

Testimony of Dr. Tess Bridgeman¹
Prepared Testimony to the Committee on Rules
United States House of Representatives

March 23, 2021

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

Introduction

Chairman McGovern, Ranking Member Cole, and Members of the House Rules Committee, thank you for the opportunity to participate in this hearing on Reforming the War Powers Resolution for the 21st Century. I appreciate this Committee’s continued bipartisan focus on Congress’ authority and responsibility vis-à-vis the Executive branch. This Committee’s hearing last March entitled “Article I: Constitutional Perspectives on the Responsibility and Authority of the Legislative Branch” addressed concern over the erosion of Congress’ constitutional prerogatives over several decades. As Ranking Member Cole stated, “[t]hrough the shift has been gradual, Congress has not only ceded its authority at times, but Presidents of both parties have also claimed powers that belonged to the legislative branch.” I could not agree more – resetting the balance of powers between the President and Congress is an imperative that transcends political party and becomes more urgent with each presidential administration’s accretion of greater authority.

This dynamic is nowhere more important than in relation to the war powers. As Chairman McGovern rightly reminds us, this mighty power was “put in Congress’ hands because [Congress is] closest to the people.”² It is important to acknowledge the argument that the complexity of the modern era makes Congress too slow compared to the agility of the Executive branch to make decisions about the use of armed force abroad. There is some truth to this comparison. But the critique fundamentally misses the point – the framers vested Congress with the authority to decide whether to take the nation to war because of, not in spite of, its deliberative pace.³ Indeed, the Constitution vests Congress with the power to declare war, raise

¹ Co-Editor-in-Chief, *Just Security*, and Senior Fellow and Visiting Scholar, NYU Law School Reiss Center on Law and Security; Former Deputy Legal Adviser to the National Security Council, Special Assistant to the President, and Associate White House Counsel.

² The framers’ desire to ensure the elected officials closest to the people have a meaningful voice in decisions on whether to go to war meant the House of Representatives, in particular, “had a vital role to play in restraining military conflict.” David Golove, *The American Founding and Global Justice: Hamiltonian and Jeffersonian Approaches*, 57 VA. J. INT’L L. 621, 625 (2018) (“The people, [the Founders] imagined, were pacifistic and would resist wars and the human suffering and taxes that military ventures inevitably produced.”).

³ Brian Egan and Tess Bridgeman, *Top Experts’ Backgrounder: Military Action Against Iran and US Domestic Law*, JUST SECURITY (June 21, 2019), <https://www.justsecurity.org/64645/top-experts-backgrounder-military-action-against-iran-and-us-domestic-law> (“This design ‘is a feature, not a bug’—it ‘anticipates that Congress would be less inclined to go to war’ than the President.”). See also John Hart Ely, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 3–4 (1993).

and support armies, and provide and maintain a navy, alongside a host of related powers designed to ensure Congress would have authority to regulate situations that could lead to armed conflict,⁴ in order to protect the nation from getting into wars too easily or for unpopular purposes. Moreover, the framers anticipated that the President may have to act quickly, without prior congressional authorization, to repel sudden attacks against the United States.⁵ But this power was purely defensive in nature and was limited to situations of imminent peril.

Today, however, in the view of the Executive branch, whether or not the President has authority under Article II to use military force without congressional authorization is not even framed as a question of whether the nation or its citizens are in imminent peril. The Department of Justice's Office of Legal Counsel (OLC) assesses the question using an increasingly elastic two-part test: whether the President has articulated a "national interest" in using force – an expansive concept in recent practice that aims merely to "situate [the President's stated] interests within a framework of prior [Executive branch] precedents;"⁶ and whether the "anticipated nature, scope, and duration" of the military action would amount to "war in the constitutional sense," which has been defined narrowly to mean "prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period."⁷ It is only the latter type of engagement that is understood to implicate the power reserved to Congress by the Declare War clause, with Congress' other war-related powers not factoring into the Executive's analysis.

Even extensive engagements in volatile situations that involve using force against sovereign nations have not been enough in the view of the Executive branch to seek congressional authorization: the extensive bombing campaign in Libya in 2011 under President Obama, strikes against Syria in 2017 and 2018 and the 2020 killing of Iranian General Qassem Soleimani in Iraq under President Trump, operations to enforce an embargo on Haiti followed by the deployment of over 20,000 U.S. troops to the country and the subsequent interventions in Bosnia and Kosovo under President Clinton – whether or not you agree with the wisdom of any of these uses of military force, it should be plain that none were aimed at defending the United States or its nationals, and none were authorized by Congress. Many of these engagements (among others) have crossed the line into armed conflict with another state, or gotten dangerously close to doing so, but in the Executive's view still did not constitute "war" in the "constitutional sense." Contemporary conflicts against non-state actors also create special problems. The Executive branch's increasing reliance on the deeply contested "unable or unwilling" theory, under which it

⁴ See U.S. Const. art. I, § 8, cl. 11 (authority to declare war, grant letters of marque and reprisal, and make rules governing capture on land and water); *id.* cl. 12 (authority to fund military operations); *id.* cl. 13 (authority to provide and maintain a navy); *id.* cl. 14 (authority to make rules regulating land and naval forces); *id.* cl. 15, 16 (authority relating to raising and providing for militias); *id.* cl. 18 (authority to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States").

⁵ See, e.g., The Records of the Federal Convention of 1787, at 318 (Max Farrand ed., rev. ed. 1966).

⁶ April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. slip op. (2018), <https://www.justice.gov/olc/opinion/file/1067551/download> (according to OLC, "national interests" sufficient to justify use of force without congressional authorization extend well beyond self-defense or the rescue or protection of US nationals, to include "responding to humanitarian catastrophes," "assistance to allies," "promoting regional stability," and "support for the United Nations").

⁷ *Id.* At 9 (citing *Authority to Use Military Force in Libya*, 35 Op. O.L.C. at *8).

uses force within non-consenting states, has brought the United States directly into firefights with Russian forces in Syria, for example, again without Congress having a say.⁸

How did we get so far from the intended balance of powers in the Constitution, and indeed, the words in the document itself? The short answer comes in two parts: (1) Executive branch precedent has become the dominant – sometimes the only – source consulted in determining whether presidential action is lawful, and (2) the Executive branch has been left by its co-equal branches to police the limits of its authority itself. As a result, over time, administrations of both political parties generally have interpreted the sources of presidential authority more and more expansively, and the limits on that authority more and more narrowly. These interpretations in turn create precedent used to justify further incremental expansions of presidential authority.⁹ Only in rare circumstances does the Executive branch disclaim authority it has assigned to itself through this cycle of interpreting its own prior practice.

I served as Deputy Legal Adviser to the National Security Council and Associate Counsel to the President, and prior to that as a civil servant at the State Department in the Office of the Legal Adviser in both the Office of Political-Military Affairs and as Special Assistant to the Legal Adviser. In those roles, I was deeply involved in the legal-policy process that conscientiously and seriously deliberated on these issues. Nevertheless, the Obama Administration’s legacy, like those before it, was an expansion, operation by operation, of the claimed scope of the President’s authority to use force.

These expansions came not only in the form of constitutional interpretation, but also interpretations of the 2001 Authorization for Use of Military Force (2001 AUMF).¹⁰ Through Executive branch interpretation alone, that authorization was first expanded to cover new armed groups known as “associated forces” of al-Qa’ida and the Taliban (the two groups described but not named in the 2001 AUMF). The claim was that there is *implied* authority under the 2001 AUMF to wage war against “co-belligerents” of al-Qa’ida and the Taliban, although there was essentially no legal content to the term “co-belligerency” in international or domestic law that would inform understandings of how a group attains that status or what the limitations of the concept might be.¹¹

Interpretations of the 2001 AUMF subsequently expanded to cover so-called “successor forces” in order to bring ISIS within the authorization’s scope, even though ISIS was in open hostilities with the statute’s true target, al-Qa’ida, when the Executive branch adopted this theory in 2014, and despite the war being conducted in Iraq and Syria, not Afghanistan. These interpretations allowed the President to extend the armed conflict to groups that did not exist at the time of the

⁸ Thomas Gibbons Neff, *How a 4-Hour Battle Between Russian Mercenaries and U.S. Commandos Unfolded in Syria*, N.Y. TIMES (May 24, 2018), <https://www.nytimes.com/2018/05/24/world/middleeast/american-commandos-russian-mercenaries-syria.html>.

⁹ Rebecca Ingber, also testifying today, has discussed this dynamic in detail. See Rebecca Ingber, *Legally Sliding into War*, JUST SECURITY (Mar. 15, 2021), <https://www.justsecurity.org/75306/legally-sliding-into-war/>.

¹⁰ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

¹¹ See Rebecca Ingber, *Co-Belligerency*, 42 YALE J. INT’L L. (2017), at 74-79.

September 11, 2001 attacks (including ISIS), and to countries that were not involved in harboring or otherwise aiding the perpetrators, without seeking authorization from Congress.¹² At every turn, these increasingly expansive interpretations of the power conferred on the President by the 2001 AUMF were justified on the basis that Congress must have *intended* to authorize military operations against these new armed groups in new countries. Whether or not that was a fair assessment of congressional intentions, Congress did not object, and in some cases, such as with the codification of detention authority in the NDAA,¹³ blessed parts of the Executive’s expansive claims.

Two additional internal Executive branch dynamics contribute to the incremental expansions of claimed presidential power. First, these broader and more aggressive interpretations can occur even when Executive branch lawyers internally disagree on a particular interpretation of Article II or of an AUMF. Second, some Executive branch legal offices take the view that the question before them in any given case is whether a low bar of legality is met – namely, whether it is “legally available” for the President to engage in the proposed military operation – rather than offering what the “best view of the law”¹⁴ would counsel. In the hardest cases, this can boil down to a question of whether there is a non-frivolous case to be made for the presidential exercise of authority. This should not be the standard applied in matters of such great importance to our servicemembers and their families, to our foreign policy, and to the health of our democracy.

What is Congress to do in the face of this increasing Executive branch usurpation of Article I war powers? The War Powers Resolution (WPR)¹⁵ was intended to remedy the imbalance between the political branches in matters of war and peace that was already stark at the time of its enactment in 1973. On its face, it gives Congress the power to stop unauthorized war, but for a variety of reasons, in practice it has not constrained Presidents nearly to the extent intended. While its reporting provisions have had an important transparency-forcing function, it lacks definitions of key terms, its primary enforcement mechanism has been gutted by post-enactment Supreme Court case law, and it was written against the backdrop of Cold War conflicts that look very different from many of the military engagements we see today.

But as then-Senator Joe Biden wrote in 1988, while “the [War Powers] Resolution contains readily identifiable flaws,” “they are correctable.”¹⁶ I firmly believe this remains true, and that correcting the WPR’s flaws is within Congress’ grasp today.

¹² In effect, the limiting clauses have been read out of the authorization. The 2001 AUMF authorized the President to use force specifically against those who “planned, authorized, committed, or aided” the September 11, 2001 attacks (“or harbored such organizations or persons”), but also for a specific purpose: “in order to prevent any future acts of international terrorism against the United States *by such nations, organizations or persons.*”

¹³ National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, §§ 1021(c), (b)(2), 125 Stat. 1298, 1562 (2011).

¹⁴ See Mary B. DeRosa, *National Security Lawyering: The Best View of the Law as a Regulative Ideal*, 31 GEO. J. LEGAL ETHICS 277 (2018),

<https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3156&context=facpub>.

¹⁵ War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973).

¹⁶ Joseph R. Biden, Jr. & John B. Ritch III, *The War Power at a Constitutional Impasse: A “Joint Decision” Solution*, 77 GEO. L. J. 367 (1988),

<https://heinonline.org/HOL/LandingPage?handle=hein.journals/glj77&div=20&id=&page=>

War Powers Resolution Reporting Practice

I recently created the War Powers Resolution Reporting Project¹⁷ at NYU Law School's Reiss Center on Law and Security (RCLS), which analyzes the war powers reporting practices of every President since the WPR was enacted, in the hopes that providing a comprehensive understanding of practice to date can help lay the groundwork for reform. The interactive graphics and searchable database highlight a number of phenomena I observed directly when serving in the Executive branch. For example, most Presidents aim to comply with the WPR's reporting provisions most of the time, including the timely submission of reports required within 48-hours of introducing forces into hostilities (or "situations where imminent involvement in hostilities is clearly indicated by the circumstances"), deploying combat-equipped forces abroad, or substantially enlarging such deployments.

These 48-hour reports are intended to provide Congress with an opportunity to weigh in on situations that could lead the nation into armed conflict. The quality and timeliness of these reports matter: they form the foundation for the rest of the WPR framework. Reports of introductions into hostilities (or imminent involvement in hostilities) trigger the WPR's 60-day termination clock (extendable to 90 in certain circumstances), at which point the President must "terminate" the use of armed forces unless Congress has authorized their continued use.

But the data also illustrate significant flaws in the WPR's reporting requirements and provide a concrete understanding of how often Presidents engage in uses of force without congressional authorization in circumstances that extend well beyond the core Article II power to defend the United States or its nationals from sudden attack. Out of the 34 reports of "hostilities" (or "imminent involvement in hostilities"), 17 are for humanitarian, stabilization, or advise and assist missions – the types of military engagements that have traditionally been understood to require congressional authorization, like the interventions in Kosovo, Haiti, Libya, and Syria described above.

To be sure, the President will always retain the authority to defend the United States against imminent attack and to rescue citizens in peril. Congress cannot, and should not have to, authorize in advance every emergency embassy evacuation, for example. But it matters that the authority of the branch the Constitution vested with the power to decide whether to go to or stay at war has diminished so greatly. Our servicemembers and their families deserve no less than an active and engaged Congress that authorizes their missions with purpose when doing so is wise and lawful, and that makes difficult decisions about when they should *not* be deployed into harm's way, even in some cases when the President believes force ought to be used. Our democracy requires public debate on these difficult choices, and that debate requires leadership by the representatives of the people. Without Congress stepping up to seize its Article I war powers, presidential deference to Congress' constitutional role will be the exceedingly rare exception¹⁸ rather than the norm.

¹⁷ The database, interactive graphics, and analysis of the War Powers Reporting Project are available at: <https://warpowers.lawandsecurity.org>. RCLS Executive Director Rachel Goldbrenner, RCLS student scholars, and RCLS staff have been instrumental in establishing the project and maintaining it as a living resource.

¹⁸ One of these rare cases was in 2013, when President Obama stated it was his "judgment as Commander-in-Chief" that strikes against Syria were, on balance, appropriate, but that he would decline to use his Article II authority

Proposed Reforms

In this Committee’s hearing last March, Chairman McGovern asked: “the question is whether we are going to implement reforms and take our power back.” I believe it is not too late to restore a meaningful measure of these mightiest of powers to the closest representatives of the people.¹⁹ A common sense, mutually reinforcing set of reforms is possible. My proposals here focus on key issues where reform is necessary and highlight the ways in which these measures would work together to shore up Congress’ authority while leaving sufficient space for the President to act in self-defense of the United States and its nationals when necessary. I hope these proposals serve as a useful starting point for discussion.

1. Define the President’s Authority

The WPR’s “Purpose and Policy” section provides Congress’ view that the President’s constitutional powers to introduce U.S. forces into hostilities (or situations where imminent involvement in hostilities is clearly indicated by the circumstances) may be “exercised only 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.”²⁰ This is consistent with the framers’ intended allocation of powers in the Constitution, although it is radically different than the broad view of presidential power expressed by the Executive branch in recent decades.

The WPR should be updated to delineate the circumstances when the President may use force without prior congressional authorization. One possible formulation is as follows:

The President retains authority under Article II of the Constitution (1) to repel an imminent or sudden attack on the United States, its territories, or its nationals; and (2) to protect, evacuate, or rescue U.S. nationals in situations involving a direct and immediate threat to their lives.

This recognizes that the President must be able to act quickly in situations where immediate defense of the United States or its nationals are necessary. But it also leaves to Congress the

(which he argued was sufficient) unilaterally because, “in the absence of a direct or imminent threat to our security,” it is “right” to “take this debate to Congress.” He added that “our democracy is stronger when the President acts with the support of Congress” and “America acts more effectively abroad when we stand together.” President Barack Obama, Remarks by the President in Address to the Nation on Syria (Sept. 10, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria>; *see also* Tess Bridgeman, *Trump’s War Powers Legacy and Questions for Biden*, JUST SECURITY (Feb. 23, 2021), <https://www.justsecurity.org/74903/trumps-war-powers-legacy-and-questions-for-biden/> (noting that this approach “implies the view (which is in my view incorrect) that going to Congress in such a situation is the ‘right’ and ‘stronger’ choice, but ultimately a discretionary one.”).

¹⁹ Stephen Pomper has noted that the “idea of war powers reform is hardly new,” but that there may now be reasons to believe meaningful change is possible: “we are in a season of firsts—the first two war powers resolutions within the 1973 framework passed by majorities in both houses; the formation of the first bipartisan war powers caucus in the House,” and serious interest among civil society actors. Stephen Pomper, *The Soleimani Strike and the Case for War Powers Reform*, JUST SECURITY (Mar. 11, 2020), <https://www.justsecurity.org/69124/the-soleimani-strike-and-the-case-for-war-powers-reform/>.

²⁰ War Powers Resolution, Pub. L. No. 93-148, § 2(c), 87 Stat. 555 (1973).

power assigned to it by the Constitution to decide whether to initiate force for other purposes – such as humanitarian or stabilization operations or advise and assist operations that might lead us into armed conflict. When considered in the context of the WPR’s termination clock for unauthorized activity, it also ensures that the authority to repel attacks and protect nationals does not bleed into an authority to prosecute a war without congressional authorization once the immediate threat is met.

2. Define “Hostilities”

The term “hostilities” is arguably the most important in the WPR, but it is not defined in the statute. It is used in three key parts of the statutory framework: (1) introductions into “hostilities” trigger the 48-hour reporting requirement; (2) those “hostilities” reports trigger the 60-day termination clock;²¹ and (3) the expiration of that clock, should “hostilities” be ongoing after 60 days, in turn triggers the termination requirement absent congressional authorization.

Executive branch interpretations of the term “hostilities” are the other side of the coin of interpretations of existing force authorizations: while a *broad* interpretation of the 2001 AUMF has expanded presidential power to use force, a *narrow* interpretation of “hostilities” reduces the WPR’s constraints on the President’s use of force without congressional authorization. Indeed, the Executive has used narrower and narrower interpretations of the term since 1975, when the Ford administration adopted a definition that would result in far less constraint on the President than the WPR’s drafters intended. The legislative history of the WPR describes “hostilities” as encompassing a “state of confrontation in which no shots have been fired” but there is “a clear and present danger of armed conflict.”²² The goal was to ensure the President would seek authorization from Congress in volatile situations *short* of a shooting war.

The Executive, however, has long said “hostilities” for war powers purposes includes only situations where U.S. forces “are actively engaged in exchanges of fire with opposing units of hostile forces.” Presidents of both parties have argued that situations shy of “full military engagements,” in which “exposure” of U.S. forces is limited, or in which military engagements are “intermittent,” do not trigger the WPR’s 60-day termination rule. In short, Presidents have given themselves the flexibility to claim the termination provisions of the WPR simply do not apply to most military engagements because they do not qualify as “hostilities.”

Members of Congress have long criticized the Executive’s interpretation of “hostilities,” but recent legislation passed pursuant to the WPR’s priority procedures aimed at ending U.S. support for the Saudi-led military intervention against Houthi rebels in Yemen shows for the first time that bipartisan majorities in both houses have a much more expansive view of hostilities than the Executive branch. It also shows members are willing to go on record rejecting the Executive’s constrained view.

Congress should amend the WPR to include a definition of “hostilities” focused on the use of lethal force. To account for modern conflicts, the definition should clearly state that the term “hostilities” encompasses uses of force in any domain (land, sea, air, cyber, or otherwise),

²¹ The 60-day period is extendable to 90 days in specific circumstances. *Id.* at § 5(b).

²² H.R. Rep. No. 547, 93d Cong., 1st Sess. 7 (1973).

including those deployed via remote weapons systems (such as unmanned aerial vehicles or cyber weapons). And to preclude Executive claims that the termination clock starts and stops with each discrete use of force in an escalating series of hostilities such that the clock never runs for more than a day or two at a time, the definition should specify that low-intensity or “intermittent” engagements are also covered.

3. Shorten the Termination Clock

In practice, given how broadly the Executive branch construes the President’s unilateral authority to use force and how little push back its co-equal branches have offered, the WPR’s 60-day clock that requires termination of ongoing hostilities that have not been authorized is the only meaningful external constraint on the President’s Art. II power. But two failings of the current WPR framework have made it less effective than it might otherwise be. First, as described above, by narrowing the definition of “hostilities,” the Executive has claimed that most military engagements do not implicate the termination clock at all (and as described above, the solution is a clear statutory definition of the term “hostilities”).

Second, the 60-day period, sometimes extendable to 90, has come to be treated as “more or less free time during which the president is permitted to launch operations on the authority of his Art. II powers alone.”²³ This can lead to an assumption that so long as operations can be wound up in two or three months, they can be launched without congressional involvement. In practice, this creates situations where the need to “finish” a military engagement that has commenced leads to further weakening of the WPR framework. Take these two examples:

In both the Kosovo and Libya interventions (1999 and 2011 respectively), which were planned as essentially humanitarian in nature, this calculation proved wrong. Neither campaign concluded within [60 days]. But the proverbial bell is very hard to unring once forces are introduced. Having launched the U.S. military, the Executive Branch was not about to pull it back before it had achieved its objectives... and Congress was not about to force it to do so. Instead, the Executive Branch found ways to interpret the WPR [narrowly] so that the 60/90-day clock did not apply to those operations....²⁴

A straightforward solution is to shorten the termination clock. It should be long enough that the President can still complete an operation that *does* fall within his or her unilateral authority to use force – repelling a sudden attack, evacuating an embassy, rescuing hostages. In practice, a majority of the operations that fall into this category take only a few days, but for the sake of caution (after all, it is the defense of the nation at issue), the period should be at least two weeks. But to avoid the temptation to start engagements that are not defensive in nature, or to turn defensive strikes into escalatory conflicts, the termination provision should be much shorter than the current 60 days. This would also incentivize the Executive to engage in far more meaningful consultation with Congress before commencing military operations in order to secure support and to keep Congress fully informed once any hostilities begin.

²³ Tess Bridgeman & Stephen Pomper, *Good Governance Papers No. 14: War Powers Reform*, JUST SECURITY (Oct. 30, 2020), <https://www.justsecurity.org/73160/good-governance-paper-no-14-war-powers-reform/>.

²⁴ *Id.*

4. Enforcement: Automatic Funds Cut-Off

Priority procedures that ensure votes are taken on terminating or authorizing presidential uses of force are imperative. They must remain and, if possible, be strengthened in any WPR modernization legislation. Retaining an automatic termination provision requiring the President to cease the unauthorized use of military force unless Congress votes to authorize it within a certain period of time is also crucial. But these tools are not enough.

Following the Supreme Court's invalidation of the legislative veto in its 1983 decision *INS v. Chadha*,²⁵ the WPR's key enforcement mechanism – passage of a concurrent resolution through both houses to stop unauthorized military action by the President²⁶ – was essentially nullified. We are left with the intended balance of powers turned on its head: instead of a majority of Congress having the power to authorize the President to initiate the use of force, a *supermajority* is required to *stop* the President from doing so.

A WPR modernization bill should include an automatic funds cut-off linking presidential non-compliance with the WPR's termination provision to Congress' core Article I power of the purse. An automatic de-funding mechanism does not require a vote, let alone a supermajority in both houses, to take effect. It has the added benefit of being backed by the Anti-Deficiency Act,²⁷ which makes it illegal to “make or authorize an expenditure or obligation exceeding an amount” appropriated or funded for a specified purpose. This is a powerful disincentive for Executive branch officials.

Adding teeth back into enforcement is mutually reinforcing with shortening the 60-day clock. If the Executive knows it must either obtain authorization or cease expenditures within, say, a few weeks, it arguably will be more likely to use only that force that is absolutely necessary in self-defense, rather than beginning a build-up for more extensive operations.

Congress should ensure that a funds cut-off is comprehensive and clear, as any ambiguity will undermine the purpose of the provision. One possible formulation²⁸ is as follows:

Notwithstanding any other provision of law, no funds appropriated or otherwise made available under any law may be obligated or expended for any activity by United States Forces that is subject to the section 4(a) 48-hour reporting requirement herein [the hostilities prong], and for which prior congressional authorization has not been obtained, beyond 20 days from the date the 48-hr report was provided or should have been provided, whichever is earlier.²⁹

²⁵ 462 U.S. 919, 954-55 (1983).

²⁶ War Powers Resolution, Pub. L. No. 93-148, § 5(c), 87 Stat. 555 (1973).

²⁷ 31 U.S.C. § 1341 (2019).

²⁸ See Tess Bridgeman and Stephen Pomper, *Good Governance Paper No. 14: War Powers Reform*, JUST SECURITY, Oct. 30, 2020, available at <https://www.justsecurity.org/73160/good-governance-paper-no-14-war-powers-reform/>.

²⁹ Jack Goldsmith and Bob Bauer have proposed the following formulation: “No funds made available under any provision of law may be obligated or expended for any use of force abroad inconsistent with the provisions of this act.” BOB BAUER & JACK GOLDSMITH, *AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY* (2020).

The efficacy of this approach depends on including a clear definition of “hostilities” in modernized legislation, lest the Executive simply claim that the activity at issue does not constitute “hostilities” and the automatic funds cut-off is thereby not implicated.

5. Meaningful Reporting and Transparency

Section 4(a) of the WPR requires that the President submit to Congress the following information in 48-hour reports: “(A) the circumstances necessitating the introduction of United States Armed Forces; (B) the constitutional and legislative authority under which such introduction took place; and (C) the estimated scope and duration of the hostilities or involvement.”³⁰

The Executive branch is often reluctant to offer any more information than is absolutely required in reports to Congress; “over-reporting” is seen as potentially setting a precedent that may not be sustainable in the future. (The counterargument, of course, is that the President’s actions may be more likely to be seen as justified if more information is provided.) In the war powers context, there may be additional reasons to offer less detailed information, ranging from a legitimate need to maintain the classification of operational information to a desire to avoid scrutiny. The net result is that absent specific and detailed reporting requirements, the Executive is likely to provide broad and minimal information.

The good news about the WPR’s existing reporting provisions is that, for the most part, Presidents intend to comply with them and generally succeed in notifying Congress of covered activities within 48 hours. In other respects, however, reporting practice across administrations of both parties shows that these requirements are woefully inadequate to provide Congress the information it needs to do its job.

The first deficiency is that the WPR does not require the President to state which of the statute’s three reporting requirements has been triggered – an introduction into hostilities (or a situation where imminent involvement in hostilities is likely), a combat-equipped introduction, or a substantial enlargement thereof. Every President except Ford, in his report of the retaking of the *SS Mayaguez* in 1975, has declined to cite section 4(a)(1) directly. In most instances, this leaves Congress to guess whether the President believes the termination clock has been triggered. There is a simple solution: the President should be required to state in unambiguous terms whether hostilities or the imminent involvement in hostilities are implicated.

Second, the information that is statutorily mandated to be included in 48-hour reports is often provided in broad language, with two out of three of the required sections appearing to be “boiler-plate” cut and pastes from previous notifications. The constitutional or legislative authority section is generally a rote recitation at a broad level of generality that the operation was directed pursuant to the President’s authority under Article II of the Constitution, with no attempt to explain why the operation or deployment at hand fits within the President’s unilateral authority and does not encroach on Congress’. In addition, the estimated scope and duration is

³⁰ War Powers Resolution, Pub. L. No. 93-148, § 4(a), 87 Stat. 555, 555–56 (1973).

generally so vague as to be meaningless, except when the President can report a completed operation (in which case the future scope and duration are moot issues).

Presidential reporting practices have varied more widely in describing the “circumstances necessitating introduction.” But for the most part, in recent decades even this information has been relatively vague. The most recent 48-hour report, the first of the Biden administration, did not even mention the target of the use of force by name (instead referring to “Iran-supported non-state militia groups”) even though a Pentagon press release the day of the strikes did name two specific groups (Kait’ib Hezbollah and Kait’ib Sayyid al-Shuhada).³¹ It also provided only a general flavor of the threat environment that would have “necessitated” the introduction into hostilities, making it difficult to assess whether the President was indeed acting in the face of an imminent attack. And, consistent with presidential practice since Ford, the word “hostilities” is not used in the report. The report did, however, return to the best practice of providing an international legal basis for the activity, although stated at a relatively high level of generality as per usual Executive branch practice.

Fortunately, there are straightforward ways to enhance the quality of information the President must provide in 48-hour reports. The WPR should be updated to require that reports state clearly whether the hostilities prong is triggered, as stated above, and if so, the following information also should be required to ensure 48-hour reports are not a box-ticking exercise:

- the specific factual circumstances that necessitated the introduction, including any reasonably available information about the threats posed to the United States or its nationals that was relied upon in determining the introduction was necessary;
- the domestic and international legal basis³² for the introduction;
- the specific country (or countries) and/or organized armed group(s) against which the use of force is occurring or is expected to occur based on the circumstances;
- the estimated risk to U.S. forces, other U.S. persons or property involved in the operations, and to civilians; and
- an assessment of the potential for escalation.

If Congress is to vote on authorizing the hostilities at issue, or allow them to terminate, it needs a meaningful opportunity to understand the reason for the introduction and its implications. This enhanced reporting should not be seen as too onerous, as the Executive generally prepares all of this information during the policy and legal processes that precede the use of military force.

Fourth, an updated WPR must not leave a months-long vacuum between an initial 48-hour report and the periodic reports required only every six months, particularly in cases of “hostilities.” As I’ve proposed previously, Congress should require reporting at least every 7 days, or until such time as the President certifies that hostilities or the serious risk thereof are no longer ongoing. Such reports should describe at least the following: (1) any material change in information from

³¹ Press Release, U.S. Dep’t of Def., U.S. Conducts Defensive Precision Strike (Feb. 25, 2021), <https://www.defense.gov/Newsroom/Releases/Release/Article/2516518/us-conducts-defensive-precision-strike/>.

³² The WPR Reporting Project found that “over half of the 48-hour reports provide enough information to identify an international legal basis for the reported activity, even though doing so is not required by the text of the War Powers Resolution.” Most reports marking the introduction of U.S. armed forces into hostilities provide the international legal basis for the activity. *See* <https://warpowers.lawandsecurity.org>.

the original 48-hour report; (2) the estimated cost of any operations to date; (3) any other information as may be required to fully inform Congress of the circumstances of the operations.

6. Do Not Leave Stretched and Stale Force Authorizations on the Books

The Executive's broad interpretations of the statutory authority provided by Congress in existing force authorizations can only be meaningfully addressed by repealing the decades old AUMFs still languishing on the books.³³ Representatives Meijer, Gallagher, Golden, and Spanberger have introduced the "Outdated AUMF Repeal Act," repealing the 1957, 1991, and 2002 AUMFs.³⁴ This is a commonsense step that is long overdue. So long as these authorizations remain on the books, in the words of Rep. Spanberger, they are "vulnerable to being exploited by future administrations to justify sending American servicemen and women into hostilities."³⁵ Removing these authorizations will also put Congress on the right path towards reclaiming its constitutional war powers and having "the courage to vote on decisions of war and peace."³⁶ None of these AUMFs are operationally necessary – their repeal should be uncontroversial.

But it is the 2001 AUMF that has been stretched beyond recognition by successive presidential administrations of both parties, and that law must also be repealed if Congress is to make meaningful progress in reclaiming its authority. To the extent circumstances may require a new AUMF to replace the 2001 AUMF, it must include explicit boundaries to avoid repeating the situation we find ourselves in today. Based on our experience with the 2001 and 2002 AUMFs, I have put forward seven simple principles that should guide any future effort to enact a new AUMF with co-authors Steve Vladeck, Ryan Goodman, and Stephen Pomper. In short, any force authorization should clearly specify who the President is authorized to use force against; explicitly preclude force against other groups or states; sunset after no more than three years to ensure each Congress decides whether armed conflict must continue; require that the exercise of the authority granted be in compliance with U.S. international legal obligations; and require meaningful transparency to keep Congress and the American people informed.³⁷ These principles are largely consistent with the five principles for AUMF reform put forward by Chairman McGovern and Representatives Lee, Meeks, Schiff, and Brown.³⁸

Conclusion

Congress's constitutional role in determining if and when the United States uses military force is a fundamental feature of our democracy. Although the realities of modern warfare and the geopolitical interests of the United States have changed over time, the importance of Congress

³³ Tess Bridgeman, *Now is the Time to Repeal the 2002 AUMF*, JUST SECURITY (Jul. 11, 2019), <https://www.justsecurity.org/64885/now-is-the-time-to-repeal-the-2002-aumf/>.

³⁴ Outdated AUMF Repeal Act of 2021, 117th Cong. § 1 (2021), <https://gallagher.house.gov/sites/gallagher.house.gov/files/Outdated%20AUMF%20Repeal%20Act.pdf>.

³⁵ Rep. Abigail Spanberger (@RepSpanberger), Twitter (Mar. 18, 2021, 6:29 PM), <https://twitter.com/RepSpanberger/status/1372676594838421505?s=20>.

³⁶ *Id.*

³⁷ Tess Bridgeman et al., *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/>.

³⁸ Letter from Members of Congress to President Biden (Jan. 21, 2021), [https://lee.house.gov/imo/media/doc/Biden%20AUMF%20letter%20FINAL%20\(1\).pdf](https://lee.house.gov/imo/media/doc/Biden%20AUMF%20letter%20FINAL%20(1).pdf)

serving as a voice for the American people on decisions of whether to send our servicemembers into harm's way remains crucial. As we have seen over many decades, through administrations of both political parties, the Executive will not relinquish its claimed authority itself: Congress must step in to reform the WPR and repeal outdated AUMFs to restore the weight of the war powers to the legislature where they belong. Thank you for allowing me the opportunity to weigh in on these important issues.