



Written by [Joe Wolverton, II, J.D.](#) on June 10, 2016

## **Amendments to NDAA Expand Presidential War-making Power; Allow Congress to “Support” Rather Than “Declare” War**

Two prominent members of the U.S. Senate have offered amendments to the Fiscal Year 2017 National Defense Authorization Act (NDAA) that would give the president sweeping new powers to prosecute the “war” against ISIL and other purported threats to the safety of the American people.

First, Senator Tim Kaine (D-Va.) — a member of the Senate Armed Services and Foreign Relations Committees — is sponsoring an amendment that would require the upcoming presidential administration to propose a rewritten and updated request for the Authorization of the Use of Military Force (AUMF) within two years.



As it stands today, President Obama has perpetuated the “War on Terror” on the AUMF passed in the days following the attacks of September 11, 2001.

Kaine’s second proposal is cosponsored by Senator Jeff Flake (R-Ariz.) and would, among other things, mandate that the renewed AUMF would “provide military support to regional partners in their battle to defeat ISIL” and establish the new AUMF as the “sole statutory authority for U.S. military action against ISIL.”

“Nearly two years into an executive war against ISIL, the unwillingness of this Congress to authorize the war not only shows a lack of resolve, it sets a dangerous precedent,” said Kaine, in a statement published on his webpage.

“It’s not hard to imagine a future president using this inaction to justify the hasty and unpredictable initiation of military action against new enemies on new fronts without the permission of Congress. Short of passing an ISIL-specific authorization this year, it’s my hope that we can revise the 2001 Authorization for Use of Military Force — a broad, open-ended measure passed just days after September 11, 2001 — to better tailor the U.S. fight against terrorism and non-state actors globally, as well as clarify our mission for the American people and those servicemembers we are asking to risk their lives,” he added.

While there are significant constitutional problems with these proposals, they seem to escape Senator Kaine.

In a commencement address delivered to graduates at the Virginia Military Institute (VMI), Kaine explained his position on just who has war powers and how they should be exercised.



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Kaine declared:

For those of you who received a commission yesterday, you swore an oath to “support and defend the Constitution of the United States against all enemies, foreign and domestic.” What an interesting oath — think about it. A military officer does not pledge to support and defend the United States, but instead pledges to support and defend the Constitution of the United States. So do military enlisted personnel. So does the President of the United States. And a United States Senator makes the same pledge.

Let’s look at the pledge we make together and apply it to our current situation. On August 8, 2014, the President initiated a bombing campaign against ISIL — the Islamic State in the Levant. ISIL was rapidly taking over territory in Syria and Iraq and, left unchecked, posed a threat to a US consulate in Irbil, Iraq. Within a few weeks, the imminent threat to the United States was over. But the President determined that ISIL posed a long-term threat to the US and its allies and that we needed to “go on offense” against ISIL. He described the threat to the American public in a televised address on September 10, 2014 and asked Congress to support him in that mission.

Twenty-one months of offensive war later, thousands of Americans have been deployed to fight ISIL, including some VMI graduates. Virginians connected with the USS *Harry Truman* carrier strike group are there now. We’ve launched over 9,000 airstrikes and spent more than seven billion dollars. And the original theatre of battle — Iraq and Syria — has expanded to include military action against ISIL elements in Yemen, Libya and Afghanistan and ground fighting as well as airstrikes. As ISIL has conducted widening terrorist attacks in the Middle East, Africa and Europe — far from the original field of battle — there are ongoing discussions about whether US military force should be used in additional countries to battle the ISIL threat.

So far, Congress, despite repeated requests from the President, has refused to debate or vote to authorize the military action against ISIL. Congress has strongly criticized the President for virtually every aspect of our anti-ISIL strategy. But Congress has been unwilling to vote either to authorize the war or to stop it.

Kaine goes on to explain that Congress has the obligation to pass authorization for the president to commit combat troops into any overseas conflict.

He says this is how the Framers intended to balance the war-making powers between the executive and legislative branches of the federal government.

Kaine quotes James Madison, citing the Virginian as an authority who supported the concept of congressional authorization of wars carried on by the president.

Madison might be surprised to find himself being recruited to such a position.

In a letter to Thomas Jefferson written in 1798, Madison explained to his frequent collaborator why the Constitution placed exclusive control over declaring war in the legislative branch:

The constitution supposes, what the History of all Governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care, vested the question of war in the Legislative. But the Doctrines lately advanced strike at the root of all these provisions, and will deposit the peace of the Country in that Department which the Constitution distrusts as most ready without cause to renounce it.

There is nothing in this statement that even hints that Madison would approve the proposition that the



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president possesses power to deploy the U.S. military and that Congress should play a merely advisory, post-hoc role in that potentially fatal decision.

To put a finer point on the issue, imminent jurist and influential states' rights advocate St. George Tucker set out in his *Commentaries on Blackstone* the reason behind resting war power in the hands of the people's representatives:

The power of declaring war, with all its train of consequences, direct and indirect, forms the next branch of the powers confided to congress; and happy it is for the people of America that it is so vested. The term war, embraces the extremes of human misery and iniquity, and is alike the offspring of the one and the parent of the other. [Volume 3, Page 102] What else is the history of war from the earliest ages to the present moment but an afflicting detail of the sufferings and calamities of mankind, resulting from the ambition, usurpation, animosities, resentments, piques, intrigues, avarice, rapacity, oppressions, murders, assassinations, and other crimes, of the few possessing power! How rare are the instances of a just war! How few of those which are thus denominated have had their existence in a national injury! The personal claims of the sovereign are confounded with the interests of the nation over which he presides, and his private grievances or complaints are transferred to the people; who are thus made the victims of a quarrel in which they have no part, until they become principals in it, by their sufferings.

Finally, perhaps Senators Kaine and Flake can point to the provision in the Constitution wherein the federal government is given the authority to send U.S. service members to "provide military support to regional partners"? There is no such authorization.

Kaine told the VMI graduates that Americans must "hold [Congress] accountable for its votes regarding sending troops into combat. He said that Congress should be forced to demonstrate legislatively its "support for that war [the war against ISIL]."

The Constitution doesn't call for Congress to vote to "support" wars declared by the president; Congress is required to "declare" war before money and men are sacrificed to that cause.

"Support" is not the same as "declare," and Congress needs to be held accountable for their decision to rewrite Article I, Section 8 of the Constitution, an amendment that allows them to escape accountability for the death, destruction, and debt that have come as companions of our perpetual and unconstitutional wars.



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