

OUR FACULTY

PUBLIC LAW 107-40—SEPT. 18, 2001

115 STAT. 225

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

Approved September 18, 2001.



115 STAT. 224

PUBLIC LAW 107-40—SEPT. 18, 2001

Public Law 107-40 107th Congress

Joint Resolution

Sept. 18, 2001
[S.J. Res. 23]

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; 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,

Authorization for
Use of Military
Force.
50 USC 1541
note.

SECTION 1. SHORT TITLE.

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

SEC. 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.

President.

LEGISLATIVE HISTORY—S.J. Res. 23 (H
CONGRESSIONAL RECORD, Vol. 147 (20
Sept. 14, considered and passed Sen
WEEKLY COMPILATION OF PRESIDEN
Sept. 18, Presidential statement.

Presidential War Powers and the War on Terror

Oona A. Hathaway '97 is the Gerard C. and Bernice Latrobe Smith Professor of International Law and Director of the Yale Law School Center for Global Legal Challenges.



Within hours of the attacks of September 11, 2001, a law was drafted that would provide the legal basis for the war on terror for years to come. Congress then passed the 2001 Authorization for the Use of Military Force (AUMF) days later with almost no opposition. In the years since, however, the law has been called into question by many who have argued that the law gives the president too much latitude and has been used to justify actions beyond its original scope.

Professor Oona Hathaway testified in March about the authorization before the House Committee on Foreign Affairs in a hearing on reclaiming congressional war powers. She answered questions about the 1991, 2001, and 2002 authorizations for the use of military force as the 20th anniversary of September 11 and the fall of Afghanistan brought renewed attention to them.

Yale Law Report When you testified before the House, you spoke in favor of repealing both the 1991 and 2002 Authorizations for the Use of Military Force (AUMFs) in Iraq, calling it “wise” to do so. Why?

Oona A. Hathaway I support repealing the 1991 and 2002 AUMFs because they have far outlived their usefulness. The 1991 AUMF permitted then-President George H.W. Bush to use military force pursuant to U.N. Security Council Resolution 678, a resolution that required Iraq, then led by Saddam Hussein, to withdraw from Kuwait, which it had invaded and occupied. The 2002 AUMF was enacted by Congress over fears that Saddam Hussein’s Iraq possessed weapons of mass destruction that posed a direct threat to the United States and its allies. The purposes of these authorities have long ago been met. The government of Iraq was expelled from Kuwait, the U.N. resolutions referred to

in the resolutions have since expired, and Iraq does not pose a threat to the United States or its allies. Leaving these AUMFs on the books simply leaves the door open to their misuse without giving presidents any additional legitimate basis for military action. Indeed, the Biden Administration has made clear that it is not relying on these AUMFs for any current military operations and that it supports repealing them both.

There have been calls to “repeal and replace” the 2001 Authorization for the Use of Military Force for years. Why has this authorization been controversial for so long?

The 2001 AUMF was enacted on September 18, 2001—mere days after the September 11 attacks on the United States. The authorization was necessarily vague because the government was not yet entirely confident as to the group or groups responsible for the attack. It was also the first time that the United States had effectively declared war on a nonstate actor group. The AUMF authorized 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.” Through a series of interpretive moves over the course of two decades by Republican and Democratic administrations alike, it has been stretched and pulled far beyond its plain meaning and is now treated by the government as a blank check for battling jihadist groups around the world. Several members of Congress have

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Bloomberg Law

Jonathan Macey '82 in “Why Is the ESG Focus on Private Companies, Not the Government?,” on August 19, 2021:

“In simple terms, government unresponsiveness and ineptitude have created a vacuum, and the ESG movement reflects a broad shift from primary reliance on government to primary reliance on the private sector as the source of solutions to broad social problems.”



Cristina Rodríguez '00 in “What the U.S. Constitution Says about Immigration,” on September 7, 2021:

“Immigration from the very beginning was used as a political tool to keep people thought not to be loyal to the United States from coming into the country.”

“Leaving these AUMFs on the books simply leaves the door open to their misuse without giving presidents any additional legitimate basis for military action.”

PROFESSOR OONA A. HATHAWAY '97

HATHAWAY (CONTINUED)

→ Presidential War Powers (from page 21)

made clear that it is now being used to support military operations that they never dreamed of when they voted for the authorization. The only reason it has not yet been repealed is that there has been little agreement on the replacement. But I am hopeful that we are beginning to develop enough consensus that reform may now be possible.

At the time of your testimony in 2021, many observers thought the time might finally be right for reforms to go forward. Is future reform still likely now, given events like the fall of Afghanistan?

I think that, if anything, the end of U.S. ground presence in Afghanistan should make reform more likely, not less. The 2001 AUMF was the legal basis under which the Bush Administration launched the military operation in Afghanistan, leading to the overthrow of the Taliban government. Now that the U.S. has left Afghanistan, that ends a chapter that began with the September 11 attacks. It is clearer now more than ever that we need to step back and ask what authorities the president needs to defend the United States against threats that exist today, not the threats of 20 years ago.



How do you approach teaching students about the 2001 and 2002 AUMFs and related issues in your class?

I approach it differently in different classes. In my Constitutional Law small group, which I am teaching this term, I am using the debate over the AUMFs and war powers to help the students understand separation of powers, checks and balances, and the growth of unilateral executive power. In my advanced Foreign Relations and International Law course last year, we examined whether existing Congressional oversight of executive decisions to use force was sufficient for cyber operations and other forms of modern warfare. We then wrote a co-authored article, forthcoming in the *William & Mary Law Review*, entitled “Congressional Oversight of Modern Warfare: History, Pathologies, and Proposals for Reform.”



“Located Institutions: Neighborhood Frames, Residential Preferences, and the Case of Policing,” by **Monica C. Bell** ’09 received the 2021 Distinguished Article Award and the Jane Addams Award from the American Sociological Association.

The Washington Post

Amy Kapczynski ’03 in “The Claim that the U.S. Government Already Has the Power to Lower Drug Prices,” on September 8, 2021:

“March-ins to address overpricing are fully consistent with the purpose of Bayh-Dole as I understand it, and I think any good economist would — including to prevent price gouging, where the government has already paid substantially for an invention.”

Romano Receives 2020 Ronald H. Coase Medal

Roberta Romano ’80, Sterling Professor of Law and Director of the Yale Law School Center for the



Roberta Romano

Study of Corporate Law, has been awarded the 2020 Ronald H. Coase Medal by the American Law and Economics Association (ALEA), recognizing her work in the field of law and economics. Romano received the

award and delivered her acceptance address on October 23, 2021, at the 31st Annual Meeting of the American Law and Economics Association.

“It is an honor to be a recipient of the Ronald H. Coase Medal,” Romano said. “On an occasion such as this one, I can’t help but think back to my days as a law student in the late 1970s at YLS in Marvin Chirelstein’s Business Units II class. Marvin’s class launched me in a field and interdisciplinary methodology that has occupied my interest ever since.”

“ Marvin’s class launched me in a field and interdisciplinary methodology that has occupied my interest ever since.”

ALEA is dedicated to advancing economic understanding of the law and related areas of public policy and regulation. Since 1999, the Association has published the *American Law and Economics Review*, a refereed journal. The Ronald H. Coase Medal was established in 2010 and is conferred biannually in recognition of significant contributions to the field of law and economics. Recipient lectures are also published in the *American Law and Economics Review*.

WHITMAN

Whitman Elected Honorary Fellow of the American Society for Legal History

The American Society of Legal History (ASLH) recently elected Ford Foundation Professor of Comparative and Foreign Law James Q. Whitman '88 as an Honorary Fellow. The Society reserves its highest honor for distinguished historians whose scholarship has made a significant impact on legal history and influenced the work of others.



James Q. Whitman

On November 6, 2021, at the ASLH Annual Meeting in New Orleans, the honorary fellows were recognized during their annual awards ceremony. Amalia D. Kessler '99, Lewis Talbot and Nadine Hearn Shelton Professor of International Legal Studies at Stanford Law School, presented the citation for the fellowship to Whitman.

"Professor Whitman sets a model of scholarly erudition, brilliance, and creativity, as well as respectful, engaged and compassionate mentorship," Kessler said in her citation. "But what is perhaps most remarkable is that he manages to draw on this erudition in ways that are never narrow and arcane but in service of a highly ambitious research agenda that probes some of the deepest, most enduring questions of social theory while engaging directly with many of our most profound socio-legal challenges today."

KOHLER-HAUSMANN

Professor Kohler-Hausmann Receives Senior Law and Society Fellowship

Issa Kohler-Hausmann '08, Professor of Law at Yale Law School and Associate Professor of Sociology at Yale, was recently awarded the Spring 2022 Senior Law and Society Fellowship from the Simons Institute for the Theory of Computing at the University of California, Berkeley.



Issa Kohler-Hausmann

The Simons Institute promotes research on the foundations of computer science to expand the field's horizons by exploring other scientific disciplines through a computational lens. Launched in 2020, the Institute's interdisciplinary Law and Society Fellowships support leading researchers focused on addressing the profound impact technology and computing has on human society and its implications for ethics, law, and policy.



Robert Ellickson '66 was a panelist on "The Role of Empirical Research in Defining the Scope of Constitutionally Protected Property Rights: A Tribute to Vicki Been" at the Bringham-Kanner Property Rights Conference in Williamsburg, Virginia, on October 1, 2021.



Stephen Carter '79 in "Beside Classrooms, Americans Have Learned about Democracy at the Movies," on October 9, 2021:

"Star Wars is, in part, a story of struggle for democracy. And more than that, it's a story about how people who participate view democracy."

ADMINISTRATIVE LAW

Administrative Law Roundtable Gathers Early-Career Scholars

In September, 14 early-career legal scholars and 13 senior commenters gathered for the annual Administrative Law New Scholarship Roundtable, this year hosted by Yale Law School.

Though originally planned to be held in person, the conference was held online due to COVID-19 restrictions, with four online discussions of six to seven participants each.

Subjects being researched by the authors "reflect the wide range and high stakes of administrative governance in the United States today," said Nicholas R. Parrillo '04, William K. Townsend Professor of Law, and include unpredictability in immigration enforcement decision-making, racial and gender inequity in consumer safety regulation, and the role of agency-sponsored public deliberation in societal attitudes toward new medical and reproductive technologies.

Several of the subjects discussed in this year's roundtable underscore administrative law's status as "constitutional law at the retail level," according to Parrillo, who organized the conference, including the after-effects of Supreme Court separation-of-powers litigation on how the government grants patents, the capacity of the White House to control supposedly "independent" agencies through their chairs, and shifts in the political and academic coalitions that have supported or resisted presidential power.

The New York Times

Robert C. Post '77 in "Florida Bars State Professors from Testifying in Voting Rights Case," on October 29, 2021:

"The university does not exist to protect the governor. It exists to serve the public. It is an independent institution to serve the public good, and nothing could be more to the public good than a professor telling the truth to the public under oath."

Does administrative regulatory power violate the Constitution's original meaning?



Parrillo Argues for the Constitutionality of Agency Rulemaking

In his first lecture as the William K. Townsend Professor of Law, Nicholas R. Parrillo '04 explored a question of administrative law that, until recently, had a straightforward answer. Speaking on November 8, 2021, at an event recognizing his new appointment, Parrillo asked whether administrative regulatory power — the power that Congress gives to agencies to make rules — is constitutional. Delegating power to agencies to put laws into effect has long been routine, Parrillo noted. For example, the Environmental Protection Agency puts the Clean Air Act into effect and makes regulations to that end.

“As of 10 years ago, the general assumption was that this power was constitutional,” Parrillo said. “But recently, more and more people have been suggesting that it’s not constitutional. And some of those people are on the Supreme Court.”

Dean Heather K. Gerken said that Parrillo, who has also received the Law School’s annual teaching award, is a popular and respected teacher. “As a scholar, Nick grapples honestly with history and eagerly with the real world,” she said. “He identifies understudied topics and makes them central to ongoing conversations.”

LEGAL SCHOLARS

Paper Ranks Most-Cited Legal Scholars

A new paper by Yale Law School's Associate Director for Collections and Special Projects Fred Shapiro ranks the most cited U.S. legal scholars of all time — and Yale Law School faculty are prominent on the list.

The *University of Chicago Law Review* published Shapiro's essay, "The Most-Cited Legal Scholars Revisited." Shapiro's findings come 21 years after his last study quantifying scholarly citations. He writes that a database of journal articles since launched can generate a list of its 2,000 most-cited authors. To create his own ranking, Shapiro started with the journal database's list and added journal citations of the authors' books to give a more complete picture of their scholarship before tabulating the results.

Current Yale Law School faculty on the main list include William N. Eskridge Jr. '78 (#7), Bruce Ackerman '67 (#16), Akhil Reed Amar '84 (#18), Guido Calabresi '58 (#25), Owen M. Fiss (#46), and Jonathan R. Macey '82 (#47).

Acknowledging that scholars with long careers have more citations, Shapiro produced a ranking of the most-cited younger legal scholars, or those born in 1970 or later. Current faculty on that list are Oona A. Hathaway '97 (#7), Douglas Kysar (#8), and Abbe R. Gluck '00 (#16).

The paper also includes the most cited scholars in five specialty areas. The list includes professors Harold Hongju Koh (#5, international law); Jonathan R. Macey (#4, corporate law); Judith Resnik and Reva Siegel (#4 and #5, respectively, in critical race theory and feminist jurisprudence); Eskridge (#2, public law); and Robert C. Ellickson '67, Dan M. Kahan, and Tom R. Tyler (#4, #5, and #6, law and social science).

POST AND BALKIN

Post and Balkin Discuss Free Speech with Yale President on Podcast

Professors Robert Post '77 and Jack Balkin joined Yale President Peter Salovey in October for a podcast about the spread of misinformation and regulation in the information age. The conversation was part of President Salovey's Yale Talk series.



Robert Post

Post commented that the internet allows for no-cost or low-cost information spreading, which can create "epidemics of misinformation." Balkin took that thought further, saying, "It's not simply that misinformation is costless. It actually turns out that misinformation is a very lucrative profession. ... So it's not just simply frictionless communications, it's actually amplified communication that is a key feature of our system today."



Jack Balkin

What has yet to be established is what regulation should be in place to moderate the information online.

Salovey asked about the anonymity of social media and the impact of sources being unknown, leading the two law professors into a discussion of authority. Post, using examples from religion and medicine, said that in the past, people in authority could control what information was made public. Balkin added that the question is now also about who is granted authority. The public, he argued, is granting a status of authority not because a source is trustworthy and has the appropriate credentials or background, but because they are trusted and familiar.

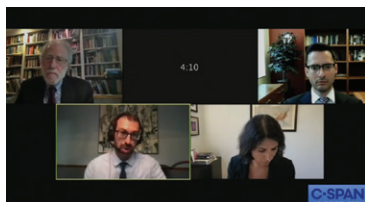
Both professors discussed Balkin's concept of an information fiduciary. This idea suggests that online companies who collect and use our data should be acting as fiduciaries and have the responsibility to work in our best interests. As fiduciaries, Balkin said, "they'll have public obligations toward us and toward all the people that they collect data from."

To listen to the full podcast, visit president.yale.edu/president/yale-talk/first-amendment-information-age.

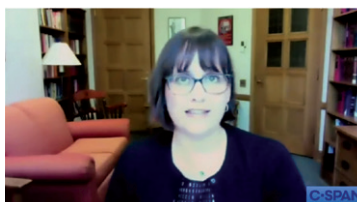
In summer 2021, **Lawrence J. Fox**, who taught the Ethics Bureau at Yale for many years, received the ABA Medal, the American Bar Association's highest honor.

Professor John Morley '06 and Robert Jackson, a former S.E.C. commissioner, have filed suit against Pershing Square Tontine Holdings in a case that could have far-reaching implications for the Special Purpose Acquisition Company industry. The case contends that investor Bill Ackman's SPAC isn't an operating company, but is an investment company, which should be regulated by the Investment Company Act of 1940.

APPEARANCES



On June 30, 2021, **Samuel Moyn** gave testimony to the Presidential Commission on the Supreme Court of the United States.



On June 30, 2021, **Cristina Rodríguez '00** presented at the public meeting of the Presidential Commission on the Supreme Court. Rodríguez is a co-chair of the Commission.

SCHULTZ

Civil Rights Law Project and New Seminar Launched



Vicki Schultz

A new project led by Ford Foundation Professor of Law and Social Sciences Vicki Schultz and involving Yale Law students will examine the early work done by lawyers in the U.S. Department of Justice Civil Rights Division, Employment Litigation Section (ELS) and analyze what that work might have to say for current and future civil rights law.

With exclusive authority to prosecute cases involving a pattern or practice of workplace discrimination under Title VII of the Civil Rights Act in its first decade, the lawyers of ELS worked tirelessly to dismantle deep-seated patterns of segregation and inequality in the American workforce, taking on structural discrimination in industries like steel, construction, trucking, and public utilities and later in police

and fire departments and other city and state governments around the country. Lawyers built the law from the ground up, creating novel legal concepts like disparate impact, pattern or practice, and affirmative action to breathe life into Title VII. This new project aims to weave together the legal, political, and organizational history to show how a small but dedicated group of lawyers can change America.

Schultz will offer a seminar in the spring 2022 term called “Living Civil Rights Law,” in which students will engage with these pioneering lawyers themselves. Students will conduct interviews with former ELS attorneys in order to tell their stories and preserve the agency’s legacy, along with considering the far-reaching implications of ELS cases in the context of contemporary civil rights law.



On Twitter
Marisol Orihuela
@MsolOG

August 19, 2021

It was great to teach Rita’s Case yesterday to the Class of 2024! Welcome to @YaleLawSch!

John Fabian Witt ’99 gave the 2021 plenary address at the annual meeting of the American Society for Legal History in New Orleans in November. The lecture was titled “Garland’s Million: The Tragedy and Triumph of Legal History.” Watch or listen to the full address at aslh.net/2021-plenary-address.



Anika Singh Lemar took her Community and Economic Development Clinic students kayaking on New Haven’s Mill River this fall.

APPEARANCES



David Schleicher (lower right) was a panelist discussing electoral reform in New York City for the Manhattan Institute on July 7, 2021.



Nicholas Parrillo ’04 was a panelist for the Federalist Society Executive Branch Review Week on “Non-Delegation? Or No Divesting? Art. I, Sec. 1 at the Founding and Today” on May 17, 2021.

LISTOKIN

Macroeconomics Conference Examines Law in a Post-Pandemic World

In October, Yale Law School partnered with several institutions from around the globe to host the Fourth Conference on Law and Macroeconomics.

This year's conference examined the role of law in establishing a macroeconomy for a post-pandemic world that better mitigates the uncertainty of the current economic downturn. The virtual event included two days of panels. Papers addressed a range of topics, including financial policy and institutions, regulation, recessions, ethical investing, debt, and inequality.

The conference was co-hosted by the Queen Mary University of London Centre for Commercial Law Studies (CCLS), Georgetown Law Institute of International Economic Law (IIEL), Tulane Law, Cornell Law, Bank of England, and Rebuilding Macroeconomics.

Event co-host and Shibley Family Fund Professor of Law Yair Listokin '05 said the impetus for the annual forum was to bridge the gap between two groups of people: "Even though lawyers craft much of our economic policy and many limits on macroeconomic policy are legal rather than economic, academic lawyers and macroeconomists rarely talk to each other."

"The two groups need to collaborate to develop institutions that are robust and geared toward today's conditions," said Listokin, who moderated some of the conference panels and presented two papers. "We live in a turbulent macroeconomic era with historically low interest rates and many people out of the labor force. However, our economic policy-making institutions are designed to cope with a very different macroeconomic paradigm featuring high-interest rates and rapid inflation."



Yair Listokin

RESNIK

Resnik Testifies on Proposed Solitary Confinement Legislation



In early August, Judith Resnik, Arthur Liman Professor of Law and Founding Director of the Arthur Liman Center for Public Interest Law, was invited to present expert testimony for a policy hearing of the Pennsylvania Senate Democratic Policy Committee, "Ending the Unethical Use of Solitary Confinement in PA."

The testimony addressed a proposed bill to limit the use of solitary confinement in Pennsylvania. Resnik — joined by Liman Director and Visiting Professor Jenny Carroll, Curtis-Liman Clinical Fellow Skylar Albertson '18, and Yale Law students Sarita

Benesch '23 and Wynne Graham '23 — analyzed the text of the Pennsylvania draft and put it in the context of the dozens of other statutes proposed or enacted since 2018. A few legislatures such as Colorado, New York, Massachusetts, Minnesota, New Jersey, and New Mexico have enacted comprehensive reforms that constrain the use of solitary

confinement. Other statutes focus on subpopulations, including young and pregnant people and individuals with mental health challenges. These statutes include those enacted in Arkansas, Florida, Georgia, Louisiana, Maryland, Montana, Nebraska, South Carolina, Texas, Virginia, and Washington, among others.



Judith Resnik

The New York Times

David Schleicher in "We the People," on August 4, 2021, a feature in the opinion section inviting writers and legal scholars to propose amendments to the Constitution:

PROPOSED AMENDMENT:
NO STATE OR POLITICAL SUBDIVISION OF A STATE SHALL PASS ANY LAWS, REGULATIONS OR BINDING JUDICIAL DECISIONS THAT, ON THEIR OWN OR IN THEIR CUMULATIVE EFFECT, SUBSTANTIALLY LIMIT THE CAPACITY OF RESIDENTS OF OTHER STATES, LOCALITIES OR TERRITORIES — INDIVIDUALLY, IN AGGREGATE OR AS MEMBERS OF GROUPS OR PROFESSIONS OR TRADES — TO ENTER, RESIDE WITHIN OR WORK WITHIN THEIR BORDERS UNLESS THOSE LAWS ARE FOUND TO FURTHER A SUBSTANTIAL GOVERNMENT INTEREST OTHER THAN POPULATION CONTROL BY MEANS THAT ARE TAILORED TO ACHIEVE THAT INTEREST.



Muneer Ahmad (upper left) participated in a panel discussion "How to Prepare Lawyers for 21st Century Crises?" for Harvard Law School on November 10, 2021.



Vicki Schultz was interviewed on Reuters Video about state laws to fight sexual harassment on March 12, 2021.