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Hearing on Article I: Reforming the War Powers Resolution for the 21st Century

Chairman McGovern, Ranking Member Cole, and Members of the Committee: thank you for the invitation to testify as you consider the critical matter of war powers reform.

I am a professor of law at the Cardozo School of Law, where I write and teach about executive power, international law, war powers, and national security. I am also a Senior Fellow at The Reiss Center on Law and Security at NYU School of Law. Previously, I served for several years in the U.S. government as an attorney-adviser in the U.S. Department of State Office of the Legal Adviser, where I advised the State Department and worked with colleagues at the Departments of Justice and Defense, in the intelligence community, and at the White House, on issues of international law and the President's war powers.

With whom are we at war, today? This is a question that should have an easy answer, a known answer. And yet it does not. As you are aware, the United States is currently engaged in a series of violent conflicts across the globe, many of which are not on the radar of the American public. The U.S. military is prosecuting wars with groups most Americans have never heard of. Relatedly, and despite the constitutional delegation of war-declaring authority to Congress, the United States is at war with groups that Congress has never determined the nation should be fighting, in countries with which we are not at war.

This has not always been the case, and it is not a necessary state of affairs. The Constitution gives Congress and not the President the power to declare war, along with a host of other war-regulating powers. These include the power to: “raise and support Armies;”¹ “provide and maintain a Navy,”² and to make rules to regulate both, including to define and punish offenses against the law of nations.³ In considering the allocation of these powers, the framers expressly raised concerns with consolidating war-making power in one individual and emphasized the benefits of placing the decision to go to war in the slower, more deliberative branch.⁴ But the Constitution's granting of these authorities to Congress does not mean the President lacks authority to stop an actual attack on the nation. The framers understood the President's authority to include the power to “repel sudden attacks.”⁵ A full century later, the Supreme Court confirmed the President's power to respond to a war not of his or

¹ U.S. Const., Art. I, § 8, Cl 12.

² U.S. Const., Art. I, § 8, Cl 13.

³ U.S. Const., Art. I, § 8, Cls 10; 11; 14.

⁴ *See, e.g.*, The Records of the Federal Convention of 1787, at 318-19 (Max Farrand ed., rev. ed. 1966); Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 528 (1836) (quoting James Wilson as explaining: “This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress, for the important power of declaring war is vested in the legislature at large.”).

⁵ *See, e.g.*, The Records of the Federal Convention of 1787, *supra*, *see also* Michael Ramsey, *The President's Power to Respond to Attacks*, 93 CORNELL L. REV. 172 (2007) (noting the understanding at the Constitutional Convention that the Declare War clause was intended to “to “leav[e] to the Executive the power to repel sudden attacks.”).

her own making in *The Prize Cases*, stating that “[i]f a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.”⁶ Hand in hand with this assumed power is the clear understanding that the President’s power to use force unilaterally is also limited to responding to specific attacks when seeking congressional approval would be infeasible.

Over time the President’s understanding of this authority expanded dramatically. The 1973 War Powers Resolution grew out of congressional frustration with increasing presidential unilateralism and lack of transparency, including active White House efforts in some instances to prevent Congress from learning the full scope of U.S. operations. In the aftermath of the Vietnam War, having tried unsuccessfully for years to rein in the President’s prosecution of the war, and having watched the courts repeatedly view their attempts to do so as instead acquiescence to the President’s policies, Congress passed the War Powers Resolution to attempt to reset the balance of power between it and the President.⁷ The goal was “to fulfill the intent of the framers of the Constitution of the United States and [e]nsure 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 The War Powers Resolution was also an admonishment to the courts, coming on the heels of several judicial decisions stretching to find congressional acquiescence to the President’s war making; it explicitly tells them (and the President) not to interpret as an authorization to use force anything other than an actual authorization to use force.

Contrary to some interpretations, the War Powers Resolution does not purport to give the President powers that he or she does not already hold. In fact, it explicitly says the contrary: “Nothing in this chapter ... shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this chapter.”⁹ Instead, the War Powers Resolution simply acknowledges the President has existing power “as Commander-in-Chief to introduce United States Armed Forces into hostilities...pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”¹⁰ Only that third category encompasses recognition of some limited Article II authority for the President to act unilaterally, in exceptional circumstances, and it is for this limited set of cases that Congress set a time limit and reporting requirements. This is recognition of the “repel sudden attacks” authority; it is not a blank check from Congress to use force during the 60-day clock. In other words, the War Powers Resolution did not expand the President’s power to act unilaterally; it simply imposed a statutory limit on the President’s exercise of that power.

Why do we need war powers reform today?

Despite Congress’ attempt to reset the balance of powers in the War Powers Resolution, we are here today because the country has slid into unbounded wars without sufficient congressional

⁶ *The Prize Cases*, 67 U.S. (2 Black) 635 (1863).

⁷ War Powers Resolution of 1973, 50 U.S.C. 1541–1548.

⁸ 50 U.S.C. 1541(a).

⁹ 50 U.S.C. 1547(d).

¹⁰ 50 U.S.C. 1541(c).

engagement.¹¹ The War Powers Resolution has been a useful legal regime in particular by creating reporting requirements, which provide Congress with some baseline information about the President's use of force that it might not otherwise have. But it did not solve all of the problems of executive branch aggrandizement, for several reasons. First, its enforcement mechanism is under a constitutional cloud. Second, it did not account for the ways that executive branch interpretations of authority would continue to sanction expansive understandings of the President's powers. And third, considering in particular what we now know, the War Powers Resolution did not go far enough to reset the balance between Congress and the President.

The War Power Resolution's enforcement mechanisms are not effective

Some of the main problems the War Powers Resolution aimed to address were the many political and practical hurdles to Congress reining in a war, once underway, that the President was bent on continuing. Congress faces collective action problems that do not equally hinder the President's ability to act quickly. And the courts during the Vietnam era did not help, repeatedly finding evidence of congressional acquiescence to the war even in congressional attempts to wind it back, and generally raising justiciability concerns to avoid reaching the merits at all.¹²

Congress sought to resolve this problem through Section 5(c) of the War Powers Resolution, which states that, "at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution."¹³ But in 1983, the Supreme Court threw the constitutionality of 5(c) into question. In *INS v. Chadha*, the Supreme Court struck down a legislative veto provision in an immigration statute, holding that in seeking to accomplish its goal in that case, Congress must adhere to the Constitutional requirements of bicameralism and presentment and "must abide by its delegation of authority until that delegation is legislatively altered or revoked."¹⁴

Many have understood the result of *Chadha* to include an effective neutering of this enforcement provision in the War Powers Resolution. If true, this is a consequential result. If Congress is forced to pass the equivalent of veto-proof legislation each time it wishes to end a war, this would place a heavy thumb on the side of unilateral presidential war power. And if this were a correct division of authorities, the President would effectively be able to bring the country to war and keep us there unless and until a two thirds supermajority of Congress called it off.¹⁵ This understanding would entirely subvert the constitutional scheme, which grants to Congress, not the President, the power to declare war.

¹¹ Rebecca Ingber, *Legally Sliding into War*, JUST SECURITY (March 15, 2021), <https://www.justsecurity.org/75306/legally-sliding-into-war/> (analyzing "the legal mechanisms through which presidential administration after administration has legally justified escalating, elongating, and expanding conflicts over the last two decades").

¹² See, e.g., *Holtzman v. Schlesinger*, 484 F.2d 1307, 1313 (2d Cir. 1973) (finding in an August 8, 1973 opinion that the Joint Resolution Continuing Appropriations for Fiscal 1974, which stated that after August 15, 1973 no funds could be expended to finance military activities in "in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia," was in fact evidence that "Congress has approved the Cambodian bombing."); *Da Costa v. Laird*, 448 F.2d 1368, 1369-70 (2d Cir. 1971) ("It was not the intent of Congress in passing the repeal amendment to bring all military operations in Vietnam to an abrupt halt.").

¹³ 50 U.S.C. 1544(c).

¹⁴ *INS v. Chadha*, 462 U.S. 919, 954-55 (1983).

¹⁵ As I discuss below, Congress could in theory refuse to appropriate funds, though this is extraordinarily difficult to do and even if accomplished might not ensure an immediate halt.

This is, frankly, an absurd result, and flips the burden for each branch to demonstrate it is acting with authority. Because the Constitution grants the power to declare war to Congress, it should be the President who bears the burden of demonstrating congressional authorization, not Congress who must de-authorize. This question has not historically arisen in the context of congressionally authorized wars, where it makes sense to require congressional legislation to repeal congressional legislation, but rather where courts are looking for other markers of Congress's support for the war. And when the courts look to the actions of the branches to find a "gloss" on their powers, surely a majority of Congress speaking its opposition should count as such and not acquiescence. The President holds a veto over Congress's ability to make law, but should not hold a veto over Congress's ability to speak. As Kristen Eichensehr explains, in certain cases, such as when "the executive argues that Congress has acquiesced in a claim of executive power," "courts, executive branch lawyers, and other interpreters can and should consider vetoed bills when construing the scope of presidential powers."¹⁶ Surely this is true for powers such as the war powers that the Constitution grants to Congress.

Nevertheless, we cannot be sure whether the courts would accept this reasoning nor how they would apply it in any given factual scenario. In recent decades, courts have shown great reticence to interfere with presidential war-making and deploy a range of doctrines to avoid even reaching the merits of such cases. It is therefore critical for Congress to use the other tools at its disposal for giving the War Powers Resolution teeth, as I address below.

The executive branch has long construed the President's Article II powers expansively

The most significant reason that the War Powers Resolution regime has not constrained presidential action is that presidential administration after administration has expansively construed its authorities—both constitutional and statutory—to act without returning to Congress. Executive branch lawyers in the Department of Justice Office of Legal Counsel (OLC) have in the last two decades blessed the President's constitutional authority to use force unilaterally under two different legal theories: 1) that the force used does not rise to the level of "war" as encompassed by the "declare war" clause; and 2) an expansive conception of self-defense. Under the first theory, OLC lawyers approve the President's use of force as long as they conclude the actions are in the "national interest" and fall below a conceptual threshold for constitutional "war," as defined by decades of OLC memoranda.¹⁷ Under this OLC precedent, "whether a particular planned engagement constitutes a 'war' for constitutional purposes [] requires a fact-specific assessment of the 'anticipated nature, scope, and duration' of the planned military operations."¹⁸ OLC points to the War Powers Resolution as accepting that understanding, citing the time limits it imposes as "allowing United States involvement in hostilities to continue for 60 or 90 days" (emphasis mine) rather than only placing an outer limit on the narrow authority the President already held to respond unilaterally to an attack.¹⁹

The result is that executive branch lawyers have found ways to legally justify actions ranging from, in just the last decade, strikes on Libya as part of a coalition acting under a UN Security Council Resolution, to strikes on Syria not authorized by such a resolution, to the recent strike on a facility in Syria used by groups it states are backed by Iran. In none of these contexts, or countless others when the President has used force unilaterally, was the President acting to repel an actual or imminent attack

¹⁶ Kristen Eichensehr, *The Youngstown Canon: Vetoed Bills and the Separation of Powers*, 70 DUKE L.J. 1145 (2021).

¹⁷ Memorandum Opinion for the Attorney General: Authority to Use Military Force in Libya, 35 Op. O.L.C. 1, 10 (Apr. 1, 2011), available at <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf>.

¹⁸ *Id.* at 8, quoting Letter Opinion for Four United States Senators: Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173, 179 (Sept. 27, 1994), available at <https://www.justice.gov/file/20306/download>.

¹⁹ *Id.*

on the nation, nor was the President required to act so precipitously that there was no time for consultation with Congress.

The second legal theory OLC has relied upon for the President's claim to use force unilaterally is an expansive conception of self-defense, derived in part from that original "repel sudden attacks" authority but in some modern examples bloated beyond recognition, untethered to a specific known threat or to an urgent need to act before Congress could convene. Two examples in particular bear highlighting. In 2001, after Congress had already authorized the use of force against al Qaeda and the Taliban, OLC asserted that the President could also use force, without authorization from Congress, not only to respond to the 9/11 attacks but to "prevent and deter future attacks" bearing no connection to 9/11.²⁰ And in a 2002 opinion, OLC concluded that the President had constitutional authority to attack Iraq, independent of the authorization Congress had already provided if he "were to determine that military action against Iraq would protect our national interests."²¹ OLC's examples of such national interests include the belief that Iraq's weapons program "might endanger our national security," or "destabilize the region" or even simply "were it the President's judgment that a change of regime in Iraq would remove a threat to our national interests."²² In neither of these cases was there an urgent need for the President to act before Congress could authorize force; to the contrary, in both of these cases Congress *had already acted*. That OLC issued each of these opinions in the aftermath of Congress meeting, deliberating, and passing statutory authorizations lays bare how far the self-defense argument moved from the need to "repel sudden attacks" before Congress is able to act. These represent a particularly extreme approach to the self-defense rationale that has not been to my knowledge reiterated in the years since, but it is important to be aware of the claims presidents have made in the past and could potentially make again if Congress does not reclaim its prerogative.

Of these executive branch legal justifications for expansive presidential power, the misinterpretation of the War Powers Resolution as delegating rather than constraining power can be resolved through statutory fixes, but executive branch claims to authority that rest on constitutional interpretation are less easily dialed back. That said, there are mechanisms Congress may deploy to reassert its prerogative in this space, which I will touch on below.

The executive branch has interpreted congressional delegations expansively

Finally, in addition to its interpretation of the War Powers Resolution as granting authority against the clear text, the executive branch has over the last two decades claimed expansive authority to act under the 2001 and 2002 Authorizations for the Use of Military Force (AUMF), far beyond what Congress could possibly have conceived at the time it passed those statutes.

The most notable of these legal moves is the concept of "associated forces," a term the executive branch crafted to identify groups that have connections to al Qaeda or the Taliban and meet relatively loose criteria. By relying on this concept, the executive branch has successfully asserted that its domestic statutory authority to use force and detain extends beyond the groups "responsible for the attacks" of 9/11, as the 2001 AUMF provides. This general legal theory, that the AUMF extends to "associated forces," has been accepted over time by the courts and Congress, in part based on the intimation from the Executive through the use of the term "co-belligerency" that this extension of the AUMF to "associated forces" had some clear authority or limiting principle derived from

²⁰ The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, 25 Op. O.L.C. 188 (Sept. 25, 2001).

²¹ Authority of the President Under Domestic and International Law to Use Military Force Against Iraq, 26 Op. O.L.C. 143 (2002).

²² *Id.*

international law. (In fact, while international law does regulate when a state may use force, it does not purport to regulate who within the state makes the decision to do so and does not provide a test for determining when a group falls within a congressional authorization.²³) Yet while the general theory of associated forces has been ratified by Congress and courts, at least in the detention context,²⁴ the specific groups against which the executive branch claims authority to use force have not.

The executive branch has extended this theory further with the concept of “successor” forces—groups that have past ties to al Qaeda but who may no longer share its mission, and even groups long disassociated from or in an open rift with al Qaeda—against whom the executive branch uses force under claimed congressional authority through the 2001 AUMF.²⁵ This has been the government’s domestic legal theory for the ongoing conflict with ISIS, a group that did not exist in 2001.²⁶

This position means that the executive branch, through its own legal interpretation of a 20-year-old congressional authorization—a statute that was intended to authorize an immediate response to the 9/11 attacks—and its application of that legal theory to facts it alone may access, may continuously update its authority to use force against new groups without going back to Congress. The result is that the President holds the unilateral power to extend the war in ways that Congress could not have known it was authorizing to groups that many Americans do not know exist (and that in many cases did not exist in 2001).

There is another use of unilateral authority that bears highlighting, which arises under both constitutional and statutory claims of presidential power: unit and partner self-defense. Unit self-defense is defense not of the state itself, but of the state’s armed forces.²⁷ It is naturally vital for the United States to be able to protect the soldiers that that we send abroad, and U.S. military regulations therefore assume authority to act in self-defense when they find themselves under attack. That authority is also a significant mechanism for escalation of conflict, whether intentional or not. As occurred in the case of al Shabab and other groups, these legal theories can end up justifying the United States using force, without congressional authorization, against a novel group that has never attacked us, in a state that has never attacked us, in defense of a perceived threat to another state’s or group’s forces. It is critical that members of Congress understand that slippery slope at the outset of the decision to deploy troops abroad.

Under the U.S. military’s Standing Rules of Engagement (SROE), issued by the Joint Chiefs, “Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent.”²⁸ These rules apply to U.S. armed forces that may be deployed abroad to contexts where their very presence may quite foreseeably inflame tensions. One state may consent to the presence of U.S. troops, providing the international legal justification for that move. But once there, a threat to these troops provides the grounds for significant discretion to escalate the situation, under the unit self-defense theory. Under the SROE, a mere “hostile act or

²³ Rebecca Ingber, *Co-Belligerency*, 42 YALE J. INT’L L. 67 (2017).

²⁴ National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, §§ 1021(c), (b)(2), 125 Stat. 1298, 1562 (2011) (affirming Congress’s understanding that the 2001 AUMF includes the authority to detain “[a] person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces”) (emphasis added).

²⁵ Robert Chesney, *The 2001 AUMF: From Associated Forces to (Disassociated) Successor Forces*, LAWFARE (Sept. 10, 2014), <https://www.lawfareblog.com/2001-aumf-associated-forces-disassociated-successor-forces>.

²⁶ Stephen W. Preston, *The Legal Framework for the United States’ Use of Military Force Since 9/11* (Apr. 10, 2015), <http://www.defense.gov/News/Speeches/Speech-View/Article/606662>.

²⁷ Charles P. Trumbull IV, *The Basis of Unit Self-Defense and Implications for the Use of Force*, 23 DUKE J. COMP. & INT’L L. 121 (2012).

²⁸ CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT (SROE)/STANDING RULES FOR THE USE OF FORCE (SRUF) FOR U.S. FORCES at 85 (Jun. 13, 2005).

demonstrated hostile intent” could provide sufficient basis to respond with force.²⁹ The result may be the U.S. military using force against non-state actors who do not have the capacity to threaten U.S. territory, in a state that has not attacked the United States, providing the groundwork for a future escalation with either that non-state actor or the state itself—and all without authorization from Congress or any opportunity for the American public to consider and debate whether this is a war they wish to initiate or otherwise become embroiled in.

The executive branch has further taken the position that these theories of self-defense extend to partner armed forces, including non-state partners, under a broad conception of “collective self-defense.”³⁰ As a result of concerns about this theory and its potential slippery slope,³¹ Congress included in the 2020 NDAA a requirement that the Secretary of Defense provide a report on the use of U.S. forces in “collective self-defense” of foreign nationals or property.³² This is necessary in part because the executive branch tends to construe these acts of unit or partner self-defense as falling within the existing statutory framework, and as a result need not be separately reported to Congress under the War Powers Resolution.

Considerations for Congress in resetting the balance

There have been many useful proposals for war powers reform put forward, and I look forward to discussing these with the committee.³³ As we do so, I suggest a few overarching considerations.

We need a holistic approach to war powers reform

First, we need a holistic approach to war powers reform. We need to think of the President’s use of unilateral force as an expanding balloon. If we press on one side of the balloon—for example if Congress were to repeal statutory authorizations—this will manifest as pressure on the other side of the balloon, leading the President to rely more significantly on sole constitutional authority. Consider that the Administration’s legal justification for the recent strike in Syria was not tied to an AUMF but relied on the President’s constitutional powers alone. The goals must be to release air from the balloon as a whole. To do that requires moving forward with both AUMF reform and general war powers reform, together.

Legislative solutions must have teeth

Second, legislative solutions must have concrete mechanisms to compel compliance by the executive branch. History suggests that courts will be exceedingly reticent to even evaluate whether

²⁹ *Id.*, at 83.

³⁰ Elvina Pothelet, *U.S. Military’s “Collective Self-Defense” of Non-State Partner Forces: What Does International Law Say?*, JUST SECURITY (Oct. 26, 2018), <https://www.justsecurity.org/61232/collective-self-defense-partner-forces-international-law-say/>.

³¹ Senator Tim Kaine, Letter to James Mattis, Sec’y of Defense (Oct. 2, 2018), available at <https://www.scribd.com/document/390037794/Kaine-Presses-Trump-Administration-on-the-Expansive-Use-of-Collective-Self-Defense-to-Justify-Military-Action-That-Bypasses-Congress>.

³² 50 U.S. CODE § 1550(A).

³³ For concrete proposals, see Tess Bridgeman, Ryan Goodman, Stephen Pomper & Steve Vladeck, *Principles for a 2021 Authorization for Use of Military Force*, JUST SECURITY (Mar. 5, 2021), <https://www.justsecurity.org/74273/principles-for-a-2021-authorization-for-use-of-military-force/>; Tess Bridgeman & Stephen Pomper, *Good Governance Paper No. 14: War Powers Reform*, JUST SECURITY (Oct. 30, 2020), <https://www.justsecurity.org/73160/good-governance-paper-no-14-war-powers-reform/>; Stephen Pomper, *The Soleimani Strike and the Case for War Powers Reform*, JUST SECURITY (March 11, 2020), <https://www.justsecurity.org/69124/the-soleimani-strike-and-the-case-for-war-powers-reform/>; Tess Bridgeman, Stephen Pomper, Matthew C. Waxman, Scott R. Anderson & Ona A. Hathaway, *The War Powers Resolution*, Tex. Nat’l Security Rev.: Pol’y Roundtable (Nov. 14, 2019), <https://tnsr.org/roundtable/policy-roundtable-the-war-powers-resolution/>.

presidents using force have exceeded their constitutional or statutory authority. Reform efforts must therefore include concrete consequences that Congress can impose directly, and clear rule-like requirements that make it simple for Congress, the courts, and others to judge compliance.

The most significant card Congress holds here is the power of the purse. Yet as you know better than I, it is extraordinarily difficult for Congress to affirmatively act to defund a war once begun. And yet history has also shown the perils of prosecuting a war without congressional support. The far better result would be for the President to avoid bringing the country to war without the support of Congress. A standing funding cutoff would resolve this quandary, by putting the President and executive branch officials on notice from the outset that if they cannot get congressional support for their actions, their funding has an expiration date. And it would give Congress as well an understanding of their own responsibility and role to play in the decision to go to war.

War powers reform should also include a more sharply defined trigger for when that clock starts and reporting requirements engage, as well as continuous reporting requirements throughout the duration of the conflict, not just at the outset. Longstanding authorizations to use military force should be repealed, and any revisions or new authorizations must account for how the executive branch has interpreted past authorities. AUMFs should include precise language regarding the targets of force, strict parameters for how and where that force is expected to be used, and clear rules for when the force authorization will sunset. Finally, Congress must be involved in decisions to deploy troops abroad, and those decisions must take into account the risk such deployments pose for creating new conflicts, should those troops use force in response to perceived threats to themselves or to partner forces.

International law should be a constraint, but not the trigger or limiting principle

Finally, international law plays many roles in U.S. war powers. It can be a constraint on the United States' and thus the President's powers, and it is most often thought of in that light. But it is also a source of authority. And within our domestic system, presidents and executive branch lawyers, as well as courts, have at times engaged in legal interpretation which, wittingly or not, deployed international law as a means of expanding the President's domestic power vis-à-vis Congress or as an exception to domestic law constraints.³⁴

For example, the Supreme Court held in *Hamdi v. Rumsfeld* that the 2001 AUMF giving the President authority to use force also implicitly authorized military detention, including of U.S. citizens on U.S. soil; it did so by citing the international law governing armed conflict that recognized detention in war by regulating it, in particular in stating that it "may last no longer than active hostilities."³⁵ So too when the Office of Legal Counsel justified the targeted killing of an American citizen abroad, it found an implicit exception to the normal statutory and constitutional prohibitions on killing U.S. citizens for killing that accords with the international laws of war.³⁶ In both of these cases international law provided an outer limit, but it was an outer limit that the President's domestic powers normally would not extend to reach; thus the Court and the executive branch used that limiting principle from international law to interpret expansively the President's domestic authorities.

To be clear, it is vitally important that the United States respect, and demonstrate respect for, international law. Adherence to international law is essential to retaining the trust and cooperation of

³⁴ Rebecca Ingber, *International Law Constraints as Executive Power*, 57 HARV. INT'L L.J. 49 (2016).

³⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507, 520.

³⁶ Memorandum from the Off. of Legal Counsel to the Att'y Gen: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi, Op. O.L.C. (Jul. 16, 2010), available at <https://www.justsecurity.org/wp-content/uploads/2014/06/OLC-al-Aulaqi-memo.pdf>.

our allies, to ensuring their continued ability in turn to work with us, and to our reputation as a partner who honors our commitments.³⁷ But it is worth bearing in mind that the executive wields significant control in determining the contours of the U.S. interpretation of international law. And particularly in the war-making space today, the U.S. executive branch's interpretation is often controversial, evolving, and not necessarily fully public. Thus, in the separation of powers context, using concepts drawn from international law as the trigger for consultation or reporting or the limiting principle on presidential power could risk granting the President significant discretion to determine the contours of his or her own authority.

Congress should make legislative triggers and limiting principles governing the U.S. use of force clear, transparent, and unequivocal. This means, for example, defining the trigger for consulting and reporting obligations in direct terms instead of importing a potentially too-high bar such as "hostilities" from international law. It means defining the precise groups that are covered by use of force authorizations, rather than nodding to ill-defined concepts like "co-belligerency." And it means stating clearly that the executive branch must return to Congress before using force against new groups not included in any given statutory authorization.

Conclusion

Executive branch officials will not easily surrender the authority that has accreted to that branch over the last many decades. They may push back with arguments that the context of warfighting has evolved dramatically since the founding. We face different kinds of threats today, threats that have the capacity to create significant harm on a scale unimaginable then. This is true. But the President and Congress also find themselves with dramatically different capabilities. Convening Congress need not require days of travel. Consultation itself could be instantaneous. The President, for his part, has command of extraordinary powers that did not exist at the founding, including our extraordinary standing armed forces. As a practical matter, that standing force gives the President the ability to act unilaterally in ways that the founders may not have foreseen at a time when entry into war would have required Congress first raising an army. Having created that standing force, Congress needs now to more strongly assert its prerogative to regulate its use.

Some will likewise argue that war powers reform would be dangerous, that it might hamstring the President's ability to defend the nation. But let us be clear. Without a change to the Constitution, the President will never lack authority to stop an actual attack on the nation. You need not worry that you will encroach too far; that has never been Congress's problem in this space. And rest assured that the executive branch will continue to aggressively protect the President's prerogatives.

There is one more risk that I want to raise. There have been times in history where presidents have been reticent to involve Congress in war-making decisions not because they fear a lack of support for their use of force, but because they fear Congress will push for even more aggressive action for reasons based in politics rather than sound policy. Involving Congress does not necessarily entail less war and it does not necessarily ensure more prudent decision-making. No decision-making framework can ensure this. But the framers' design is intended to promote deliberation, prevent rash decisions, and encourage transparency and accountability in government decision-making, values that are critical to restoring public trust in our democratic institutions.

While the nature of the groups that the United States is fighting today may be a somewhat new feature of war powers conversations, the reality of presidential unilateralism is not. For decades members of Congress have raised concerns with presidential unilateralism. But accomplishing war

³⁷ Ashley Deeks, *Intelligence Communities, Peer Constraints, and the Law*, 7 HARV. NAT'L SEC. J. 1 (2016).

powers reform requires political will and a perfect storm of events. A public increasingly weary of forever war, a committed Congress *and* a President who has spoken favorably of war powers reform may just provide that perfect storm. These are consequential war and peace decisions, and we need to ensure that they are taken in a way that respects our democratic system—with transparency and deliberation, and with an opportunity for the people’s representatives in Congress to weigh in, just as our constitution directs. No President will ever unilaterally cede the authority that has accreted in the executive branch. Executive branch officials and lawyers view it as part of their job to protect executive power. It is up to members of Congress to protect theirs.