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America's Permanent War State: Money is Raining Down on the US Military Complex

The US Congress and the Omnibus Military Bill

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Global Research, December 20, 2015

Region: USA
Theme: Militarization and WMD, US NATO War Agenda

The funding to continue the war against ISIL is an authorization of force against ISIL, albeit a quiet one, designed not to attract public attention. Jack Goldsmith, Lawfare, Dec 17, 2015

Money is raining down on the US military complex in the $1.15 trillion spending bill that was unveiled on Wednesday by various leaders of Congress.[1] Of that portion, a good $572.7 billion is set aside for Pentagon expenditure. (These figures tend to be deceptive in themselves, given the notoriously unreliable accuracy of defence accounting.)

The portions, roughly broken down, come to $58.6 billion for so-called Global War on Terror/Overseas Contingency Operations (GWOT/OCO) funds, $111 billion for procurement, which comes to $17 billion more than actual expenditures for the 2015 fiscal year, and $49.8 billion for R&D – $13.7 billion more than 2015 (Defense News, Dec 16).[2]

House Appropriations Chairman Hal Rogers (R-Ky.) pressed his colleagues to pass the legislation, insisting that the "package reflects conservative priorities in both funding and policy – including support for critical areas such as our national defence, halting many harmful regulations, and trimming wasteful spending."

The overwhelming message here was placed on security, even if there were also very public utterances on the issue of Puerto Rican debt and an end to the ban on crude oil exports. There was less concern about funding ongoing civilian operations – the stress, rather, was on the issue of entrenching the state in what could only be described as a deeper war footing.

Democrat mainstays, despite facing opposition within their own ranks on various parts of the bill, were similarly eager to get it to pass, which it ultimately did. To not pass it would be irresponsible, suggested Whip Steny Hoyer (D-Md.) while minority leader Nancy Pelosi (D-Calif.) was insisting that differences be worked out.[3]

The Omnibus bill contains a few sneaky provisions. All in all, this forms a standard tactic: a weighty volume of 2000 pages, in which various provisions can be slipped in and importantly, not debated with any degree of thoroughness, let alone awareness. In the case of such matters as continued authorisation of force, this is a notable point indeed.[4]

Rogers claims, for instance, that the bill "includes funds to combat the real-world threat of the Islamic State of Iraq and the Levant (ISIL)." Some analysis on this suggests that the funds will issue from the OCO funding pool, a practice that has been previously suggested

by the Obama administration. In November last year, President Barack Obama proposed amendments for the Department of Defense (DOD) and the Department of State and Other International Programs to fund Overseas Contingency Operations. These included "$5.6 billion for OCO activities to degrade and ultimately defeat the Islamic State of Iraq and the Levant (ISIL) – including military operations as part of Operation Inherent Resolve."[5]

The legal overview of this by legal commentators such as Harvard University's Jack Goldsmith suggests that Congress will effectively authorise the use of force by way of its appropriations power. This is an interesting point, given that section 8(a)(1) of the War Powers Resolution suggests that congressional authorisation for the use of force "shall not be inferred from any provision of law…, including any provision contained in any appropriation Act, unless such provision specifically authorises the introduction of the United States Armed Forces into hostilities".

Quibblers will see this differently, but it seems clear that a bit of legal acrobatics has been done here to effectively engage the US in deeper involvement in overseas conflict without broader public debate. At the very least, it suggests that the war machine should continue uninterrupted by the intrusiveness of public discussion.

A memorandum opinion for the US Attorney general from the Justice Department regarding continued authorisation for military operations in Kosovo in 2000 is a case in point.[6] The opinion regards it as given wisdom that "Congress may express approval through the appropriations process" in the area of war making.

It doing so, it takes a rather flexible view about the War Powers Resolution framework, which is supposedly designed to "fulfil the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities" and "continued use of such forces in hostilities or in such situations."

Section 8(a)(1) of the War Powers Resolution is effectively neutered, as, according to the Kosovo memorandum, it "does not bar later Congresses from authorizing military operations through appropriation" as a later Congress cannot be bound by the will of a previous one. In any case, one should try as best to see a direct intent on the part of Congress to authorise such force.

An open door in the bill is thereby allowed for the introduction of US armed or military forces into hostilities against Iraq and Syria, or into their respective territories. While the public face of the Obama administration is set against the formal deployment of US combat personnel on the ground, the infrastructure is very much there to permit it. Best, it would seem, to cover those legal channels.

The permanent state of war the US finds itself is not merely set to get deeper at the operational level; it is set to be further legalised, at least in the eyes of Congress, in a surreptitious way. Fine, and importantly informed scrutiny, is set to further abate.

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Notes

[1] http://docs.house.gov/billsthisweek/20151214/CPRT-114-HPRT-RU00-SAHR2029-AMNT1final.pdf

[2] http://www.defensenews.com/story/defense/policy-budget/budget/2015/12/16/congress-includes-5727b-dod-spending-bill/77411080/

[3] http://thehill.com/homenews/house/263683-ryan-pelosi-corral-votes-as-11t-funding-bill-speeds-to-floor

[4] https://www.lawfareblog.com/congress-about-vote-aumf-against-isil-quietly-and-without-debate

[5]https://www.whitehouse.gov/sites/default/files/omb/assets/budget_amendments/amendment_11_10_14.pdf

[6] http://www.justice.gov/sites/default/files/olc/opinions/2000/12/31/op-olc-v024-p0327.pdf

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