

ESSAY

WAR, DIPLOMACY, AND CONGRESSIONAL INVOLVEMENT

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I. INTRODUCTION

As members of the United States Senate, we believe that control over war powers has drifted too far from its constitutional moorings, which established legislative control over war-making, and that a rebalance toward the Legislative Branch is long overdue. Our position is not a question of politics but instead one of values and sound constitutional doctrine. We further believe that now is the time to restore that balance.

The constitutional allocation of war powers is brief and non-specific, but early Presidents understood the expectations as to how those powers would be exercised. Article I, Section 8 of the Constitution provides that “Congress shall have power . . . to declare war.”¹ Article II, Section 2 provides that the President is the “Commander in Chief” of the nation’s armed forces.² The Constitution’s drafters and early Presidents understood that vesting in Congress the power to take the country to war did not diminish the President’s authority to defend the nation against sudden or imminent attack,³ nor would we wish to impede that ability today. But the leading role of Congress in matters of war and peace was as well understood by the Constitution’s authors and early practitioners as it seems to be misunderstood today. In a 1798 letter, James Madison, the Constitution’s leading architect, explained to Thomas Jefferson, “The constitution supposes, what the History of all Gov[ernmen]ts demonstrates, that the Ex[ecutive] is the branch of

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¹ U.S. CONST. art. I, § 8, cl. 11.

² U.S. CONST. art. II, § 2, cl. 1.

³ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318 (Max Farrand ed., Yale Univ. Press 1911) (“Mr. M[adison] and Mr Gerry moved to insert ‘declare,’ striking out ‘make’ war; leaving to the Executive the power to repel sudden attacks.” (alteration in original)).

power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legis[ature].”⁴ Five years earlier, Madison had written, “In no part of the Constitution is more wisdom to be found than in the clause which confides the question of war or peace to the legislature, and not to the executive department.”⁵

Soon after the Constitution went into effect, events tested the practical balance between the relative war-making powers of Congress and the presidency and established a boundary between them. In his 1801 message to Congress, President Jefferson described a defensive mission against the Barbary States, against whom Congress had not yet authorized military action:

I sent a small squadron of frigates into the Mediterranean, with assurances to that power of our sincere desire to remain in peace, but with orders to protect our commerce against the threatened attack. . . . One of the Tripolitan cruisers having fallen in with, and engaged the small [American] schooner Enterprise . . . was captured, after a heavy slaughter of her men, without the loss of a single one on our part. . . . Unauthorized by the constitution, without the sanction of Congress, to go out beyond the line of defence, the vessel being disabled from committing further hostilities, was liberated with its crew. The legislature will doubtless consider whether, by authorizing measures of offence, also, they will place our force on an equal footing with that of its adversaries. I communicate all material information on this subject, that in the exercise of the important function considered by the constitution to the legislature exclusively, their judgment may form itself on a knowledge and consideration of every circumstance of weight.⁶

This letter reflects a consensus on the balance of war powers that is consistent with the vision set forth by the Constitution’s authors: the President, as commander in chief, may engage in defensive military actions to protect American lives, but only Congress has the power to authorize offensive action. This is the definitive constitutional boundary between the respective war powers of the political branches.

The constitutional principle flows from an elemental value: American troops should not be ordered into harm’s way absent a political judgment by the people’s elected legislative body that the national interest requires military action. What could be more immoral than ordering troops to risk their lives without first deciding that military action is justified?

⁴ Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), in 6 THE WRITINGS OF JAMES MADISON 170, 170 (Gaillard Hunt ed., 1900).

⁵ JAMES MADISON, “HELVIDIUS” NUMBER 4 (1793), reprinted in 15 THE PAPERS OF JAMES MADISON 106, 108 (Thomas A. Mason et al. eds., 1985).

⁶ Thomas Jefferson, *First Annual Message to Congress*, in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 326, 326–27 (Joint Comm. on Printing ed., 1897).

In the modern era, however, Presidents have repeatedly engaged in offensive action without the express consent of Congress. Congress asserted its constitutional responsibilities and institutional duties in war powers matters by enacting the War Powers Resolution (“WPR”) over President Nixon’s veto in 1973.⁷ Congress’s intent to restore the constitutional balance of war-making powers is clear in the Act’s Purpose and Policy section:

It is the purpose of this joint resolution to fulfill 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, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.⁸

In brief, the law reasserts that the President cannot take offensive military action without a declaration of war or other statutory authorization from Congress and sharply limits the circumstances under which he may act without such advance approval. Should the U.S. armed forces be introduced into hostilities without a declaration of war, the resolution requires the President to report to Congress within forty-eight hours on the circumstances of the deployment and the statutory or constitutional authority under which the engagement takes place. If no such legal authority exists and Congress fails to provide it, the President (with some exceptions) must withdraw the troops from the unauthorized hostilities within a specified period.⁹

This Essay examines how the War Powers Resolution of 1973 has failed to preserve the balance of war powers between the Executive and Legislative Branches in the past decade. It details the abuse of authorizations for the use of military force (“AUMFs”) by two presidential administrations and congressional complacency in the face of these WPR violations. The Essay also discusses another troubling trend that accompanies this war pow-

⁷ See War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. ch. 33); see also John W. Finney, *Senators Assail Policy of Nixon on War in Laos*, N.Y. TIMES (Feb. 26, 1970), <https://www.nytimes.com/1970/02/26/archives/senators-assail-policy-of-nixon-on-war-in-laos-mathias-says-the.html> [<https://perma.cc/5AGC-XU5X>] (“Criticism of the Administration’s Laotian policy broke out in the Senate today as Senator Charles McC. Mathias Jr., a freshman Republican from Maryland, charged that the Executive branch was subverting the will of Congress by the American military, involvement in Laos The American military commitments in Laos, Senator Mathias said today, clearly ‘violate the spirit’ of the National Commitments Resolution, approved by the Senate last year, which holds that specific Congressional approval should be required for every new commitment of American troops abroad.”); Robert B. Semple Jr., *Nixon Sends Combat Forces to Cambodia to Drive Communists from Staging Zone*, N.Y. TIMES (May 1, 1970), <https://www.nytimes.com/1970/05/01/archives/nixon-sends-combat-forces-to-cambodia-not-an-invasion-president.html> [<https://perma.cc/TJ3C-MA87>] (“Many legislators, particularly Senators with a long history of opposition to the Vietnam war, saw the Cambodian action as dangerous expansion of the conflict.”).

⁸ War Powers Resolution § 2.

⁹ *Id.* at §§ 5–6.

ers imbalance: unilateral presidential threats to withdraw from duly ratified treaties without Senate input. To prevent such abuses in the future, we recommend short-, medium-, and long-term legislative solutions to restore the balance of power on matters of war and peace.

II. THE WAR POWERS RESOLUTION OF 1973: AN OPPORTUNITY IGNORED

As we consider Legislative-Executive relations in the WPR era, we regret that the WPR did not fulfill its purpose. It might have heralded an era of interbranch cooperation and joint accountability to the American people on decisions to launch offensive military action. Such cooperation, which we believe the American people expect, would have required Presidents to observe not only the *letter* of the law but also its *spirit*. Nowhere is this more evident than in the presidential misuse of the 2001 AUMF that launched the War on Terrorism and the 2002 AUMF authorizing the use of force against Saddam Hussein's regime in Iraq. To be clear, these AUMFs fully comply with the WPR and are consistent with the principle that the President must come to Congress before ordering U.S. forces to launch offensive operations. Our point is that they have been used to justify engagements beyond the scope of the authority they provide. They have been used to avoid the scrutiny a congressional debate over new AUMFs would provide and therefore to evade the requirements of the WPR.

Roughly 300 words in length, the 2001 AUMF authorizes the President to take "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."¹⁰ The law provides no expiration date, geographic limit, or process by which Congress may review the President's determinations.¹¹ Its open-ended language invites abuse when Presidents need a handy statute upon which to justify an operation against a group with no ties to al-Qaeda or the September 11th attacks.

More detailed than the 2001 AUMF and seemingly less prone to misuse, the 2002 AUMF authorizes the President to "use the Armed Forces of the United States as he determines to be necessary and appropriate in order to—(1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq."¹² That AUMF, because it was passed months before the United States invaded Iraq, requires the President to re-

¹⁰ Authorization for Use of Military Force, Pub. L. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541).

¹¹ *Id.*

¹² Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3(a), 116 Stat. 1498, 1501 (2002) (codified at 50 U.S.C. § 1541).

port to Congress before or within forty-eight hours of commencing military action under it.¹³ It further requires the President to report to Congress every sixty days on activities related to the authorization.¹⁴ As with the 2001 AUMF, the 2002 AUMF includes no expiration date and has no means for Congress to review the President's determinations regarding his authority to take military action under the statute.

Abuse of these AUMFs became a salient concern with Operation Inherent Resolve—the Obama administration-initiated military campaign against the Islamic State of Iraq and Syria (“ISIS”). At a May 2014 hearing before the Senate Foreign Relations Committee, as ISIS was emerging as a significant threat in Iraq, Senator Bob Corker (R-Tenn.) questioned Department of Defense (“DOD”) General Counsel Stephen Preston about whether the president had authority under the 2001 AUMF to attack the group:

SENATOR CORKER. Are there groups today that the administration cannot go against because the AUMF does not allow you to do that? Terrorist groups.

MR. PRESTON. Senator Corker, I am not aware of any foreign terrorist group that presents a threat of violent attack on this country that the President lacks authority to use military force to defend against, as necessary, simply because they have not been determined to be an associated force within the AUMF.

In other words, if a group that is not, or may not be, covered by the AUMF presents a threat of violent attack to this country, the President does have authority to take action, including military action, to protect the country from that threat.

SENATOR CORKER. So, there are groups that did not exist at the time but are affiliated with the al-Qaeda that today are covered by the 9/11 AUMF, even though they did not exist at the time.

MR. PRESTON. That is correct, sir. . . .

SENATOR CORKER. Yes. So, the group that I discussed in my opening comments, ISIS, which is split from al-Qaeda, that is not affiliated with al-Qaeda—and actually, I heard administration officials had expressed concerns about their ability to deal with them in Syria and as they migrate back across into Iraq. Are you saying that, even though they are not a part of al-Qaeda, you have the authority to go against them?

¹³ *Id.* § 3(b).

¹⁴ *Id.* § 4(a).

MR. PRESTON. Senator, what we would do if we were presented with a need and an opportunity of contemplating the use of military force would be to examine what our authorities were. That would consist, first of all, of determining whether or not they would fall within the AUMF as an associated force, using the definition that we have provided, or, if not, if they present a threat of imminent attack on this country, we could rely on the President's inherent constitutional authority.

SENATOR CORKER. So, you would not rely on the AUMF. He just has authority to do whatever.

MR. PRESTON. We could rely on the AUMF to the extent that this group, or any other group, is covered by the AUMF.

SENATOR CORKER. But—I thought you just—yes. Mr. Chairman, I find this bizarre, and I hope that our next group of witnesses is a little more clear.¹⁵

This exchange shed light on two pillars of the Obama administration's claim of authority to attack ISIS—evading the question and advancing a broad legal interpretation of both the 2001 AUMF and the President's constitutional power to defend the country. In June 2014, President Obama's official statements on proposed strikes against ISIS made mention of congressional *consultation* but made no reference to seeking congressional *authorization* for his actions under the Constitution or the WPR.¹⁶ Consultation is a valuable mechanism that can raise unexplored issues and test presidential assumptions, but we contend it can be no substitute for the constitutionally mandated congressional authorization for offensive operations.

Nevertheless, in early August, President Obama authorized targeted airstrikes against ISIS in northern Iraq to protect American diplomats in Erbil, warned that such airstrikes could continue for months, and sent 130 military advisors to Iraq; as the lines between defensive and offensive operations blurred, the President again made no mention of seeking congressional authorization.¹⁷ On August 20th, the White House acknowledged carrying out a

¹⁵ *Authorization for Use of Military Force after Iraq and Afghanistan: Hearing Before the S. Comm. on Foreign Rels.*, 113th Cong. 17–18 (2014) (statement of Stephen W. Preston, Gen. Couns., U.S. Dep't of Def.).

¹⁶ See Remarks on the Situation in Iraq and an Exchange with Reporters, 2014 DAILY COMP. PRES. DOC. 454, at 2 (June 13, 2014); Remarks on the Situation in Iraq and an Exchange with Reporters, 2014 DAILY COMP. PRES. DOC. 470, at 2 (June 19, 2014).

¹⁷ See Remarks on the Situation in Iraq, 2014 DAILY COMP. PRES. DOC. 602 (Aug. 7, 2014); Michael D. Shear, *Obama Says Iraq Airstrike Effort Could Be Long-Term*, N.Y. TIMES (Aug. 9, 2014), <http://www.nytimes.com/2014/08/10/world/middleeast/us-airstrikes-on-militants-in-iraq.html> [<https://perma.cc/86SZ-SFDR>]; Rebecca Kaplan, *Obama Administration Sending 130 More Military Personnel to Iraq*, CBS NEWS (Aug. 12, 2014), <http://www.cbsnews.com/news/obama-administration-considers-sending-more-advisers-to-iraq/> [<https://perma.cc/D6S5-ZHGY>].

failed Special Operations attempt to rescue murdered American journalist James Foley and other hostages; a fight between American commandos and ISIS militants during this operation marked the first use of ground troops (and first U.S. military injury) in the fight against ISIS.¹⁸ Still, President Obama did not seek congressional authorization to attack ISIS, even as he was considering offensive airstrikes against ISIS in Syria.¹⁹ It is true that countering ISIS and rescuing kidnapped Americans were urgent policy imperatives, but in the absence of clear statutory authority to act, the President should have come to Congress to secure that authority.

On September 10th, months after the rise of ISIS that might have been used to forge an anti-ISIS AUMF with Congress, President Obama announced the formation of a United States-led coalition to degrade and destroy ISIS through, among other means, a systematic set of airstrikes.²⁰ The mission was now clearly offensive, yet the President had not requested congressional approval.²¹ On September 16, Secretary of Defense Chuck Hagel testified to the Senate Armed Services Committee that the President's legal counsel had concluded that he had both constitutional and statutory authority to attack ISIS.²² When asked the source of the statutory authority, Secretary Hagel cited the 2001 AUMF and "probably" the 2002 AUMF.²³ Throughout the rest of the mission, the Executive Branch would continue to cite these two AUMFs as its authority to attack ISIS.²⁴

¹⁸ Adam Goldman & Karen DeYoung, *U.S. Staged Secret Operation into Syria in Failed Bid to Rescue Americans*, WASH. POST (Aug. 20, 2014), https://www.washingtonpost.com/world/national-security/us-weighs-response-to-apparent-execution-of-american-by-islamic-state/2014/08/20/e33558a8-287d-11e4-8593-da634b334390_story.html [<https://perma.cc/7R4Z-AYFL>].

¹⁹ See Dion Nissenbaum, *U.S. Considers Attacks on ISIS in Syria*, WALL ST. J. (Aug. 22, 2014), <http://www.wsj.com/articles/u-s-considers-attacks-on-isis-in-syria-1408751459> [<https://perma.cc/CJU3-Z6DV>].

²⁰ Address to the Nation on United States Strategy to Combat the Islamic State of Iraq and the Levant (ISIL) Terrorist Organization, 2014 DAILY COMP. PRES. DOC. 654, at 2 (Sep. 10, 2014).

²¹ See *id.* ("First, we will conduct a systematic campaign of airstrikes against these terrorists. Working with the Iraqi government, we will expand our efforts beyond protecting our own people and humanitarian missions, so that we're hitting ISIL targets as Iraqi forces go on offense.").

²² See *U.S. Policy Towards Iraq and Syria and the Threat Posed by the Islamic State of Iraq and the Levant (ISIL): Hearing Before the S. Comm. on Armed Services*, 113th Cong. 38 (2014) ("Senator, obviously the question of authority was asked early on as we developed a strategy and our advice to the President. Does he have the constitutional authority which he believes he does? His legal counsel told him he did. Does he have the statutory authority, which he believes he does, and he has said that as to his legal counsel saying the same thing. We believe that he has both statutory and constitutional authority. That was a recommendation that I made.").

²³ *Id.* at 57.

²⁴ See, e.g., Stephen W. Preston, Gen. Couns., U.S. Dep't of Def., *The Legal Framework for the United States' Use of Military Force Since 9/11*, Speech at the Annual Meeting of the American Society of International Law (Apr. 10, 2015) (transcript available at <https://www.defense.gov/Newsroom/Speeches/Speech/Article/606662/the-legal-framework-for-the-united-states-use-of-military-force-since-911/>) [<https://perma.cc/J2AM-9NFV>] ("The 2001 AUMF has authorized the use of force against the group now called ISIL since at least 2004,

We believe neither AUMF provided a valid legal basis for the anti-ISIS operation, no matter how necessary the strike might have been, and that President Obama should have come to Congress and made his case. Recall the constitutional framework set forth by the drafters and followed by Jefferson: defensive action is permissible, but offensive actions are forbidden in the absence of congressional authorization.²⁵ While early strikes to protect American diplomats in Erbil could easily be understood as defensive in the same way that the 1801 strike against aggressive Tripolitan forces under Jefferson was, forming a coalition to engage in a months-long fight against ISIS would be akin to Jefferson going on full attack against the Barbary States before Congress had declared war. Such a move would have been unconstitutional, as Jefferson recognized.²⁶ President Obama's decision to form a coalition and commence airstrikes without sanction by Congress suffered from the same constitutional defects. Two facts precluded his reliance upon the 2001 AUMF for legal justification: ISIS did not exist when Congress passed the 2001 AUMF, and it no longer affiliated itself with Al-Qaeda or any organization responsible for the September 11th attacks.²⁷ Even more confounding is the attempted reliance on the 2002 authorization, which authorized hostilities against an Iraqi regime no longer in existence, not a terrorist organization that emerged in Iraq more than a decade later.²⁸

President Trump continued the practice of using the 2001 and 2002 AUMFs as the legal bases for attacking ISIS in Iraq and Syria and similarly used overly liberal interpretations of national security statutes to engage in combat around the globe.²⁹ In October 2017, reports broke that terrorist ambushers had killed Army Sergeant La David Johnson, Sergeant Bryan Black, Sergeant Jeremiah Johnson, and Sergeant Dustin Wright in Niger; the United States later identified their attackers as ISIS affiliates.³⁰ When asked at an October 30, 2017 Senate Foreign Relations Committee hearing to cite

when bin Laden and al-Zarqawi brought their groups together. . . . The President's authority to fight ISIL is further reinforced by the 2002 authorization for the use of military force against Iraq (referred to as the 2002 AUMF)."

²⁵ See Jefferson, *supra* note 6, at 327 ("Unauthorized by the constitution, without the sanction of Congress, to go out beyond the line of defence . . .").

²⁶ See *id.*

²⁷ Liz Sly, *Al-Qaeda Disavows Any Ties with Radical Islamist ISIS Group in Syria, Iraq*, WASH. POST, (Feb. 3, 2014), https://www.washingtonpost.com/world/middle_east/al-qaeda-disavows-any-ties-with-radical-islamist-isis-group-in-syria-iraq/2014/02/03/2c9afc3a-8cef-11e3-98ab-fe5228217bd1_story.html [<https://perma.cc/DT7V-N8LG>].

²⁸ See Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

²⁹ See *The Authorizations for the Use of Military Force: Administration Perspective: Hearing Before the S. Comm. on Foreign Rels.*, 115th Cong. 8 (2017) (statement of Rex Tillerson, Sec'y of State, U.S. Dep't of State).

³⁰ Luis Martinez & Elizabeth McLaughlin, *4th US Soldier Killed in Niger Ambush Identified*, ABC NEWS (Oct. 7, 2017), <https://abcnews.go.com/International/soldiers-killed-niger-ambush-identified/story?id=50326955> [<https://perma.cc/4USS-EKU3>]; Thomas Gibbons-Neff & Helene Cooper, *U.S. Identifies 3 ISIS Militants Who Led Deadly Ambush in Niger*, N.Y. TIMES (May 29, 2018), <https://www.nytimes.com/2018/05/29/us/politics/isis-militants-ambush-niger.html> [<https://perma.cc/YXLA-5U49>].

the legal authority pursuant to which American troops were present in Niger, Secretary of Defense James Mattis answered, “The troops are there are [sic] under Title 10 in a train-and-advise role.”³¹ Portions of Title 10 allow the Secretary of Defense to provide support to friendly foreign countries to help conduct operations he deems permissible.³² If troops serving in this “train-and-advise role” can come under deadly fire, it raises the question of whether they were under the threat of “imminent involvement in hostilities,” which would trigger the WPR.³³ At the time of the Niger ambush, President Trump’s most recent WPR message to Congress had identified nineteen countries where American troops had been deployed and equipped for combat: Afghanistan, Iraq, Syria, Yemen, Somalia, Libya, Kenya, Niger, Cameroon, Uganda, South Sudan, Democratic Republic of Congo, Central African Republic, Djibouti, Jordan, Turkey, Egypt, Cuba, and Kosovo.³⁴ While the administration claimed that Title 10 rather than the 2001 AUMF authorized the military presence in Niger, the incident nonetheless provided an opportunity to probe the broader question of whether the Trump administration believed it had authority under the 2001 AUMF to engage in offensive operations in Africa. Senator Cardin pursued that issue with Secretary Mattis at that same October 30th Foreign Relations Committee hearing:

SENATOR CARDIN. Do you have the authority under the 2001 [AUMF] to pursue Boko Haram’s atrocities?

SECRETARY MATTIS. These troops were there under Title 10.

SENATOR CARDIN. I know.

SECRETARY MATTIS. But as far as Boko Haram goes, they have pledged allegiance to ISIS or al-Qaeda, and so either way, they have associated themselves with the very group that that authorization is targeted on.

SENATOR CARDIN. So, without any further authorization from Congress, you believe you have authorization if the determination is made to deploy whatever force is necessary to go after Boko Haram, including ground troops?

³¹ *The Authorizations for the Use of Military Force: Administration Perspective: Hearing Before the S. Comm. on Foreign Rels.*, 115th Cong. 12 (2017) [hereinafter *AUMF Hearing*].

³² See 10 U.S. Code § 331 (authorizing the Secretary of Defense to designate operations in “friendly foreign countries” to which the United States would provide support, including “[p]rovision of specialized training to personnel of friendly foreign countries in connection with such an operation”).

³³ War Powers Resolution, Pub. L. No. 93-148, § 4(a), 87 Stat. 555, 555–56 (1973).

³⁴ *AUMF Hearing*, *supra* note 31, at 2.

SECRETARY MATTIS. If the President detects that there is a threat from them against us, our interests, I believe he would have the authority to designate that group, yes, sir.

SENATOR CARDIN. Yes, I understand the threat, but the threat is related to the 2001 threat is what you are saying. That this is a group that is—whose terrorist activities are endangering—

SECRETARY MATTIS. If it is an associated group, he would, under that—

SENATOR CARDIN. Well, he could—he could declare that to be an associated group?

SECRETARY MATTIS. No, he didn't.

SENATOR CARDIN. He could—

SECRETARY MATTIS. Boko Haram declared that they were an associated group.

SENATOR CARDIN. They did, but the President could authorize them as an affiliate group, and then use the full force of our military, including ground troops, without further restrictions?

SECRETARY MATTIS. Right now, Senator, they are—our troops are there under Title 10. I do not want to speculate about that because that is not what they are doing right now. I would have to go back and study it, but I believe a group that declares its allegiance to either al-Qaeda or ISIS would then be part of al-Qaeda or ISIS, yes, sir.

SENATOR CARDIN. Yeah, but my question really is related to how far he could commit our military to these types of campaigns. When we were attacked on September the 11th, we recognized the need for a military response, and we certainly understood that American troops are going to be called upon to protect our country. I am not sure that Congress envisioned that we would have the potential of ground troops in Northern Africa in combat missions. However, if I understand what you are saying, unless we modify this AUMF, you would feel that you have adequate authorization to commit American ground troops in Northern Africa.

SECRETARY MATTIS. Senator, if the President determines they are a threat to the United States, and—under the AUMF, say, they are allied with al-Qaeda or ISIS, yes, sir, I believe so.³⁵

The Executive Branch was now taking the position that the 2001 AUMF authorized operations around the world against groups that did not exist in 2001 and are not affiliated with the perpetrators of the September 11th attacks.³⁶ This reasoning raises the question of whether fighting would be prohibited anywhere under the 2001 AUMF. Indeed, as of the conclusion of President Trump's term, he and his two predecessors had already used the 2001 AUMF to justify action in the Philippines, Georgia, Yemen, Djibouti, Kenya, Ethiopia, Eritrea, and Somalia.³⁷ While presidential attorneys may argue the 2001 AUMF legally sanctions military action all around the world, it defies common sense and the plain meaning of any AUMF to argue that Congress intended to rubber-stamp non-defensive engagements in these countries when it passed the 2001 AUMF.

This issue reached unprecedented urgency on January 2, 2020, when, at the direction of President Trump, the United States killed General Qasem Soleimani, commander of Iran's Revolutionary Guards' Quds Force, in a drone strike near Baghdad.³⁸ In a memo to Congress forwarded one month after the attack—outside the forty-eight-hour window mandated by the WPR—the administration said the purpose of the attack was to “deter Iran from conducting or supporting further attacks against United States forces and interests.”³⁹ The memo's only legal justification for the attack under the President's Article II defensive military power was a note that Iran is “a state responsible for conducting and directing attacks against United States forces in the region.”⁴⁰ While Iran's record of aggression is indisputable, it fell

³⁵ *Id.* at 12–13.

³⁶ LARUEN PLOCH BLANCHARD & KATIA T. CAVIGELLI, CONG. RSCH. SERV., IF10173, BOKO HARAM AND THE ISLAMIC STATE'S WEST AFRICA PROVINCE 2 (2018) (“In March 2015, [Abubakar Shekau, the leader of Boko Haram,] released a statement pledging loyalty to the leader of the Syria/Iraq-based Islamic State. An IS spokesman welcomed the pledge, urging followers to travel to West Africa to support Boko Haram. . . . Some argue that AQIM [al-Qaeda in the Islamic Maghreb], which had links to Boko Haram prior to its alignment with IS, may seek to build ties with one or both of the factions, although evidence for this is scarce.”).

³⁷ Memorandum from Matthew C. Weed, Specialist in Foreign Pol'y Legis., Cong. Rsch. Serv., to Congressional Offices, on Presidential References to the 2001 Authorization for the Use of Military Force in Publicly Available Executive Actions and Reports to Congress 4–7, 13 (May 11, 2016), <https://www.hsdl.org/?abstract&did=792875> [<https://perma.cc/TN4Z-B3S5>].

³⁸ Michael Crowley, Falih Hassan & Eric Schmitt, *U.S. Strike in Iraq Kills Qasim Soleimani, Commander of Iranian Forces*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/01/02/world/middleeast/qassem-soleimani-iraq-iran-attack.html> [<https://perma.cc/N9HP-5EEK>].

³⁹ EXEC. OFF. OF THE PRESIDENT, NOTICE ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 1 (2020), https://foreignaffairs.house.gov/_cache/files/4/3/4362ca46-3a7d-43e8-a3ec-be0245705722/6E1A0F30F9204E380A7AD0C84EC572EC.doc148.pdf [<https://perma.cc/R9UQ-CDCL>].

⁴⁰ *Id.*

short of the standard the memo itself cited for a President to invoke his defensive powers under the Constitution: there must be an “attack or threat of imminent attack” on the nation.⁴¹ To justify the offensive nature of the strike, the memo also cited the 2002 AUMF, which the administration openly acknowledged was designed to authorize force against “the threat posed by Saddam Hussein’s regime,” not Iran or its militias in Iraq.⁴² The Soleimani strike represented an escalation of the AUMF creep, for President Trump was no longer using the 2002 AUMF as duplicative of the 2001 AUMF authority to justify action solely against terrorist groups; he was using it to justify killing a general of a sovereign state other than Iraq. We shed no tears for Soleimani, and his removal from the battlefield was overdue, but the use of the 2002 Iraq AUMF to justify killing an Iranian leader was completely misplaced, though a sadly logical extension of the Bush, Obama, and Trump administration’s successive expansions of unilateral executive war-making claims. These episodes—airstrikes against ISIS, the combat deaths of U.S. service members in Niger, and the assassination of Soleimani—represent extensive military engagement by the Executive Branch, yet at no point did congressional opposition result in a cessation of operations under the WPR, suggesting the WPR’s failure to achieve its stated goals.

III. DIPLOMACY, TREATIES AND MARGINALIZING CONGRESS

In addition to recent administrations’ disregard for the constitutional role of Congress on the question of initiating military action, executives often seek to bypass Congress on key diplomacy initiatives. The Obama administration attempted to complete a comprehensive nuclear accord with Iran without legislative review until Congress passed the Iran Nuclear Agreement Review Act,⁴³ forcing the administration to submit the Agreement to Congress.⁴⁴ And the Trump White House explored marginalizing the Senate’s role in treaty oversight.⁴⁵

Article II, Section 2, Clause 2 of the Constitution allows the Senate to approve treaties negotiated by the President and thus give them the force of federal law.⁴⁶ But the Constitution is silent on who has the power to withdraw the United States from a treaty. While the practice of treaty withdrawal has varied widely throughout American history, the Supreme Court has

⁴¹ *Id.*

⁴² *Id.*

⁴³ Pub. L. No. 114-17, 129 Stat. 201 (2015) (codified at 42 U.S.C. §§ 2011, 2160e).

⁴⁴ *Id.* § 2; see also Jonathan Weisman & Peter Baker, *Obama Yields, Allowing Congress Say on Iran Nuclear Deal*, N.Y. TIMES (Apr. 14, 2015), <https://www.nytimes.com/2015/04/15/us/senators-reach-deal-on-iran-nuclear-talks.html> [<https://perma.cc/Q7KP-E63V>].

⁴⁵ David E. Sanger, *Trump Will Withdraw from Open Skies Arms Control Treaty*, N.Y. TIMES (May 21, 2020), <https://www.nytimes.com/2020/05/21/us/politics/trump-open-skies-treaty-arms-control.html> [<https://perma.cc/Q9TU-JU42>].

⁴⁶ U.S. CONST. art. II, § 2, cl. 2.

never ruled on whether the President has the authority to withdraw from a treaty unilaterally.⁴⁷

This is a significant question, given the Senate's key role in binding the country to the terms of a treaty. Article VI, Section 2 of the Constitution specifies that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."⁴⁸ If a treaty is the law of the land entered into by both the President and the Senate, it follows that senators should play a leading role in the revocation of a treaty absent any treaty terms or other provisions of law that permit unilateral presidential withdrawal.

In spite of this conclusion, *The New York Times* reported in 2019 that "several times over the course of 2018, [President] Trump privately said he wanted to withdraw from the North Atlantic Treaty Organization [NATO]."⁴⁹ The North Atlantic Treaty was ratified by the Senate in July 1949, and neither that treaty nor any other act of Congress provides for unilateral withdrawal from NATO by the President.⁵⁰ The Trump administration's threats to unilaterally withdraw from NATO represented a clear incursion into congressional power regarding diplomacy.

IV. PRESIDENTIAL DISREGARD FOR CONGRESS AND ITS PREROGATIVES

We readily concede that Congress has failed to enforce both its constitutional powers and the provisions of the WPR. This state of affairs is due to lack of political backbone and cannot be excused. As President Obama increased military strikes against ISIS in September 2014 and some members of Congress urged the body to vote on an authorization, the press quoted an anonymous Democratic Senate staff member: "Asking anybody to take that vote within two months of an election is just stupid. Why would you put people in that position?"⁵¹ This elevation of political fear over the Constitution is Capitol Hill conventional wisdom: if Congress can evade a tough vote on military action, it will. And this failing is completely bipartisan.

Perhaps as a consequence, the indifference with which successive Presidents have treated the WPR demonstrates a current belief that the Executive has virtually unfettered authority to launch offensive military operations, the original constitutional architecture notwithstanding. In addition to having engaged in prolonged military operations without specific congressional au-

⁴⁷ DAVID M. ACKERMAN, CONG. RSCH. SERV., RS21088, WITHDRAWAL FROM THE ABM TREATY: LEGAL CONSIDERATIONS 3–6 (2002).

⁴⁸ U.S. CONST. art. VI, § 2.

⁴⁹ Julian E. Barnes & Helene Cooper, *Trump Discussed Pulling U.S. from NATO, Aides Say amid New Concerns over Russia*, N.Y. TIMES (Jan. 14, 2019), <https://www.nytimes.com/2019/01/14/us/politics/nato-president-trump.html> [<https://perma.cc/7VDF-3EKC>].

⁵⁰ North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

⁵¹ Alexander Bolton & Amie Parnes, *Senate Dems Frustrated by Colleague's Push for ISIS Vote*, HILL (Aug. 27, 2014), <https://thehill.com/homenews/senate/216026-senate-dems-frustrated-by-colleagues-push-for-isis-vote> [<https://perma.cc/BF6V-WE8V>].

thorization, every President from Nixon to Trump has considered the WPR at least partially unconstitutional.⁵² In this case, great contempt leads to great disregard.

The opening weeks of the new administration have shown that President Biden understands he is at a potentially decisive crossroads. On February 25, 2021, he authorized missile strikes against Iranian-backed militia groups located in Syria who had been connected to earlier attacks on U.S. and coalition troops located in Iraq.⁵³ The attacks were not self-defense in an ongoing or imminent attack, as the President claimed,⁵⁴ but rather an effort to retaliate for earlier attacks and deter future harms. And the attacks had an immediate counter-effect, further compounding Iran's rejection of an open diplomatic offering from the United States⁵⁵ and resulting in the targeted militias apparently engaging in retaliatory missile strikes against U.S. positions within days.⁵⁶ Even limited unilateral military action provokes likely escalation.

To support the missile strike, which caught most members of Congress completely by surprise, the Biden administration thankfully did not cite either the 2001 or 2002 AUMF.⁵⁷ Neither could be stretched so far as to cover this strike. But the administration asserted a broad power under Article II of the Constitution to initiate military action to protect the national interest.⁵⁸ Such a claim is completely open ended. A President will always claim that actions are taken for the national interest, but such claims should not be allowed to erase from the Constitution the clear command that Congress has the sole power to initiate war.

In the days following the February strike, the Biden administration seemed to grasp the danger of simply continuing the practice of past administrations that has put America on a "forever war" footing. The White House Press Secretary Jen Psaki committed that President Biden would work with Congress to restore balance in these fundamental decisions, opening up the

⁵² See MATTHEW C. WEED, CONG. RSCH. SERV., R42699, THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICE 6 (2019).

⁵³ Helene Cooper & Eric Schmitt, *U.S. Airstrikes in Syria Target Iran-Backed Militias that Rocketed American Troops in Iraq*, N.Y. TIMES (Mar. 3, 2021), <https://www.nytimes.com/2021/02/25/us/politics/biden-syria-airstrike-iran.html> [https://perma.cc/RE9X-A2YY].

⁵⁴ See Letter to the Speaker of the House and President Pro Tempore of the Senate Consistent with the War Powers Resolution, 2021 DAILY COMP. PRES. DOC. 177 (Feb. 27, 2021) [hereinafter Letter].

⁵⁵ Laurence Norman & Michael R. Gordon, *Iran Rejects Offer of Direct U.S. Nuclear Talks, Ratcheting up Tension with West*, WALL ST. J. (Feb. 28, 2021), <https://www.wsj.com/articles/iran-rejects-offer-of-direct-us-nuclear-talks-senior-diplomats-say-11614529319> [https://perma.cc/8X9X-4GG4].

⁵⁶ *New Attack on Iraqi Air Base Fits Profile of Iran-Backed Militia, U.S. Officials Say*, REUTERS (Mar. 3, 2021), <https://www.reuters.com/article/iraq-security-int-idUSKBN2AV0J4> [https://perma.cc/5V5S-9PTT].

⁵⁷ See Letter, *supra* note 54.

⁵⁸ *Id.*

possibility, after so many years, for much-needed reform.⁵⁹ Similarly, in hearings before Senate Committees, Biden nominees for key national security posts have also pledged greater consultation with Congress over diplomatic initiatives, such as the ongoing effort to constrain Iran from obtaining nuclear weapons.⁶⁰ The President, a thirty-six-year veteran of the Senate and former Chair of the Senate Foreign Relations Committee, understands the integral roles of the Executive and Legislative Branches in war, peace, and diplomacy as well as anyone who has ever occupied the office.⁶¹

V. NEAR-TERM GOALS: REPEAL ZOMBIE AUMFs, PROTECT NATO, AND IMPROVE INTER-BRANCH DIALOGUE

With a new administration signaling an understanding that the Executive and Legislative Branches must work together to create a more balanced and effective process on war, peace, and diplomacy, the question is posed: how should it be done?

First, Congress should repeal “zombie war authorizations,” those grants of power to wage war that have outlived their purposes.⁶² Americans may be surprised to learn that the 1991 AUMF that approved using military force to eject Iraq from Kuwait remains valid law.⁶³ And the 2002 AUMF to wage war against Iraq is a bizarre relic at a time when the nation is now a security partner working together with us to defeat regional terrorist networks.

It is time to repeal the 1991 and 2002 AUMFs. On March 3, 2021, we joined with a bipartisan group of our colleagues in filing legislation to do just that.⁶⁴ These AUMFs served their respective purposes and should now be formally removed from American law. Their repeal would affect no current military operation. The Department of Defense cited neither of these

⁵⁹ Bryan Bender & Andrew Desiderio, *Biden Backs New War Powers Vote in Congress, White House Says*, POLITICO (Mar. 5, 2021), <https://www.politico.com/news/2021/03/05/biden-war-powers-congress-473843> [<https://perma.cc/7ZVG-YEZ6>].

⁶⁰ See, e.g., *Hearing on the Nomination of Antony Blinken to Be Secretary of State Before the S. Foreign Rels. Comm.*, 117th Cong. 4–5 (2021) [hereinafter *Blinken Hearing*] (statement of Antony J. Blinken, Nominee for Sec’y of State).

⁶¹ As of this Article’s publication, President Biden has not articulated a formal position on the War Powers Resolution’s constitutionality, though we note that in his report to Congress on the February 25, 2021 airstrike against Iranian-backed militias in Syria, he cited no statutory authority, relying instead on his powers as commander-in-chief and the right of self-defense as recognized in the UN Charter. The President characterized his report as “consistent with” the War Powers Resolution, thus following the precedent of his predecessors in complying with the reporting requirement but not conceding the constitutionality of the law.

⁶² See Conor Friedersdorf, *Zombie Iraq War: Why Haven’t We Repealed the Authorization to Fight There?*, ATLANTIC (May 29, 2013), <https://www.theatlantic.com/politics/archive/2013/05/zombie-iraq-war-why-havent-we-repealed-the-authorization-to-fight-there/276315/> [<https://perma.cc/B6QR-TUWB>].

⁶³ See Authorization for the Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991) (codified at 50 U.S.C. § 1541 note).

⁶⁴ See S.J. Res. 10, 117th Cong. (2021).

resolutions in its sixty-day WPR reports to Congress between December 2011 and September 2014.⁶⁵ Since then, recent administrations have claimed the 2002 authorization provides mere reinforcement for activities already covered by the 2001 AUMF.⁶⁶ These messages from the Executive Branch suggest that removing the 1991 and 2002 AUMFs would not hinder Presidents' ability to claim authority for ongoing military engagement.

Second, Congress should also pass legislation stipulating that Presidents may not unilaterally withdraw from duly ratified treaties. Since treaties are "the supreme Law of the Land" under the Constitution,⁶⁷ it stands to reason that they remain in effect until, as with other laws, legislation is passed that relieves the country of its obligations.⁶⁸ In particular, Congress should pass a law prohibiting unilateral presidential withdrawal from NATO. To prevent destructive action by a President who might contest such an act's legitimacy and rely upon his commander-in-chief power to carry out a withdrawal, the bill should prohibit the use of funds going toward unilateral NATO withdrawal and should authorize Congress to appoint counsel to represent it in court should any judicial proceedings occur over the matter. Such a bill already received significant bipartisan support in the 116th Congress.⁶⁹ Given this support and the current President's friendlier attitude toward NATO and eagerness to signal support to our NATO allies, the prospects for this kind of bill's enactment in the near future are quite promising.⁷⁰

Third, the Armed Services Committees should hold hearings to consider revisions to the authorities granted to the Executive Branch in the security cooperation statutes.⁷¹ In current form, these statutes provide sweeping authority to the Department of Defense to "support" friendly foreign countries in their pursuit of operations under the jurisdiction of the Secretary of Defense or that "benefit[t] the national security interests of the United States."⁷² These statutes do not prohibit the United States from pro-

⁶⁵ See Executive Communication EC-4036 from Assistant Sec'y, Bureau of Legis. Affs., Dep't of State, to Comm. on Foreign Rels. (Nov. 18, 2011); Executive Communication EC-6913 from Assistant Sec'y, Bureau of Legis. Affs., Dep't of State, to Comm. on Foreign Rels. (Sep. 11, 2014); Email from Matthew Weed, Specialist in Foreign Pol'y Legis., Cong. Rsch. Serv., to Zachary Woodward, Rsch. Dir. & Writer, Off. of Senator Tim Kaine, U.S. Senate (Mar. 9, 2021, 12:55 EST) (on file with co-author Kaine).

⁶⁶ See *AUMF Hearing*, *supra* note 31, at 6.

⁶⁷ U.S. CONST. art. VI, § 2.

⁶⁸ See Barry M. Goldwater, *Treaty Termination Is a Shared Power*, 65 A.B.A. J. 198, 199 (1979) ("The Constitution is silent as to how a treaty shall be terminated. It is also silent on how a statute or any other law shall be cancelled. Yet no one makes the argument that the President alone can repeal a statute.").

⁶⁹ See S.J. Res. 4, 116th Cong. (2019).

⁷⁰ See Amanda Macias, *An Attack on One Is an Attack on All—Biden Backs NATO Military Alliance in Sharp Contrast to Trump*, CNBC (Feb. 19, 2021), <https://www.cnbc.com/2021/02/19/munich-security-conference-biden-backs-nato-in-sharp-contrast-to-trump.html> [<https://perma.cc/P6X6-XT7G>].

⁷¹ See 10 U.S.C. §§ 331–33.

⁷² *Id.*

viding support to military operations in conflicts where U.S. involvement has not been authorized by Congress.⁷³ Such broad authority has enabled operations, such as that seen in the 2017 attack in Niger, that are indistinguishable from war. Legislative clarification of the authorities under which our forces operate in such conflicts would reduce the probability that they would encounter hostilities, prevent mission creep, reduce the encroachment upon Article I war-making powers, and give Congress opportunity to act before the fact. We fully recognize the need for robust cooperation with allied forces and the need to train them to meet shared objectives, and we believe that, working together as the Constitution envisions, we can arrive at a solution that addresses the needs of both the President and Congress.

VI. MEDIUM-TERM GOAL: REPEAL AND REPLACE THE 2001 AUMF

Because it has been cited by multiple administrations as the basis or potential basis for actions against multiple terrorist groups from Niger to the Philippines, repealing and replacing the 2001 AUMF would be the single most effective step Congress could take to stem the growing imbalance of war powers.⁷⁴ It is too early to see how extensively President Biden will rely on the 2001 AUMF to justify anti-terrorist operations not associated with al-Qaeda and its affiliates, but the broad authority claimed by his two immediate predecessors is troublesome. Still, there is cause for optimism. During his presidential campaign, Biden promised to “end the forever wars in Afghanistan and the Middle East.”⁷⁵ In addition, during his confirmation hearing, Secretary of State Blinken said, “I think the AUMF from 9/11 has been used in countries and against groups that were not contemplated or cited in the AUMF, which is the very strong reason why we should revisit it.”⁷⁶ We agree and believe that this effort should be done before the twentieth anniversary of the AUMF’s passage this September.

In spite of our desire to revisit the 2001 AUMF, we do not want to deprive the President of the authority to defend our country, nor would we expect our congressional colleagues or President Biden to tolerate such a circumstance. We believe the 2001 AUMF should be repealed but only with the simultaneous passage of a replacement AUMF that reflects current threats, for it remains the only legal justification for certain military activities critical to our national defense. For example, the continued presence of some troops in the short term is necessary for the safety of our service members as we withdraw from Afghanistan, but if the 2001 AUMF were repealed

⁷³ See *id.*

⁷⁴ MATTHEW C. WEED, CONG. RSCH. SERV., 7-5700, THE 2001 AUTHORIZATION FOR USE OF MILITARY FORCE: BACKGROUND IN BRIEF (2013); *AUMF Hearing*, *supra* note 31, at 12–13.

⁷⁵ Bill Barrow, *Biden Promises to End ‘Forever Wars’ as President*, ASSOCIATED PRESS (July 11, 2019), <https://apnews.com/article/fcd9b36a5f0542c5b0a9688f38338e2b> [<https://perma.cc/6V2U-2QEY>].

⁷⁶ *Blinken Hearing*, *supra* note 60.

without a replacement, there would be no statutory or constitutional basis for their presence. A replacement should allow for current mission needs, such as counterterrorism operations against al-Qaeda, and should be broadened to include efforts to crush the remnants of the Islamic State and its affiliates. These brutal organizations have been degraded but not fully eliminated, and we must ensure the President has the necessary congressional authority to defend the American people against the threats they pose. Including relevant—but limited and specific—language in replacement legislation would afford the President such authority but would remove the temptation to advance weak justifications for actions not approved by Congress in the 2001 AUMF.

We stress, however, that a replacement AUMF must include key restraints absent in the 2001 AUMF, lest it produce the same unanticipated misuses of the earlier authorization. First and foremost, a replacement should include a sunset provision—an expiration date after which a President could no longer use the law to justify military action—or some other provision to allow for the AUMF’s periodic review.⁷⁷ A sunset provision does not limit military actions to short durations; many operations require extended engagement, and Congress should not prematurely disengage for the sake of brevity. Rather, a sunset provision would provide Congress an opportunity to review periodically how the mission has evolved since initial passage and how the current administration is using the AUMF. With an expiration date, members of Congress would be forced to debate whether continued engagement is in the public interest and, if so, to consider amending the authorization to meet current demands. As Congress has done with other national security legislation, a sunset provision would be coupled with expedited legislative procedures for passing a bill to renew the AUMF in the House of Representatives and, more importantly because of the filibuster, the Senate.⁷⁸ A new AUMF that does not contain a sunset provision should, at minimum, enact procedures for expedited repeal or modification of the AUMF after a

⁷⁷ See, e.g., S.J. Res. 43, 115th Cong. § 8(a) (2017) (“In General.—In order to encourage periodic review of the use of force authorized by this joint resolution, the authorization for use of force in section 3 shall terminate five years after the date of the enactment of this joint resolution, unless reauthorized by Congress.”).

⁷⁸ See, e.g., *id.* at § 11(b) (“Expedited Procedures.—Consideration of the resolution described in subsection (a) [a replacement AUMF] shall be governed by the procedures set forth in section 6, as if the resolution described in subsection (a) were a resolution described in section 6(a), including the procedures relating to veto messages specified in section 6(c).”); *id.* at § 6(b)(3) (“Proceeding to Consideration.—Notwithstanding Rule XXII of the Standing Rules of the Senate, it is in order, not later than 2 days of session after the date on which the resolution is reported or discharged from the committees, for the Majority Leader of the Senate or the Majority Leader’s designee to move to proceed to the consideration of the resolution. Thereafter, it shall be in order for any Member of the Senate to move to proceed to the consideration of the resolution at any time.”); *id.* at § 6(c)(2)(B) (“[D]ebate in the Senate of any veto message with respect to the resolution, including all debatable motions and appeals in connection with the resolution, shall be limited to 10 hours, to be equally divided between, and controlled by, the Majority Leader and the Minority Leader of the Senate or their designees.”).

fixed period of time.⁷⁹ However, we believe a sunset provision is far preferable because it forces discussion and contemplation of drawn-out military engagements among members of Congress.

We also believe a new authorization must include a clear definition of the enemy to be defeated. The 2001 AUMF authorizes military force “against those nations, organizations, or persons [that the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”⁸⁰ Because Presidents have cited this language—particularly the phrase “or harbored such organizations or persons”—as authorization for attacks against groups that did not even exist in 2001, new authorization language must be narrower, and the enemy specifically defined. To fulfill mission needs, an AUMF should specify by name the terrorist groups against which Congress authorizes the commander-in-chief to take military action and require him or her to take additional action, such as notifying Congress, in order to receive authorization to use force against “associated forces.” To prevent the Executive from exploiting the vague term “associated forces” to justify his or her actions, the authorization should include a narrow definition of the phrase. Such a narrowly drawn definition should designate specific associated forces known to Congress at the time of enactment and should specify a process for designating new associated forces that may emerge after enactment. This process may mirror the notification requirements of the WPR, requiring the President to notify Congress promptly (e.g., within forty-eight hours) upon determining that a new person, organization, or force is an “associated force” under the authorization. The AUMF should mandate that such a report provide Congress with sufficient details to evaluate the President’s determination and allow for a review period (e.g., sixty days) during which Congress may veto the President’s determination by passing a resolution specifying that such groups do not meet the definition of “associated forces” under the AUMF. The authorization may privilege such a resolution to provide for its expedited passage on the House and Senate floors. Additionally, the authorization may provide the President an initial opportunity to designate associated forces during a short window (e.g., sixty days) after the authorization’s passage to allow him or her to seek preemptive approval for action against associated forces known to the President but not initially contemplated by Congress. To prevent executive abuse, such designations should be subject to the same congressional review process as later designations.⁸¹

⁷⁹ See, e.g., S.J. Res. 59, 115th Cong. § 4(b) (2018) (“Expedited Congressional Reconsideration.—During the 60-calendar day period beginning on January 20, 2022, and again every 4 years thereafter, a qualifying resolution to repeal or modify this joint resolution shall be entitled to expedited consideration pursuant to section 9 of this joint resolution.”).

⁸⁰ Authorization for Use of Military Force, Pub. L. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

⁸¹ See, e.g., S.J. Res. 43, 115th Cong. §§ 3, 5; S.J. Res. 59, 115th Cong. §§ 3, 5.

Geographic limitations in a new authorization can take many forms. A strict AUMF might designate specific locations where Congress authorizes military action and forbid action elsewhere.⁸² A more flexible one may authorize action in no more than a few countries by name and require the President to submit to Congress an initial list of additional countries where he or she anticipates using military force under the AUMF; it may also allow the President to later designate new countries where he or she deems action authorized under the AUMF.⁸³ Such geographic designations should be subject to similar reporting and congressional review requirements as the President's designations of new associated forces. Under such a legal regime, actions taken in far-off locales not anticipated by Congress (e.g., Niger, the Philippines) could more easily spark debate in Congress, and, if the people's representatives in Congress deem such actions not in the national interest, they could readily be halted. An even more lenient version of the authorization could include no mention of geographic limitations whatsoever if Congress deems that the nature of our enemies requires the President to have flexibility to attack them wherever they emerge. However, such liberality should be counterbalanced by strong provisions regarding the definition of "associated forces" to prevent engagement in new theaters where combatants are only tenuously connected to those designated by the text of the AUMF.

Clearly, the parameters a replacement AUMF could set vary sizably. In fact, the authors of this Essay do not fully agree on an ideal AUMF. Such disagreement among members of Congress is expected and should be voiced on the House and Senate floors and in the relevant congressional committees. The contours of the United States' offensive military action involve, by the Framers' design, inherently political questions, and those questions should be decided by the people's elected representatives, not the President's unelected lawyers. Having these debates in Congress and turning those debates into a repeal and replacement of the 2001 AUMF will send a strong message to our service members that their representatives have contemplated their mission and carefully considered the risks before sending them into harm's way. To continue letting the Executive Branch send our troops wherever it sees fit under overly broad interpretations of a twenty-year-old AUMF would send a message that we are not thinking of our service mem-

⁸² See, e.g., S.J. Res. 44, 113th Cong. § 2(a) (2014) ("In General.—In order to protect the United States and other countries from terrorist attacks by the Islamic State in Iraq and the Levant (ISIL), and in order to protect individuals from acts of violence in clear contravention of international law and basic human rights, the President is authorized, as part of a multinational coalition, subject to the limitations in subsection (b)—(1) to use all necessary and appropriate force to participate in a campaign of airstrikes in Iraq, and if the President deems necessary, in Syria, to degrade and defeat ISIL; and (2) to provide military equipment and training to forces fighting ISIL in Iraq or Syria, including the Iraqi security forces, Kurdish fighters, and other legitimate, appropriately vetted, non-terrorist opposition groups in Syria.").

⁸³ See, e.g., S.J. Res. 43, 115th Cong. § 5; S.J. Res. 59, 115th Cong. § 5(b).

bers and have delegated our constitutional war duties to the branch of government the Framers least trusted to initiate them.⁸⁴

VII. LONG-TERM FOCUS: REVISING THE WAR POWERS RESOLUTION

For all of the flaws of the WPR, it is clear to us that its goal of outlining procedures for Congress and the President to exercise their war powers is sound. We also hold that the history of the past twenty years has fed an unfortunate propensity for the Executive Branch to go it alone. Such unilateral action degrades the role of Congress and defies the constitutional intent.

Since the WPR's enactment, there have been various proposals to strengthen it and make it possible to fulfill its essential purpose. One of these proposals was, of course, the Use of Force Act introduced by then-Senator Biden (D-Del.) in 1995.⁸⁵ Scholars and other lawmakers have advanced others. In February 2007, the University of Virginia's Miller Center impaneled the War Powers Commission, co-chaired by former Secretaries of State James Baker III and Warren Christopher, to "identify a practical solution to help future Executive and Legislative Branch leaders deal with the issue" of balancing war powers.⁸⁶ In July 2008, the Commission released a report of its findings that concluded that "the War Powers Resolution of 1973 does not provide a solution" to the issue of war powers and recommended the introduction of a War Powers Consultation Act, which would provide that the President shall consult with Congress before deploying U.S. troops into "significant armed conflicts";⁸⁷ define the types of hostilities that would or would not be considered "significant armed conflicts";⁸⁸ create a new Joint Congressional Consultation Committee, which would include leaders of both Houses as well as the chair and ranking members of key committees;⁸⁹ establish a permanent bipartisan staff with access to the national security and intelligence information necessary to conduct its work;⁹⁰ and call on Congress to vote up or down on significant armed conflicts within thirty days of initiation.⁹¹ In 2014, Senators Tim Kaine (co-author of this Essay) and John McCain (R-Ariz.) introduced a bill modeled after this proposal, but it did not

⁸⁴ See *Madison Debates: August 17*, AVALON PROJECT, https://avalon.law.yale.edu/18th_century/debates_817.asp [<https://perma.cc/47ZN-9BJV>]. ("Mr. GERRY never expected to hear in a republic a motion to empower the Executive alone to declare war.")

⁸⁵ S. 564, 104th Cong. (1995).

⁸⁶ MILLER CTR. OF PUB. AFFS., NATIONAL WAR POWERS COMMISSION REPORT 3 (2008), <http://web1.millercenter.org/reports/warpowers/report.pdf> [<https://perma.cc/678S-SP3A>] [hereinafter NAT'L WAR POWERS COMM'N].

⁸⁷ *Id.* at 6.

⁸⁸ *Id.* at 8.

⁸⁹ *Id.* at 9–10.

⁹⁰ *Id.* at 10.

⁹¹ *Id.* at 8.

receive committee or floor consideration before the conclusion of the 113th Congress.⁹²

Another suggestion to improve the WPR is to eliminate the window of sixty to ninety days within which the President can act militarily without authorization and instead require advance authorization or implement a shorter timeframe of thirty days.⁹³ Another proposal is to change the automatic troop-withdrawal mechanism to require or make it easier for Congress to authorize a joint resolution for either action or disengagement,⁹⁴ and another is to cut off funding for activities by U.S. forces that violate the resolution.⁹⁵ In such cases, practice has shown that Congress is reluctant to vote against troop deployments once underway or withhold financial support to them.⁹⁶ In light of this reluctance, a permanent Joint Congressional Consultation Committee (as recommended by the Miller Center) that engages in ongoing, regular discussions with the President on use-of-force issues and on identifying when explicit congressional approval is required might offer the President valuable insights and forestall encroachments on congressional war powers.⁹⁷ Until this broad framework is reworked with both bipartisan and interbranch support—with no claims of unconstitutionality—attempts to revise AUMFs will be patchwork fixes.

It is clear to us that replacing the WPR must include a clear definition of the term “hostilities,” the condition that triggers the statute’s provisions. That term’s vagueness and susceptibility to presidential misuse are illustrated by the case of Yemen. In the first weeks of the 116th Congress, a bipartisan group of senators introduced a resolution requiring the termination of U.S. support for hostilities in Yemen.⁹⁸ Central to the ensuing debate was whether the provision of aerial refueling to Saudi Arabia’s aircraft conducting strikes in Yemen met the threshold of “hostilities.”⁹⁹ The resolution asserted that the U.S. support did meet that threshold, while the administration claimed that it was instead “limited support” pursuant to the Arms Export Control Act, statutory authority for the Department of Defense, and the President’s constitutional powers.¹⁰⁰

We note an unfortunate dearth of war powers notifications from Presidents to Congress regarding the war in Yemen and observe that successive administrations appear to believe support for hostilities in Yemen falls under

⁹² See War Powers Consultation Act, S. 1939, 113th Cong. (2014).

⁹³ WEED, *supra* note 52, at 65.

⁹⁴ *Id.*

⁹⁵ *Id.* at 65–66.

⁹⁶ *Id.* at 66.

⁹⁷ See NAT’L WAR POWERS COMM’N, *supra* note 86, at 36–38.

⁹⁸ See S.J. Res. 7, 116th Cong. § 2 (2019).

⁹⁹ *Id.* § 1.

¹⁰⁰ Donald J. Trump, *Statement of Administration Policy: S.J. Res. 7—Directing the President to Remove United States Armed Forces from Hostilities in the Republic of Yemen that Have Not Been Authorized by Congress*, AM. PRESIDENCY PROJECT (Mar. 13, 2019), <https://www.presidency.ucsb.edu/documents/statement-administration-policy-sj-res-7-directing-the-president-remove-united-states-0> [https://perma.cc/83T6-2H8Z].

an exception to the reporting requirement of the WPR. This exception removes the reporting requirement for “deployments which relate solely to supply, replacement, repair, or training” of foreign forces.¹⁰¹ Arguments about the nature and intent of logistical support are not new; President Franklin D. Roosevelt’s “arsenal of democracy,” whereby the United States sold the Allies military equipment for nearly a year before the attack on Pearl Harbor, attempted to exploit the same gap of “logistical” support to an ally while nominally remaining neutral to avoid the need for a congressional war declaration.¹⁰² Prime Minister Winston Churchill later stated that the many equipment transfers made by the United States to the United Kingdom were “a decidedly unneutral act by the United States.”¹⁰³

Prime Minister Churchill is not alone in his assessment that support, even without engaging in armed conflict, is “unneutral.” In passing the 2001 AUMF, Congress deemed those who “harbored” the organizations responsible for the September 11th attacks to be targets of U.S. military action.¹⁰⁴ And in 2015, the United States conducted an airstrike against Sanafi al-Nasr, whose offense was not aiding in combat but “funneling money” for al-Qaeda.¹⁰⁵ Congress has more recently taken a similar view, as evidenced by Section 1021 of the National Defense Authorization Act for Fiscal Year 2012, which affirmed that the 2001 AUMF allowed for the detention of “a person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities.”¹⁰⁶ In the war on terror, the United States clearly views those who funnel money to or otherwise support our enemies as engaging in combat; we must similarly acknowledge that when we provide money or other support to those engaged in combat, we ourselves are engaging in combat.

It is clear to us that our participation in Yemen was also “unneutral” and invited retaliation against our forces. As such, our participation was certainly under hostile conditions and did not lie within the WPR’s exception. A future revision of the WPR must clarify and update the definition of “hostilities” as it pertains to our adversaries and must define and limit our actions. The authors of the original resolution intended for the definition to be broad, stating in the report that

¹⁰¹ 50 U.S.C. § 1543.

¹⁰² Franklin D. Roosevelt, *Fireside Chat 16: On the Arsenal of Democracy*, UNIV. OF VA. MILLER CTR. (Dec. 29, 1940), <https://millercenter.org/the-presidency/presidential-speeches/december-29-1940-fireside-chat-16-arsenal-democracy> [<https://perma.cc/Y2R8-TVCZ>].

¹⁰³ MICHAEL GANNON, OPERATION DRUMBEAT 83 (1st ed. 1990).

¹⁰⁴ Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

¹⁰⁵ *See Pentagon Says Al Qaeda Financier Killed in Syria Air Strike*, REUTERS (Oct. 18, 2015), <https://www.reuters.com/article/us-mideast-crisis-syria-strike/pentagon-says-al-qaeda-financier-killed-in-syria-air-strike-idUSKCN0SC00520151018> [<https://perma.cc/6H5W-4MP5>].

¹⁰⁶ National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021, 125 Stat. 1298, 1562 (2011).

[t]he word hostilities was substituted for the phrase armed conflict because it was considered to be somewhat broader in scope. In addition to a situation in which fighting actually has begun, hostilities also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict.¹⁰⁷

Despite the authors' intent to provide ample latitude to Congress to assert hostilities had been initiated, the resolution is laden with phrases like "equipped for combat"¹⁰⁸ or "removal of . . . forces"¹⁰⁹ that unnecessarily restrain the interpretation of warfare to an era rendered obsolete in the late twentieth century. Armed drones, cyberwarfare, and autonomous intelligence-gathering systems strain the interpretation and applicability of the resolution today, and one wonders whether directed-energy weapons and artificial intelligence will render the phrase "United States Armed Forces" from the WPR obsolete. Congress would be well served to define these limits for the resolution before the lawyers from the Executive Branch do so.

VIII. CONCLUSION: RECLAIMING ARTICLE I AND ESTABLISHING THE PARTNERSHIP THE CONSTITUTION ENVISIONS

In May of 1995, former Secretary of Defense Robert McNamara addressed an audience in San Diego about the contents of his book, *In Retrospect: The Tragedy and Lessons of Vietnam*.¹¹⁰ The address aimed to outline the lessons he had taken from the Vietnam conflict, including that "we failed to draw Congress and the American people into a full and frank discussion and debate of the pros and cons of a large-scale U.S. military involvement in southeast Asia."¹¹¹ Secretary McNamara said of the Gulf of Tonkin Resolution, "The problem wasn't with the formalities; the problem was the substance. Neither the Congress nor the President intended that that those words would be used as we used them."¹¹² Nearly twenty years later, future Secretary of Defense James Mattis would respond to a question about Middle East policy by saying, "We've been somewhat in a strategy-free environment for quite some time. It didn't start with this administration. And so, we've been wandering. We have policies that go on and come off."¹¹³ His statement was not the only one implying that U.S. military plans were not tied to any larger

¹⁰⁷ H.R. REP. NO. 93-287, at 7 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2346, 2351.

¹⁰⁸ 50 U.S.C. § 1543(a)(2).

¹⁰⁹ 50 U.S.C. § 1544(b).

¹¹⁰ See Univ. of Cal. Television, *The Tragedy and Lessons of Vietnam*, YOUTUBE (Nov. 3, 2011), https://www.youtube.com/watch?v=KBJA6L-_dFs [<https://perma.cc/TY44-EB7N>].

¹¹¹ *Id.* at 24:23.

¹¹² *Id.* at 24:57.

¹¹³ *Hearing to Receive Testimony on Global Challenges and U.S. National Security Strategy Before the S. Comm. on Armed Servs.*, 114th Cong. (2015) (statement of Gen. James Mattis, Former Commander, U.S. Cent. Command).

objective; in a private meeting with one of the authors of this Essay, another senior military official confessed, “We have O-plans but no strategy.”¹¹⁴

For too long, Congress has looked solely to the Executive Branch for the next “grand strategy” to lead us in the twenty-first century, only to be frustrated by the inconsistency of policy in everything from troop strength in the Middle East to nuclear non-proliferation efforts in North Korea and Iran. At issue is not just the capricious nature of the Executive to craft policy for political purposes but also the inability of Congress to provide a “stable institution”¹¹⁵ in establishing U.S. policy beyond a single presidential administration. We hope to remedy this dysfunctional situation by restoring Congress to its rightful, constitutional role in crafting sound policy for defending the nation and ensuring its security now and for generations to come.

We invite President Biden, once a leading voice in defense of congressional war powers,¹¹⁶ to join with us in restoring the legislature to its proper constitutional role on questions of war and peace. He is now our commander-in-chief, and we share with him an unflinching determination to protect our country and its fine people. His assumption of the presidency after authoring the Use of Force Act¹¹⁷ signals that now is a ripe opportunity to have a conversation about restoring Congress to its rightful role in the constitutional order. We look forward to that conversation and at the same time will work to guarantee that President Biden has clear legislative backing to address any national security threat our adversaries may pose. The American people deserve nothing less.

We know our goal is ambitious and will require close cooperation with the President and our congressional colleagues. There will be political problems rising from the debates that accompany the crafting and passage of legislation the likes of which we have proposed here. What discretion should a President have to launch military operations in the absence of advance congressional authorization? How do we craft legislation that empowers the

¹¹⁴ *Hearing to Receive Testimony on United States Cyber Command in Review of the Defense Authorization Request for Fiscal Year 2017 and the Future Years Defense Program Before the S. Comm. on Armed Servs.*, 114th Cong. (2016) (statement of Sen. Tim Kaine, member, S. Comm. on Armed Servs.).

¹¹⁵ THE FEDERALIST NO. 62, at 162 (James Madison) (Michael A. Genovese ed., 2009).

¹¹⁶ See 141 CONG. REC. S3,969–73 (daily ed. Mar. 15, 1995) (statement of Sen. Joseph R. Biden, Jr.) (“But over the past four decades, what was intended as a healthy struggle between the executive and legislative branches has become an extremely excessively divisive and chronically debilitating struggle. The primary cause, in my view, is that Presidents have pushed the limits of Executive prerogative, Democratic Presidents as well as Republican Presidents. Their rationale has been the supposed burden of Presidential responsibility imposed by the stresses and dangers of the cold war. . . . The experience of the War Powers Resolution gives witness to the difficulty of finding the proper balance between the executive and legislative branches on war powers. But I am determined to try. The status quo, with Presidents asserting broad executive powers, and Congress often content to surrender its constitutional powers, serves neither branch, and clearly does not serve the American people. More fundamentally, it does not serve the men and women who risk their lives to defend our interests. For that, ultimately, must be the test of any war powers law.”).

¹¹⁷ See *supra* note 85 and accompanying text.

commander-in-chief to deal with terrorist threats but prevents the kind of creeping justifications we have witnessed over the past two decades? These are tough questions and would trigger robust debate in Congress. The Executive Branch would voice strong opinions that affected the congressional debate, but these questions lie at the heart of our international strategy. Congress must rise to the occasion. We pledge our leadership and good faith.