIS, seems to many to be similar in nature to the old monarchical monopoly over state matters, particularly waging wars. Therefore, this study aims at testing this argument in the context of the American counterterrorist policy.

The critical and complex nature of the research's theme makes it inevitable to fall short when reporting past, present, and potential policies in general. Although the research's geographical and political scopes involve at least two different main entities, the U.S. and the Middle East, most of the available literature is authored by Western scholars. This fact may challenge the endeavor of eliminating possible Western bias. Classified documents are another major limitation of the study. The data provided in such literature might not only invoke changes in research methodology but also provoke a reconsideration of the overall results.

Counterterrorism and Governmental Powers in the U.S. Constitution

The U.S. Constitution serves as the supreme source of American counterterrorism law. First, the Preamble states that the U.S. government's mission is to "insure domestic Tranquillity, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty" (U.S. Const. PMBL). These causes act as solid grounds for waging wars against domestic and foreign terrorism. Article I details many congressional powers that could be employed in shaping counterterrorism policy. These powers include providing the "common defense," defining and punishing "Piracies and Felonies," declaring wars, and using the "necessary and proper" clause (U.S. Const. art. I, § 8). Article II gives the President the power to manage war conduct and order the army as the commander-in-chief (U.S. Const. art. II, § 2). For instance, while the U.S. Congress decided that the 9/11 attacks were an act of war and, therefore, declared War on Terror, President George

W. Bush was the one who decided how the war was run by ordering the army. Finally, the Judiciary has limited access to foreign affairs conduct. Nonetheless, if their constitutionality is questioned, war acts can be subject to judicial challenges.

Article I

The Congress's war power is directly rooted in Article I, section 8, clause 11 of the Constitution, which grants Congress the power "to declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water" (U.S. Const. art. I, § 11). The aim of the framers of the Constitution in giving the war-making power to the Congress was to break from the ancient European political tradition that placed the decision of waging wars under a handful of monarchs. Congressmen Lincoln (1848) wrote:

Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This, our [Constitutional] Convention understood to be the most oppressive of all Kingly oppressions and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon.

That power is embodied in Table (1), which lists major war declarations approved by the House of Representatives from 1789 until the Second World War. In each case, the President asked for Congress's authorization to use military force. One of the key reasons behind placing such a decisive vote in the hands of the House is the fact that the Representatives take into consideration the seriousness of sending their constituents to the dangers of war when deciding on a proposed declaration of war.

Table (1): The Congress's declarations of war since 1789

Country (War)	Date	House Vote
Great Britain (War of 1812)	June 4, 1812	79–49
Mexico (War with Mexico)	May 11, 1846	174–14
Spain (War of 1898)	April 25, 1898	Voice vote
Germany (World War I)	April 6, 1917	373–50
Austria-Hungary (World War I)	December 7, 1917	365–1
Japan (World War II)	December 8, 1941	388–1
Germany (World War II)	December 11, 1941	393–0
Italy (World War II)	December 11, 1941	399–0
Bulgaria (World War II)	June 3, 1942	357–0
Hungary (World War II)	June 3, 1942	360–0
Rumania (World War II)	June 3, 1942	361–0

Source: History, Art & Archives, U.S. House of Representatives. (n.d.) https://history.house.gov/Institution/Origins-Development/War-Powers/

The Necessary and Proper Clause is another constitutional reference to the legislative supremacy to be militarily involved in a foreign country. The clause states that "the Congress shall have the power to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof" (U.S. Const. art. I, § 18). In other words, Congress can enact laws to regulate all the powers mentioned in the Constitution, including war powers in general and counterterrorism in particular.

Article II

Under the Constitution, the President of the U.S. carries the conduct of war after Congress declares it. He is the Commander in Chief of the Army, the Navy of the United States, and even state militias, makes treaties with the Senate's majority approval, and appoints ambassadors (U.S. Const. art. II, § 2). The framers of the Constitution were careful in using the word "declaring" instead of "making" war when drafting the legislative war power. Conforming with the checks and balances framework, the making of the war is delegated to the executive mainly because Congress can be dangerously slow in conducting war in response to a military threat. Hence, in the event of a war declaration, it is the President who orders troops and decides how the war is managed.

In spite of the plain constitutional language that gives Congress the supreme power to declare war, different interpretations have generated claims from the executive that it does not need authorization from Congress for each military operation. The dispute over constitutional powers between the branches included even the definition of war itself. As a result, U.S. presidents launched many military attacks overseas without congressional approval for centuries. Instances of such operations include George H. W. Bush's invasion of Panama in 1989 and Somalia in 1992, Bill Clinton's use of military force in Iraq, Bosnia, Sudan, Haiti, Afghanistan, and Kosovo, and Barack Obama's orders of military strikes targeting Libya in 2011(Lee, 2020).

Domestic and International Sources of Counterterrorism Law Terrorism in International Law

The newly emerging and unfamiliar issue of terrorism causes even more daunting challenges for the traditional nature of international law. For centuries, international matters have enclosed only states as key elements. The international system has not yet been able to cope and respond appropriately to conflicts involving non-state or individual actors. Furthermore, an international law-making umbrella seems to be remote from being created under the international legal system that involves almost 200 countries. In such circumstances, law-making has been not only inadequate but also fragmentary. Finally, international politics often slow down international law (Koplow, 2013). Under the famous slogan that one person's terrorist is another person's freedom fighter, countries have not been able to agree on how to deal with the issue of terrorism given the actors' nationalities, causes, locations, and strategies.

The first key components of international law are treaties, which are, in the context of terrorism, agreements between pairs or groups of countries on how to deal with terrorism-related problems. Although there is no single comprehensive international treaty covering all facets of terrorism, some significant international treaties deal with a number of these aspects. Convention for the Suppression of Acts of Nuclear Terrorism (2005), which 115 states, including the U.S., have ratified, outlaws causing death, injury, or environmental damage by the possession or use of radioactive material or an attack on a nuclear facility.

In addition to treaties, customary international law contributes to defining international legal behaviors against terrorism and shaping international law as a whole. It is a set of unnecessarily written codes upstate behaviors towards certain issues. The eligibility of some behaviors is determined by the number of states performing them and/or the importance of those countries to the subject matter. For instance, with the aim of ruling in its case on employing the military at sea during wars, the International Supreme Court referred to the war conduct of such countries as the U.S. and the United Kingdom for centuries (Koplow, 2013). In order for these behaviors to become part of international counterterrorism law, they must demonstrate conformity with legal obligations within countries. In the context of the quickly emerging matter of terrorism, customary international law can evolve significantly.

Finally, under the United Nations Charter, all member states agreed to give some of their sovereignty to the United Nations Security Council, which is another key element in the foundation of international law. These countries accepted to carry out The Security Council's decisions on security and peace matters. The Security Council judges whether certain behaviors undermine peace and determines how to respond to them. The responses may include authorizing or ordering countries to use their military force in case of a security threat. For instance, in response to the terrorist attacks of September 11, 2001, the United Nations Security Council enacted Resolution 1373, which condemned the attacks by stating that they, "like any act of international terrorism, constitute a threat to international peace and security." Inevitably, the 9/11 attacks were considered not only a threat to the U.S. but also a breach of International Security and peace. Through its emphatic language, the resolution also prohibits states from providing terrorists with any kind of support, including financing, weapons supply, and safe refuge. It requires them to send early warnings to other states about possible terrorist threats.

Domestic Counterterrorism Law

On a national level, counterterrorism policy is based not only on the U.S. Constitution but also on other legal bodies and authorities. While the enumerated federal powers, separation of powers, and checks and balances determine how the American government should behave towards terrorism on a constitutional basis, certain powers, such as using the police, are granted to individual states. The U.S. Code (USC), a set of laws passed by Congress, may also serve as a legal background for such decisions. For example, Chapter 45 of Title 50, which is entitled Miscellaneous Intelligence Community Authorities, can explain why and how a

suspect terrorist's call is intercepted as part of a counterterrorism investigation (*Miscellaneous Intelligence Community Authorities*, 2018). Other domestic bodies that shape counterterrorism decision-making include executive orders, case law, the Code of Federal Regulations (CFR), policy and military directives, and policy documents. These elements contribute to regulating governmental behaviors towards both state and non-state terrorist actors.

The way in which the government responds to terrorist attacks, which are defined as criminal activities, is partly determined by American criminal law, which is the set of codes that deal with criminal acts as part of U.S. domestic law. As the head of the executive branch, the president is responsible for enforcing criminal law and, therefore, can prosecute and use related coercive powers. The Federal Bureau of Investigation (FBI), for instance, can detain suspects, interrogate people and intercept phone calls. At the same time, criminal law emphasizes due process and the defendant's individual rights in case of accusation. It is also distinguished by its permanency feature that makes its clauses applicable to both peace and war statuses (Fisher, 2017).

Unlike criminal law, laws of war are a body of international law because they involve overseas actions. They were enacted as a result of peace treaties following previous wars between countries and list the different codes that regulate how war should proceed. They are a source of governmental power for the president, not only as the executor of law but also as the commander in chief of the army and a principal figure in foreign policy conduct. Due to the unpredictable nature of war's duration, the results of war laws are momentary. In other words, entities, such as soldiers, that were considered enemies during the war no longer keep that status after the end of the war.

Laws of covert action are another reference to counterterrorist acts. They are part of the domestic law but contribute to designing legal routes to operate overseas. The complex nature of these laws makes it possible for the president and intelligence agencies to conduct operations that are legal on a domestic level but forbidden by international law. They also provide a framework to hide the identity of executors of legal acts on an international level. For example, Anwar al-Awlaki, an American-born imam, was killed by a drone strike by the Central Intelligence Agency (CIA) in Yemen in September 2011 for attempting to bring down an American airliner in Detroit in 2009 (Sanchez, 2015).

Government choices of these bureaucratic legal systems outline the legal means, action options, powers, restrictions, legal path plans, and results. For example, if an investigation is held at the level of the CIA, the procedures and outcomes are directly related to intelligence strategies such as drone strikes. In case such an investigation is proceeded by the FBI, on the other hand, the legal path will include arrest, civil court prosecution, then a criminal sentence (Witte, n.d.).

Counterterrorism policies have been conducted using all three systems: criminal law, laws of war, and laws of covert action. Both domestic prosecutions and the integration of criminal, foreign, and international law shape this policy. The consequent actions may include military presence, detention, interrogation, lethal

missions, and covert action. However, a significant number of these courses of action caused heated controversy over power breaches and are legally questioned domestically and internationally. There has been a public outcry over the brutality of the CIA's detention techniques against high-profile Al-Qaeda figures because of the absence of such measures in American law and the military. In addition, most drone strikes have been condemned for being launched without authorization to use military force. But the CIA claims it has the right to use lethal force and various locking-up measures as part of its covert action.

The interaction between these legal frameworks in policy decisions makes it difficult to establish clear boundaries. For example, there were 14 to 16 detainees held in CIA’s black site at Guantanamo Bay for interrogation and then were handed over to the military by November 2013 (*The Guantánamo Docket: Detainees at the Prison at Guantánamo Bay*, 2023). The most inclusive argument that justifies the use of three legal systems is that terrorism involves most of the presidential authorities. These latter include guarding the U.S. against foreign threats and protecting its interests through its power to command the military and the right to prosecute crimes under criminal law and covert action. The different legal combinations leave vast room for various interpretations and judgments. Therefore, many policy and law experts disagree about the eligibility of the government’s use of these authorities in its counterterrorism policymaking.

Analysis of the Smith v. Trump Case

Since the emergence of ISIS in mid-2014, the U.S. has led a coalition to defeat the organization. By April 2016, 11,000 airstrikes, 70% of which were American, had targeted jihadists in the region (Glenn, 2019). The American policy was characterized by military and intelligence work, including operations such as arrest, detention, interrogation, lethal force, and drone strikes. Nonetheless, the Pentagon decreased the number of ground troops deployed in Iraq and Syria. It focused on supporting local forces, mainly the Syrian Democratic Forces (SDF) and Iraqi security forces, by training and providing military equipment. During the period of local forces’ fight, the American ground presence had reached 2,000 advisors and troops by the end of 2017 because the U.S. long-term objective in Syria has been preventing the return of ISIS (Glenn, 2019). After months of bloody battles between 2014 and the end of 2019, the local forces managed to defeat ISIS by capturing Baghouz, the last jihadist territorial enclave in Syria on March 23, 2019. The latter date marked the end of ISIS’s physical presence in Iraq and Syria. The region has been weakened by war and several thousands of ISIS jihadists surrendered, giving world countries the complex mission of repatriating them. Even after the defeat of ISIS, some American troops remained in Syria for the reason that the U.S. believes that ISIS is still active and may regain its fighting power.

Nathan Smith was a captain in the U.S. army. He was deployed as an intelligence officer in Operation Inherent Resolve, the American military operation to weaken ISIL, in Kuwait in 2016. During his deployment, he sued the president, who was Barack Obama at that time, and his administration in May 2016, arguing that he “suffer[ed] legal injury because, to provide support for an illegal war, he [had

to] violate his oath to decline the Constitution" (*Smith v. Trump*, 2018). He claimed that Operation Inherent Resolve constituted an illegal war against terrorism for the president's use of the military against the Islamic State of Iraq and the Levant (ISIL) was illegal under the WPR and Articles I and II of the Constitution (Rosen, 2017). On May 21, 2018, Smith was released from the military after he applied for resignation. His lawsuit endured through the Trump administration as well.

The case was dismissed by the District Court for bringing "nonjusticiable political questions." Captain Smith's appeal and case were mooted as his oath-related claim became no longer valid after his resignation. The plaintiff's moot response was based on the argument that the U.S. Army accepted his resignation condition of reinstatement in case he won the lawsuit, in other words, if the court ruled that Operation Inherent Resolve was illegal. He also raised the doctrine of constructive service, stating that the army obligated him to resign by forcing him to choose between dishonoring his oath and going through military discipline (*Smith v. Trump*, 2018). The court ruled that the military's acceptance of Smith's voluntary and unqualified resignation did not suggest approving his reinstatement condition and that the right of reinstatement was not part of the original complaint. Eventually, *Smith v. Trump* was dismissed on July 10, 2018 for the initial "oath injury" controversy became no longer valid after Smith's resignation.

The debate over the constitutionality of the Executive's practices against ISIS has not been limited in the court. Since the beginning of the U.S. involvement in Iraq and Syria, Many questions have been raised on whether the American military operations were legal under the WPR and the Constitution. Opponents of these operations strongly believe that the president neglected the WPR by deploying troops and launching airstrikes without authorization to use military force from Congress.

Arguments of the Plaintiff: The War Powers Resolution

Before the Second World War, it had not been very common for presidents to engage in hostilities overseas without a congressional blessing. In fact, the U.S. involvement in such conflicting events as the War of 1812, the Mexican-American War, and the First and Second World Wars was initiated by Congress's declaration of war or authorization for the use of military force. However, presidents have extended their liberties in using their role as commander-in-chief of the U.S. Army. President Harry Truman deployed troops to support South Korea in the Korean War in 1950 and President John F. Kennedy sent soldiers, military advisers, and war supplies to South Vietnam in 1963. In addition to pursuing the Vietnam War business, President Richard Nixon started bombing Cambodia secretly in 1969. When information about Nixon's actions was leaked, Congress ordered an immediate stop of bombings in Cambodia (*What Was the War Powers Resolution of 1973? History*, 2018).

Congress realized that a legislative measure must be taken to prevent the unlimited executive use of the military in foreign conflicts and, subsequently, passed the War Powers Resolution (WPR) in 1973. The resolution's main provision is that actual military commitment to overseas wars must not proceed without an agreement between the president and Congress. In other words, the president must consult and

report to Congress before deploying American troops overseas. Additionally, if the president initiates war, s/he must receive a positive vote from Congress to carry that hostility on within 60 days. In the event of the absence of congressional approval, American troops must be withdrawn within 30 days after that period expires. Finally, should the president deploy troops without a declaration of war, the troops are withdrawn at the direction of Congress (Weed, 2019). On November 7, 1973, the resolution became law though President Nixon vetoed it by claiming that it violated his constitutional power as commander-in-chief.

Despite the enactment of the WPR, the executive and the legislative branches have continued to disagree on the use of the military overseas. Congress filed lawsuits against President Ronald Regan for sending military advisors to El Salvador without reporting his action to Congress in 1981 and President Bill Clinton for having deployed troops to Kosovo for more than 60 days without a congressional affirmation in the 1990s. Both lawsuits were dismissed by the federal court (*What Was the War Powers Resolution of 1973? History,* 2018).

There have been mixed reactions toward the WPR. Some members of Congress praised the act for managing to restrain presidential use of the armed forces, promote communication between the two branches, and restore Congress's war power. Nonetheless, others believe that the objective of asserting Congress's voice in deploying troops to potential hostilities abroad was not achieved. On the other hand, the Executive and some other members of Congress criticize the time and the military constraints that the resolution imposes on the President (Weed, 2019).

In supporting his claims in *Smith v. Trump*, the plaintiff used the WPR as a central argument. He asserted that President Obama failed to release an opinion explaining the legality and constitutionality of his unilateral and open-ended campaign against ISIS. He further explained that the power to declare war is granted to Congress by the Constitution and that the president needs congressional authorization to pursue actions deploying U.S. troops in terrorism-related conflicts overseas through the WPR.

Arguments of the Defense: The 2001 and 2002 AUMFs

In its defense statement in *Smith v. Obama*, the government's central claim was derived from the 2001 and 2002 AUMFs as part of the WPR. Congress passed the 2001 AUMF to give the president the power "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" (Authorization for Use of Military Force, 2001).

Table (2): U.S. military operations citing the 2001 Authorization for Use of Military Force

Airstrikes and Operations	Support for the Counterterrorism Partners	Detention
Afghanistan (2001-2021)	Cameroon (2017-2019)	Cuba (2002-2021)
Djibouti (2002-2010, 2015-2021)	Chad (2017-2019)	
Iraq (2004-2009, 2014-2021)	Eritrea (2004-2005)	
Libya (2013, 2015-2019)	Ethiopia (2004-2005)	
Pakistan (2003)	Georgia (2002-2004)	
Somalia (2007, 2012-2021)	Kenya (2004-2005, 2017-2021)	
Syria (2014-2019)	Kosovo (2007)	
Yemen (2002-2006, 2012-2021)	Jordan (2016-2021)	
	Lebanon (2017-2021)	
	Niger (2017-2021)	
	Nigeria (2017-2019)	
	Philippines (2002-2003, 2017-2021)	
	Turkey (2015-2021)	

Source: Savell, S. (2021). The 2001 Authorization for Use of Military Force: A comprehensive look at where and how it has been used. *Watson Institute for International and Public Affairs*.

Accordingly, Congress handed over its constitutional authority on the anti-terrorism war power to the president. The president's war power was further solidified by the 2002 AUMF, which legitimized deploying the U.S. armed forces to protect American national security against the "continuing [Iraqi] threat" (Authorization for Use of Military Force Against Iraq Resolution, 2002). Table (2) shows that even after the end of the War on Terror, Presidents Obama, Trump, and Biden have continued to cite the 2001 and 2002 AUMFs when using the military in overseas hostilities, particularly the ones that targeted ISIS. The American army has launched airstrikes, held detention, and supported local forces in combatting terrorism in at least 22 countries.

The defense insisted on its claim regarding 2001 and 2002 AUMFs by stressing the relationship between Al-Qaeda and ISIS. The two terrorist non-state organizations had the same ideology, mode of functioning, objectives, fighting

strategies, and enemies. ISIS only created a new name, extended terrorist-controlled locations, and had a new successor of Oussama Bin Laden. The association between the two organizations placed the government in a strong position when claiming that the similarity between them did not remove the statutory authority given to the president by Congress in 2001. That authority included military attacks against hostile terrorist actors. The executive branch's stand was further supported by the 2002 AUMF and its legal precedent in which the U.S. continued to involve its army in hostilities years after the end of the War on Terror.

Comparing the different and/or contradicting public, judicial, political, and think-tank reactions toward the legality of counterterrorism policies in the War on Terror and American hostilities against ISIS generates a form of a double standard. Although the 2001 and 2002 AUMFs have not been repealed, and despite the similar nature of Al-Qaeda and ISIS, the War on Terror did not receive the controversial legal backlash that was demonstrated in the fight against ISIS. Based on these arguments, it is, thus, concluded that American hostilities against ISIS during the Obama and Trump presidencies were legal under the non-repealed 2001 and 2002 AUMFs as a follow-up to the WPR, a law passed by Congress in light of its constitutional proper and necessary clause. The research results support the defense's cause, not to agree with the U.S. military business in Iraq, Syria, and the Middle East's insurgencies in general, but to confirm the absence of constitutional grounds denying American hostilities against ISIS while blessing them in the War or Terror.

Conclusion

This paper was not an effort to support or criticize any American counterterrorism practices in different countries. Rather, it highlights the double standard in opinion and law interpretations regarding executive actions in fighting terrorism. If there has been a clear presidential legal breach of war power according to the Constitution and domestic and international law, that breach is not specific to the complaints raised in *Smith v. Trump* and does not provide the War on Terror with related legal immunity. A debate about such a breach should have equal treatment to all presidents whose counterterrorism policies conflicted with Congress's war authority since the Second World War, particularly after enacting the WPR.

Smith v. Trump is a reach legal instance for recommended further research in checks and balances in practice as far as war and counterterrorist policies are concerned. The language in such documents as WPR and AUMF leaves room for a wide range of interpretations of the provisions and clauses in these resolutions. There was a heated debate between the plaintiff and the defense about whether appropriation bills signed by Congress to fund military operations against ISIS could be considered a form of written authorization to engage in those hostilities. A specific investigation into the subject matter would strengthen or weaken arguments targeting the constitutional legitimacy of U.S. military operations against ISIS.

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