



POLICY ROUNDTABLE:

The War Powers Resolution

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1. War Powers Roundtable Introduction

Tess Bridgeman and Stephen Pomper

The current system for regulating the United States' use of military force abroad is anything but straightforward. It is layered and filigreed, existing on parallel planes of domestic, international, constitutional, statutory, and common law. Much of it inhabits a grey zone between law and lore and arises out of a combination of historical practice and legal opinions generated by the executive branch that are rarely, if ever, checked by a co-equal branch of government. Ask a national security lawyer when it is legal for a U.S. president to take the country to war, and you will need to be prepared for a long conversation. Ask whether the current system should be reformed, and be prepared for it to go longer still.

At the center of this complex system are the political branches of government — Congress, which has over time ceded significant authority in the area of war powers, and the executive branch, which has asserted a correspondingly expansive role. Recently, however, Congress has begun to push back. It has attempted to legislate an end to U.S. support for the Saudi-led coalition fighting in Yemen, to put guardrails on a potential rush to war with Iran, and to increase oversight of ongoing operations conducted under the 2001 Authorization for the Use of Military Force.¹ Some lawmakers and candidates for the 2020 Democratic presidential nomination are now calling for sunsets on future authorizations,²

¹ For discussion of efforts to place operations pursuant to the 2001 Authorization for the Use of Military Force under greater congressional oversight, see, e.g., Richard Fontaine and Vance Serchuk, “Congress Should Oversee America’s Wars, Not Just Authorize Them,” *Lawfare*, June 7, 2018, <https://www.lawfareblog.com/congress-should-oversee-americas-wars-not-just-authorize-them>; and Ken Gude and Kate Martin, “Preventing Endless War Requires Real Congressional Oversight—Not New War Authority,” Center for American Progress, Dec. 14, 2018, <https://www.americanprogress.org/issues/security/reports/2018/12/14/464265/preventing-endless-war-requires-real-congressional-oversight-not-new-war-authority/>.

² See, e.g., candidate Pete Buttigieg stating “And so when I am president, an authorization for the use of military force will have a built-in three-year sunset. Congress will be required to vote and a president will be required to go to Congress to seek an authorization.” “Read the Full Transcript of ABC News’ 3rd Democratic Debate,” *ABC News*, Sept. 13, 2019, <https://abcnews.go.com/US/read-full-transcript-abc-news-3rd-democratic-debate/story?id=65587810>; Sen. Chris Murphy stating that any successor Authorization for the Use of Military

and a new bipartisan war-powers caucus has formed in the House of Representatives with the stated mission of reasserting Congress' role in matters of war and peace.³

To help illuminate the current legal and policy war powers landscape, as well as what the future may hold, *Texas National Security Review* commissioned this trio of articles by Scott Anderson, Oona Hathaway, and Matt Waxman. Together, these authors bring deep scholarly insight — as well as years of collective executive branch experience — to a discussion of when it is legal for a U.S. president to take the country to war, whether the current system should be reformed, and whether reform is even possible.

A Complex Equation

By way of background, although the Constitution vests in the Congress the power to “declare war” — and the preponderance of other war-related powers — these formal grants of authority turn out to be only part of a complex equation that determines when U.S. armed forces can be used abroad.⁴ As commander-in-chief of the armed forces, the president has his or her own reservoir of constitutional war-making authority,⁵ and reams have been written about where the powers of the respective political branches begin, end, and overlap. In the early days of the republic, the prevailing view was that Congress had to authorize any uses of military force, although even then there was a widely understood

Force “must include a sunset that forces Congress to re-evaluate the merits of the law after 3-5 years”: Twitter, May 31, 2018, <https://twitter.com/ChrisMurphyCT/status/1002359971261091845>.

³ “Release: Khanna, Briggs Launch Bipartisan War Powers Caucus,” Press Release, Office of Congressman Ro Khanna, June 18, 2019, <https://khanna.house.gov/media/press-releases/release-khanna-briggs-launch-bipartisan-war-powers-caucus>.

⁴ U.S. Const. art. I, § 8, cl. 11 (power to declare war, grant letters of marque and reprisal, and make rules governing capture on land and water); *id* at cl. 12 (authority to fund military operations); *id* at cl. 13 (authority to provide and maintain a navy); *id* at cl. 14 (power to make rules regulating land and naval forces); *id*. at cl. 15 and cl. 16 (various powers relating to raising and providing for militias); *id*. at cl. 18 (“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 U.S. Const. art. II, § 2, cl. 1.

exception for forceful action necessary to repel an attack on the nation.⁶ But years of countervailing practice have altered that presumption.

Today, whether or not the president can launch the country into a conflict without congressional approval starts with a much broader question than “Is the nation in immediate peril?” Rather, the executive branch has framed the extent of the president’s Article II authority to use the nation’s armed forces abroad in terms of a two-part test: first, whether there is a sufficient “national interest” to justify the use of force, and second, whether the anticipated “nature, scope and duration” of military action would take the country into “war in the constitutional sense.”⁷

Neither prong is especially confining. As Professors Curtis Bradley and Jack Goldsmith have pointed out, the “national interest” test has been interpreted so broadly over time that it imposes few meaningful limits on the presidency.⁸ And the nature, scope, and duration test conflicts with more expansive visions of executive branch power that have been advanced by, among others, the current attorney general, William Barr.⁹

⁶ For a discussion of the constitutional allocation of war powers and how the understanding of this allocation has changed over time, see, John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* (Princeton, NJ: Princeton University Press, 1993).

⁷ See, e.g., “April 2018 Airstrikes Against Syrian Chemical Weapons Facilities,” 42 Op. O.L.C. ___, at *1, May 31, 2018, <https://www.justice.gov/olc/opinion/file/1067551/download> (“Before the strikes occurred, we advised that the President could lawfully direct them because he had reasonably determined that the use of force would be in the national interest and that the anticipated hostilities would not rise to the level of a war in the constitutional sense.”).

⁸ Curtis Bradley and Jack Goldsmith, “OLC’s Meaningless ‘National Interests’ Test for the Legality of Presidential Uses of Force,” *Lawfare*, June 5, 2018, <https://www.lawfareblog.com/olcs-meaningless-national-interests-test-legality-presidential-uses-force>.

⁹ See, e.g., Tess Bridgeman, Rebecca Ingber, and Stephen Pomper, “Bill Barr’s Extreme Views on War Powers Mean Congress’ Window to Stop War with Iran is Now,” *Just Security*, May 20, 2019, <https://www.justsecurity.org/64179/bill-barrs-extreme-views-on-war-powers-mean-congresss-window-to-stop-war-with-iran-is-now/>; Patrick Hulme, “No Substitute for the Real Thing: International and Congressional Use of Force Authorizations,” *Lawfare*, Oct. 15, 2019, <https://www.lawfareblog.com/no-substitute-real-thing-international-and-congressional-use-force-authorizations>.

Against the backdrop of elastic constitutional constraints on the executive branch, the War Powers Resolution of 1973 was an effort by Congress to legislate contemporary roles and boundaries for the two political branches in areas of overlapping authority. Enacted over President Richard Nixon's veto in the aftermath of the Vietnam War, the resolution requires the executive branch to consult Congress before introducing forces into "hostilities" or "situations where imminent involvement is clearly indicated by the circumstances," and to notify Congress within 48 hours after it has done so.¹⁰ It also requires the executive branch to terminate the use of armed forces if Congress has not authorized their continued engagement within 60 days (extendable under certain circumstances to 90 days) following notification.

Although the term "hostilities" is not defined in the resolution, as Hathaway notes in her essay, the report of the House Foreign Affairs Committee suggests that the term is intended to be "broader in scope" than the term "armed conflict," and that it encompasses a "state of confrontation in which no shots have been fired" but where there is a "clear and present danger of armed conflict."¹¹

The resolution also, on its face, gives Congress the power to stop a war. It provides that a so-called "concurrent resolution" adopted by a simple majority in each chamber — without presidential signature — can force the withdrawal of troops from hostilities. As Anderson explains in his contribution to this roundtable, the resolution additionally creates priority procedures that clear away many of the obstacles that normally prevent members of Congress from bringing legislation to the floor.

But the years have not been kind to the War Powers Resolution, which has suffered such significant blows from all three branches of the government that it is challenging to rank which was the most damaging.

A first major blow came only two years after the passage of the resolution when the Ford administration began narrowing the executive branch's interpretation of the key term

¹⁰ War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555.

¹¹ H.R. Rep. No. 287, 93d Cong., 1st Sess. 7 (1973).

“hostilities.”¹² The administration argued that the term was primarily intended to capture situations in which “units of the U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces.”¹³ With this move, the executive branch both set a precedent for advancing aggressive interpretations of the statute and turned the intent expressed in the 1973 House committee report — that hostilities should comprehend confrontational situations “in which no shots have been fired” — on its head.

The Supreme Court dealt another heavy blow with its decision in *INS v Chadha* (1983), which, by invalidating the “legislative veto,” casts essentially fatal doubt on Congress’ ability to order the withdrawal of U.S. forces by concurrent resolution. Following *Chadha*, in the face of presidential resistance, Congress can only enforce withdrawal if it commands a veto-proof supermajority. The Supreme Court’s decision also encouraged a lingering (and in our view incorrect) impression that other provisions of the War Powers Resolution are constitutionally infirm — an impression that the executive branch has sometimes encouraged.

A third significant blow — or rather succession of blows — has come from Congress itself, which, as Waxman points out, has time and again allowed the executive branch to dilute, or simply ignore, key provisions of the War Powers Resolution. In the face of executive branch interpretations that defy legislative history and common sense, the legislature has sometimes called hearings and issued nonbinding resolutions, but in general has failed to summon the political will required to pass conflict-ending legislation — preferring to let the executive branch shoulder the responsibility for deciding when to begin and end the nation’s wars.

¹² “Letter from State Department Legal Adviser Monroe Leigh and Department of Defense General Counsel Martin R. Hoffmann to Chairman Clement J. Zablocki,” June 3, 1975 (“As applied in the first three war powers reports, ‘hostilities’ was used to mean a situation in which units of the U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces....”).

¹³ “Letter from State Department Legal Adviser Monroe Leigh.”

Three Views on Reform

Even if we establish that today's war powers framework is not what the Constitution's framers had in mind, or what the 1973 Congress intended, this does not resolve the question of whether a major overhaul of the system is a good idea. It is possible, after all, that the division of labor and responsibility that has emerged over the past several decades is the product of a natural evolution driven by the contemporary threat environment and political reality. It may not be pretty, but, as one theory goes, perhaps it's the best we can do.

This sensibility is at the core of Waxman's challenge to proponents of war powers reform. Waxman understands the concerns of reformers who look both to the temperamental instability of President Donald Trump and to their own war weariness in arriving at the conviction that the current system needs to change. But, as Waxman points out, the current system is no accident. Congress' long history of running away from responsibility for major war-making decisions reflects a set of political motivations that seem close to inalterable: Most members of Congress are not especially eager to cast tough votes on matters of war and peace.

Waxman also questions whether the full spectrum of conflict that reformers seem to want to place under the framework — from cyber operations to drone strikes to partnered operations, to name a few — can really be effectively regulated by a single statutory scheme. And even if such a scheme were achievable, he is concerned about the real or perceived foreign policy retrenchment this could signal, and what it might cost the United States, in terms of deterrence, and the world, in terms of peace and security.

Waxman suggests another tack, which is for Congress to use the tools that it already has to oversee and restrain military policy more effectively. Hearings, spending bills, and the bully pulpit members enjoy are all means to shape public opinion, signal U.S. resolve, and influence how the executive branch both manages the military during war and reacts to crises that could develop into wars. While more modest in its goals, he suggests that this approach is capable of greater impact than a reform effort that simply has no chance.

What can Congress achieve when it uses the tools Waxman describes? By way of answer, Anderson's analysis of recent congressional engagement on Yemen offers a case study of what Anderson calls "the bleeding edge of contemporary congressional-executive relations around matters of war and peace."

In the Yemen case, an increasingly skeptical Congress squared off against the Trump administration over U.S. support for a Saudi-led campaign of airstrikes. The support — in the form of aerial refueling, intelligence sharing, and advisory and material assistance — may not have placed U.S. troops directly on the field of battle, but it was almost certainly sufficient to make the United States a party to the conflict for the purposes of international law. It also implicated America morally, and possibly legally, in a brutal conflict that has thus far left 100,000 dead and millions on the brink of starvation. The destruction of humanitarian infrastructure and civilian targets left an especially deep taint.

Yet, although the United States was legally at war in Yemen when it comes to international law, U.S. forces had not been "introduced into hostilities" as per the traditional executive branch interpretation of the War Powers Resolution — essentially because U.S. servicemembers were not involved in hostile exchanges of fire. Thus, while the Obama administration explained to Congress the support it was furnishing, it never provided a notification of the activity under the War Powers Resolution, never started the 60-day withdrawal clock, and was never required to obtain congressional authorization.¹⁴

For several years, Congress effectively acquiesced in this status quo, but in 2018 the landscape shifted. The horrors of the conflict, its seeming "unwinnability," and the revulsion of being implicated in the ongoing brutality took their toll on congressional complacency. The October 2018 murder of *Washington Post* journalist Jamal Khashoggi enraged even traditional Saudi supporters in Congress.

¹⁴ For a discussion of why and how the Obama administration involved the United States in the Yemen conflict, see, "Ending the Yemen Quagmire: Lessons for Washington from Four Years of War," International Crisis Group, April 15, 2019, <https://www.crisisgroup.org/united-states/003-ending-yemen-quagmire-lessons-washington-four-years-war>.

As for how Congress channeled its growing frustration with both the war and its coalition partners, Anderson explains that legislative activity during this period highlighted the largely unsung importance of the War Powers Resolution's priority procedures. Through these procedures, Republican Sen. Todd Young introduced a requirement that the administration certify the sufficiency of the coalition's casualty mitigation efforts as a condition of refueling support. He then managed to maneuver this requirement into must-pass authorization legislation, which proved instrumental in bringing about the end of refueling assistance to the Saudis.

More prominently, anti-war members of Congress also used the priority procedures to develop and pass a resolution directing the administration to withdraw U.S. forces from hostilities in Yemen. To be sure, the resolution was largely toothless: Because the operative language required withdrawal from hostilities, it was (in the eyes of the executive branch) a hollow directive. There were no U.S. troops engaged in "hostilities" and therefore no forces to withdraw.

But notwithstanding the legislation's Seinfeldian qualities (the hollowing out of the term "hostilities" by successive administrations meant that the resolution was, like the television show, essentially about nothing), and despite Trump's veto in March 2019, the multi-month march to get the bill to the president's desk was nevertheless consequential.

During this period, Saudi Arabia — which was under intense international pressure from U.S. Secretary of Defense James Mattis and others — pushed the government of Yemeni leader Abed Rabbo Mansour Hadi (the coalition's Yemeni partner in the conflict) to sit down for talks with the Houthi insurgents who drove him out of Sana'a in 2015. The agreement they reached in December 2018 had limited aims: demilitarization of the Red Sea port of Hodeida, a prisoner exchange and a de-escalation around the city of Taiz. As such, it did not end the war. But it averted a disastrous battle for Hodeida that could well have pushed the country over the brink into famine. Successfully implemented, the agreement would also have created an opening to wider peace talks.

While it is difficult to know whether, absent congressional pressure, Riyadh would have moved in this direction, or whether Mattis would have pushed Saudi Crown Prince

Mohammed bin Salman as hard as he reportedly did, it certainly appears that the legislative signaling was a force for peace.

Nevertheless, Yemen is hardly powerful proof that Congress' war powers are alive and well. As Anderson notes, "The fact that the Trump administration has been able to continue supporting the Saudi-led coalition over the express opposition of a majority in Congress underscores the limits of Congress' formal ability to override the president's decision-making." The question is whether this is something that Americans have to live with.

Hathaway thinks perhaps not. She acknowledges that it may be impossible to force members of Congress to carry out their constitutional responsibilities with respect to matters of war and peace if they insist on shirking them to avoid political risk. But she argues that a handful of changes to the current framework could help members who take those responsibilities more seriously.

First, Hathaway argues for the need to tighten the definition of "hostilities," a term that she observes had already been narrowed substantially by the early 1990s, and that, in her view, slipped over a cliff in 2011 when the Obama administration argued that its ongoing involvement in Libya — which well outlasted the War Powers Resolution's 60-day termination clock — did not constitute involvement in hostilities. Whether or not the Libya episode was indeed the final nail in the coffin (our sense is that even the Obama administration — of which we are alumni — came to treat it as an outlier), it certainly illustrates the increasing flexibility with which administrations have approached the interpretation of the term "hostilities" and which has significantly weakened the force of the statute.

Hathaway does not share Waxman's worry that altering the definition of "hostilities" will introduce new dimensions of blurriness or rigidity that make such reform politically unsellable. She proposes aligning the term with the definition of "armed conflict" — a term invoked in the legislative history of the 1973 statute. She also suggests adding specific requirements for functions the military now performs that were not part of the landscape in 1973: namely, cyber operations, the sometimes nebulous work that the military calls "operational preparation of the environment," and partnered operations.

Hathaway's second proposal is to legislate a default "rules of the road" statute that would require Congress to re-authorize operations involving the use of force every two years. For operations that are not renewed, the executive branch would be given a year to wind them down in an orderly fashion. Future Congresses could, of course, override the rules in authorizing future uses of force, but default rules would at least remind members that authorizations without time limitations can live on for years (witness the 2001 Authorization for the Use of Military Force) and strengthen the hand of those who support sunsets by forcing a conversation on the issue.

Hathaway's third suggestion is to build into the legislative framework a prohibition against using military force in contravention of international law. Acknowledging that the United States is already bound by its treaty obligations under the Constitution's Supremacy Clause, she notes that there remains confusion about the extent to which these bind the executive branch in the absence of implementing legislation. Her proposed reform would require the U.S. government to operate within international law's *jus ad bellum* restrictions in determining where and when to use force, and within its *jus in bello* restrictions in deciding how it can be used. While an executive branch lawyer might argue that the U.S. government already does this, Hathaway implies that it would do so more rigorously in the presence of a statutory requirement.

Coda

While these three thoughtful and nuanced pieces will leave any reader well armed to navigate the ins and outs of war powers issues, we will close with two thoughts.

The first is that scholars' and experts' views of the desirability of war powers reform tend to correlate strongly with whether or not they appear to consider the status quo acceptable. Undergirding the sense of caution that Waxman and, to a lesser extent, Anderson advance is a sensibility that whatever the shortcomings of the current war powers calibration, it is not too far off balance, and corrective measures could well be worse. Waxman reminds us that the current allocation of war powers has, in part, been shaped by the needs of a globally

deployed military, the threats of the post-World War II world, and a desire to empower the executive branch to do what it must to protect the nation. Anderson similarly notes that reform skeptics “may reasonably fear that a less agile United States will be less able to ensure its own national security — or might even compromise the imperfect but relatively stable global order that U.S. military power has helped to build and maintain over the past century.”

Hathaway sees things differently, arguing that the current system both betrays constitutional design and inappropriately shields U.S. military operations from democratic accountability. To these concerns we would add one further: It coarsens U.S. sensibilities when it comes to the consequences of military action. While Congress has generally authorized major ground wars, the presence of U.S. “boots on the ground” is not the only metric by which the seriousness of U.S. engagement in conflict should be assessed.

We submit that “seriousness” should take into account not just the risk of an operation to U.S. forces (although that is certainly critically important), but also the geopolitical consequences, the risk of escalation, and the risk to civilian populations. An operation that does not imperil U.S. lives could, after all, still spark a humanitarian disaster, result in the deaths of thousands of civilians, implicate the United States in wartime atrocities, create power vacuums filled by armed groups, or generate enormous ill will among locals. Yemen is a case in point for most if not all of those concerns. Waxman’s piece calls our attention to this set of issues, noting that so-called “minor” conflicts can, in fact, have major consequences, though he does not recommend war powers reform as the right way to get Congress to pay more attention.

This brings us to our final point, which is to question whether there is in fact a better way. It may well be that the ultimate key to better policy on matters of war and peace is an improved politics — one in which well-informed citizens elect members of Congress who play the policing role that we would wish for them. But under the current framework, neither Congress nor American voters necessarily have a full picture of how the United States is operating militarily around the world or what the associated costs are. That makes the more enlightened politics that are a prerequisite for a more responsible Congress difficult to generate.

We believe war powers reform can help with this. By forcing members of Congress to take responsibility — including taking more votes — on a broader range of conflicts, a reformed

War Powers Resolution would create more reasons for members to seek information about the conflicts in question, more opportunities for civil society to engage the political process, and more openings for journalists to share that information with the public. In this sense, war powers reform may not be sufficient to produce a more thoughtful U.S. approach to engagement in armed conflict, but it could well be necessary.

Whether or not it is achievable is a separate question, but we would not write off the possibility. For one thing, the politics of the moment — the growing frustration with endless war Hathaway notes coupled with nervousness about Trump that Waxman describes — has created openings that might have been difficult to imagine even a few years ago.

In order for reform to happen, reformers will need to plant the flag on a set of concrete goals and begin the hard and patient work of trying to make them realizable. There is, of course, no guarantee of success. But in a world that has been too much shaped and bruised by U.S. missteps in Yemen, Libya, and the so-called forever war, can America really afford not to try?

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2. War Powers Oversight, Not Reform

Matthew C. Waxman

President Donald Trump's impetuosity and the American public's frustration with interminable military conflicts have sparked renewed interest in war powers, including calls to restore what some reformists believe should be Congress' constitutional primacy in initiating war. The 1973 War Powers Resolution, which generally requires presidential consultation with Congress and congressional authorization to continue U.S. military involvement in "hostilities" after 60 days, has failed to dramatically shift power back from the president to Congress.¹⁵ Thus, reformists are often in search of an improved, overarching legal framework to bolster Congress' prerogative.

Proposals for overhauling war powers take many forms.¹⁶ Some recommend scrapping the War Powers Resolution and requiring advance consultation and subsequent votes of approval or disapproval by Congress. A proposed "War Powers Consultation Act," for example, would direct the president to confer with Congress before ordering troops into significant conflicts and would require Congress to vote in support or disapproval of the conflict within 30 days.¹⁷ Some would like to see the existing War Powers Resolution enforced more assertively and consistently by Congress, including through litigation seeking judicial enforcement of Congress' prerogatives.¹⁸ Others believe that the resolution already gives the president too much leeway — for instance, it allows the president to

¹⁵ "The War Powers Resolution: Concepts and Practice," Congressional Research Service, Updated March 8, 2019, <https://fas.org/sgp/crs/natsec/R42699.pdf>.

¹⁶ Some of these proposals are summarized in "The War Powers Resolution," 63–67.

¹⁷ See, "Kaine, McCain Introduce Bill to Reform War Powers Resolution," Press Release from the Office of Tim Kaine, Jan. 16, 2014, <https://www.kaine.senate.gov/press-releases/kaine-mccain-introduce-bill-to-reform-war-powers-resolution>; "National War Powers Commission Report," Miller Center of Public Affairs, 2008, <http://web1.millercenter.org/reports/warpowers/report.pdf>.

¹⁸ Tara Golsham, "Trump Ignored Congress on War Powers. Constitutional Scholars Want Democrats to Take Him to Court," *Vox*, May 27, 2019, <https://www.vox.com/2019/5/27/18634590/nancy-pelosi-donald-trump-supreme-court-war-power>.

intervene for 60 days without congressional approval — and that any significant military action ought to require Congress' express authorization.¹⁹

For several interrelated reasons, a general legal overhaul of war powers is neither workable nor needed. First, the causes of the historical shift in those powers from Congress to the presidency — including that Congress, as a whole, is at best institutionally ambivalent about wielding them — are not going away. Second, military conflicts and interventions are too diverse to regulate effectively with any single legislative scheme or type of authorization. Third, whatever agreement exists about the need to reform war powers masks deep disagreement and questionable premises about the purposes of such reform.

Instead of a legislative overhaul or requiring any single form of congressional authorization, Congress ought to exercise its existing oversight powers more effectively and consistently — including focusing more on how interventions are conducted and what is their endgame. Congress has the tools to do so. The obstacles are therefore political, not legal.

Congress' Political Incentives and Powers

Let's stipulate, for argument's sake, that the constitutional founders originally placed decisions about going to war exclusively in the hands of Congress (except to repel sudden attacks), but that over time that power has shifted to the president.²⁰ We should take a hard look at *why* that shift occurred. One reason is that presidents have, in general, asserted aggressively broad unilateral authority. Another reason, though, is that Congress has ceded control. Any war powers reform effort should begin by questioning whether Congress is truly committed to retaining the full and exclusive war powers that reformers often idealize.

This is not to argue that Congress *should* get to decide what powers it wields. After all, the Constitution allocates not just authority but responsibility.²¹ But if Congress — and that

¹⁹ For example, see, "Experts Question Proposed Changes in War Powers," Press Release, The Constitution Project, March 20, 2014, http://constitutionproject.org/wp-content/uploads/2014/03/2014.03.20_S.1939.pdf.

²⁰ Arthur M. Schlesinger, Jr., *The Imperial Presidency* (Mariner Books ed. 2004), 1–207.

²¹ John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* (Darby, PA: Diane Publishing Co., 1993), 3–11.

really means individual members of Congress — does not assert and vigorously defend its powers, they will erode.

Political scientist Edward Corwin famously described the allocation of constitutional foreign relations powers as an “invitation to struggle” between the executive and legislative branches. This has never been an even match, though, especially when it comes to war powers.²² The executive branch has a much easier time agreeing and acting on a unified view of its powers than the legislative branch, which is divided into two houses and pulled apart by partisan fissures and competing committees. It has been true since the founding that American security policy often demands swiftness and agility of which the executive is more capable than the legislature. The post-World War II strategic context, in which the United States has perpetually maintained high levels of military mobilization and alliances to defend global interests, expanded those demands while ensuring that the president always has ample military forces at his ready disposal.²³

At the same time, the politics of military intervention contribute to congressional passivity when it comes to making decisions about going to war. Members of Congress often have little to gain electorally by taking a firm stand on military intervention and much to lose if those military campaigns go awry. When a crisis erupts, the executive branch must make a decision, even if it is not to take any action. Members of Congress, on the other hand, have the luxury of watching, waiting, and criticizing from the bleachers.

One way of understanding the 1973 War Powers Resolution was as an attempt to force Congress to take a stand, whether it wanted to or not.²⁴ By requiring the president to report to Congress on new American military interventions and then to withdraw forces if Congress does not formally approve the action by a certain date, this law was intended first to compel the president to go to Congress and then to compel Congress to act.

²² Edwin S. Corwin, *The President: Office and Powers, 1787–1957*, 5th rev. ed. (New York: New York University Press, 1984), 201.

²³ On the relationship between alliances and expanded presidential war powers, see, Mira Rapp-Hooper and Matthew C. Waxman, “Presidential Alliance Powers,” *Washington Quarterly* 42, no. 2 (Summer 2019): 67–83, <https://www.tandfonline.com/doi/full/10.1080/0163660X.2019.1621652>.

²⁴ Ely, *War and Responsibility*, 53.

Experience to date, however, shows not just the president's tendency to work around the War Powers Resolution but also Congress' tendency to wriggle free of its own self-imposed constraints. In interventions such as Bosnia and Kosovo during the 1990s, and more recently in the 2011 intervention in Libya, Congress neither mustered a sufficient majority to formally approve U.S. actions within 60 days nor, in some cases, did it push back vigorously when the executive branch adopted interpretations that watered down the War Powers Resolution's requirements — such as reading congressional appropriations as implicit approval for military action or restricting the resolution's definition of “hostilities” that triggers the 60-day rule.²⁵

This is not to say that the War Powers Resolution fails to constrain the executive branch at all, or to deny that it gives Congress additional tools in pushing back against military interventions. It does both to some degree. Many reform proposals want to go much further, though, and aim to strengthen requirements for a congressional vote on all significant military actions. In light of recent experience, however, it is hard to imagine Congress truly binding itself so effectively.

Moreover, focusing only on formal congressional action obscures the more subtle but substantial ways in which Congress influences decisions about military intervention. Crucially, the fact that the president often initiates military campaigns without express authorization by Congress does not mean that congressional checks are altogether absent. Political science and history strongly suggest that, notwithstanding the often-weak electoral incentives of congressional members to formally approve or disapprove military interventions at their outset, congressional politics weigh heavily in presidential decision-making.

Studies show that congressional politics affect both the frequency with which presidents use force abroad and the probability that they will respond militarily to crises. There are many ways in which Congress influences presidential uses of force, which include not only the introduction of legislation to authorize or curtail a use of force but also congressional oversight hearings and influencing public debate over military policymaking. Congressional action or inaction also sends signals about domestic resolve to foreign parties — both adversaries and allies alike — thereby affecting the president's calculus regarding using

²⁵ “The War Powers Resolution: Concepts and Practice,” 25–43.

force.²⁶ Such political checks are especially pronounced when Congress and the presidency are controlled by opposing parties.²⁷ Focusing solely on whether and how Congress formally approves military action on the front end often neglects these other significant ways Congress can influence the use of force and how they might be enhanced.

The Diverse Forms of Modern Conflict

Military conflicts and interventions arise in too many ways and forms to regulate them effectively with a single statutory scheme or a single form of authorization. For the existing War Powers Resolution and some of the proposals to strengthen it, relatively clear lines are often seen as a virtue, because they reduce — though don't eliminate — opportunities to interpret away requirements. However, trying to draw statutory lines at specific thresholds like armed "hostilities" (as in the War Powers Resolution) or "significant armed conflicts" (as in the proposed War Powers Consultation Act) is a poor way of deciding which types of conflicts should require formal congressional approval.

From the earliest days of the republic, the United States faced varied military contingencies for which neither war declarations nor simple congressional force authorizations were well suited. In the modern era, American conflicts and security crises are even more diverse. They could begin because of a U.S. first strike or an enemy first strike, an attack by or against a U.S. ally, or a breakdown in deterrence or a miscalculation. They might include large-scale ground wars, one-off airstrikes, or a combination of the two, and increasingly they feature cyber operations as well. They can be overt or covert, or both. They may be geographically confined or global, or expected to be short or long. They are waged against states or nonstate groups, with or against a state's proxy forces, and with or without the help of allies.

²⁶ Douglas L. Kriner, *After the Rubicon: Congress, Presidents, and the Politics of Waging War* (Chicago: University of Chicago Press, 2010); Dino P. Christenson and Douglas L. Kriner, "Mobilizing the Public Against the President: Congress and the Political Costs of Unilateral Action," *American Journal of Political Science* 61, no. 4 (October 2017): 769, <https://doi.org/10.1111/ajps.12298>.

²⁷ William G. Howell & Jon C. Pevehouse, *While Dangers Gather: Congressional Checks on Presidential War Powers* (Princeton, NJ: Princeton University Press, 2011).

Recent controversies over war powers illustrate this point. In 2019, concerns about insufficiently checked presidential war powers have arisen in three vastly different contexts: continuation of a geographically sprawling and indefinite war against terrorist groups, support for a Saudi war in Yemen, and the possibility of a major U.S. war with Iran. The first began after a direct attack on the U.S. homeland, the second is a regional proxy war, and the third could arise through deliberate preemptive U.S. action, a miscalculated spiral of violence, or some other way. Stepping back, the key policy questions about force in each case differ widely. The first is mostly about where and what type of force is used, the second has to do with whether to cut off operational support to a partner, and the third is about how to wield threats of force for deterrence and coercive diplomacy.

Although recent war powers debates have sometimes focused on regional conflicts in which the United States does not put many troops directly in harm's way (at least not initially), a key aim of war powers reform is often said to be making sure that “big” wars — those that put many vulnerable American boots on the ground — are formally authorized by Congress. Historically, however, the Korean War stands out as the only exception to the tendency of presidents to seek congressional authorization in advance of large ground wars. In any event, these are the types of conflicts for which political checks often work most effectively.

Smaller-scale and less visible conflicts attract less public attention, but their consequences can be significant. “As a matter of democratic principle,” Jack Goldsmith and I have argued, treating low-intensity warfare waged stealthily and from a distance (or in cyberspace) as more appropriately conducted unilaterally than large-scale ground campaigns “probably has matters backwards”:

Light-footprint warfare is still lethal and very consequential warfare, and the lightness of the tools make them relatively easy for a President to deploy extensively. Light-footprint warfare thus has large foreign policy, strategic, and reputational consequences for the United States, akin to much heavier deployments, yet much less public examination. The President's legal theories treat this as a feature of such warfare. But it is also a bug for U.S. democracy, since the stealthy

features mean that public debate and political checks—which reduce error as well as excess, and promote legitimacy—function ineffectively.²⁸

This arguably indicates the need to expand or clarify the War Powers Resolution’s definition of the situations requiring explicit congressional approval. But any politically plausible attempts to delineate with bright-line rules which types of military action require specific forms of congressional authorization will probably function poorly in practice, where contextual variables are complex and fast-moving. Such attempts may also still exclude those conflicts for which stronger congressional scrutiny is appropriate. Alternatively, a more flexible legal standard would likely be even easier for the executive branch to bypass. A wide range of military conflicts and challenges warrant a wide range of congressional oversight tools. Moreover, as explained below, requiring congressional approval at the beginning of a military intervention often fails to encourage the right kind of congressional scrutiny.²⁹

The Purposes of Legislative Checks

Periodic pushes from both members of Congress and the public for stronger congressional checks on war powers can conceal divisions and uncertainty about why those checks are needed. Some of the goals of these efforts for congressional oversight also point to different solutions.

Sometimes, supporters of war powers reform are pushing for change simply as a matter of constitutional principle. If one believes that Article I’s directive that Congress has the power to declare war includes any use of military force (other than in defending against invasion), and one believes that the president’s Article II roles as chief executive and commander-in-chief confer no authority to initiate such actions, then nothing short of formal congressional authorization for any military intervention is likely to be satisfactory.

²⁸ Jack Goldsmith and Matthew Waxman, “The Legal Legacy of Light-Footprint Warfare,” *Washington Quarterly* 39, no. 2 (2016) 7–21, <https://www.tandfonline.com/doi/full/10.1080/0163660X.2016.1204305>.

²⁹ With regard to ongoing conflicts against terrorist organizations, Goldsmith and I favor amending the 2001 Authorization of the Use of Military Force with ongoing procedures that “would foster ongoing inter-branch deliberation about the way and extent that force is being used.” Goldsmith and Waxman, “The Legal Legacy,” 18–19.

But there have always been gaps and ambiguities in these constitutional clauses, and many (though not all) war powers reformers believe in evolving constitutional interpretation to meet evolving national conditions in other areas of law. There are good arguments to justify adapting the original allocations of military powers given the dramatic changes over 200 years in American military power, strategy, and interests, as well as dramatic changes in the way other, related constitutional powers are exercised. Reasonable people may disagree about the strength of those arguments and even whether they work in favor of or against presidential discretion, but rigid formalism does not point toward a practical solution.

Other proponents of stronger and formal congressional checks justify them in policy terms: Imposing legislative requirements would help to restrain military adventurism. The expectation here is often that the need to obtain congressional authorization serves as a brake on military responses to crises, whether because Congress is slower to act than the executive branch or because it is more sensitive to certain costs and risks, or just because more procedural hurdles means less action. Strategically, though, foreign policy retrenchment — or even perceptions of it — carries its own dangers. How well requirements for formal congressional force authorization contribute to peace and stability is also far from clear, since some conflicts stem from breakdowns in deterrence.³⁰ Politically, commitment to this goal is also often tied to who holds presidential office, and is therefore fleeting.

A third justification for war powers reform is that requiring congressional authorization promotes sounder policy through interbranch deliberation. Such requirements, the argument often goes, push the executive and legislative branches to consult one another more thoroughly, and the processes of persuasion and consensus-building result in more consistent and sustainable security policy. This claim has logical appeal, though empirical support is uneven. The 1991 and 2003 Iraq Wars were both authorized: The second turned out to be badly misguided and congressional scrutiny of the first failed to question core

³⁰ Matthew C. Waxman, “The Power to Threaten War,” *Yale Law Journal* 123 (2014): 1626, https://www.yalelawjournal.org/pdf/1626.Waxman.1691_sg4xicfv.pdf.

planning assumptions that turned out to be wrong.³¹ In any event, a legislative overhaul is not needed to achieve better interbranch deliberation.

Improving Legislative Oversight

For all of these reasons, war powers reform should not focus on strengthening any single, formal congressional approval requirement. Instead, Congress should improve the use of its existing tool set for overseeing security and defense policy. As noted above, Congress has a range of tools available to shape and restrain military policy. These include hearings, spending bills, and actions to shape public opinion. Importantly and unlike legislative overhaul proposals, some of these tools do not require Congress as a whole to act — they can be wielded by individual members, especially in key committee positions. In recent years, Congress' foreign policy and defense committees have atrophied,³² holding fewer oversight hearings than in the past.³³ A first step to boosting influence is ensuring that foreign relations, armed services, and intelligence committee members have adequate experience and resources, as well as a commitment to shaping and auditing security strategy.

Wars rarely begin out of the blue, but instead are the result of a long series of steps and counter-steps, actions and inactions.³⁴ This means that Congress needs to focus more heavily on overall military strategy and how American military resources are wielded well in advance of a crisis, rather than treating the outbreak of a crisis as Congress' moment for influence. Regularly scheduled posture hearings and annual defense authorization bills, for example, should be understood and treated as core parts of Congress' war powers.

³¹ Richard Fontaine and Vance Serchuk, "Can We Finally Get an AUMF Right?" *Politico*, Feb. 11, 2015, <https://www.politico.com/magazine/story/2015/02/aumf-congress-obama-115132>.

³² Linda L. Fowler, *Watchdogs on the Hill: The Decline of Congressional Oversight of U.S. Foreign Relations* (Princeton, NJ: Princeton University Press, 2015).

³³ James Goldgeier and Elizabeth N. Saunders, "The Unchecked Presidency," *Foreign Affairs*, Sept/Oct. 2008, <https://www.foreignaffairs.com/articles/2018-08-13/unconstrained-presidency>.

³⁴ Philip Bobbitt, "War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath," *Michigan Law Review* 92 (1994): 1386.

Fixating on congressional authorization of conflicts risks distracting or relieving lawmakers from the important duty of overseeing their conduct. Recent authorized wars in Afghanistan and Iraq show that congressional action at the front end of a conflict does not equate to thorough scrutiny — let alone consensus — of whether means and ends are well aligned or planning assumptions well tested. Congressional oversight of military intervention and conflict should be continuous and focused more heavily on the conduct of campaigns long after their initiation.³⁵ So, for instance, the outdated 2001 Authorization for Use of Military Force directed at al-Qaeda and its allies ought to be revised,³⁶ but as an addition to, not a substitute for, unremitting congressional review of how the various parts of that conflict are waged. The energy of reformists in Congress would be better spent on overseeing ongoing conflicts than on pushing new overarching frameworks that are unlikely to be adopted. Plus, the prospect of probing oversight during conflicts would bolster Congress' political influence over decisions to intervene militarily to begin with.

Some will criticize this oversight agenda as too modest. And yet, it stands a more realistic chance of addressing the problems and improving the political checks laid out above than a dramatic legislative revamping would. Others will criticize it as politically unworkable, essentially asking for a different type of congressional membership, with different political incentives and institutional commitments, than the one that exists. That may be so. If that is the case, though, then ambitions for a radical legislative overhaul — especially one that sticks — do not stand a chance.

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³⁵ Richard Fontaine and Vance Serchuk, “Congress Should Oversee America’s Wars, Not Just Authorize Them,” *Lawfare*, June 7, 2018, <https://www.lawfareblog.com/congress-should-oversee-americas-wars-not-just-authorize-them>.

³⁶ Benjamin Wittes, Robert Chesney, Jack Goldsmith, and Matthew Waxman, “A Draft AUMF to Get the Discussion Going,” *Lawfare*, Nov. 10, 2014, <https://www.lawfareblog.com/draft-aumf-get-discussion-going>.

3. Yemen and the Limits of Congressional War Powers

Scott R. Anderson

Earlier this year, a slim bipartisan majority in the U.S. Senate using special procedures associated with the 1973 War Powers Resolution adopted a joint resolution that, according to its authors, would require President Donald Trump to end U.S. support for the Saudi-led intervention against Houthi rebels in Yemen. When the House of Representatives passed that same bill, S.J. Res. 7, a few weeks later, it marked the first time that Congress had approved legislation directing the president to withdraw U.S. military forces from an overseas conflict — making Yemen’s civil war, by some measures, the most contested foreign war in American history. But this momentum was not to last. As soon as Congress presented the joint resolution to Trump for signature, he vetoed it. And its supporters in the House and Senate ultimately proved unable to rally the two-thirds support necessary to override his decision, leaving Trump’s legal authority to pursue his preferred policies in Yemen unchanged.

For many, the failure to enact S.J. Res. 7 is just another missed opportunity to end America’s involvement in Yemen’s civil war, a brutal conflict in which all sides — including close U.S. partners — have been credibly accused of committing atrocities. The United States does not itself use military force in Yemen, except against al-Qaeda and its affiliates.³⁷ But it has provided Saudi Arabia and its coalition partners with “certain logistical support (including air-to-air refueling [until late 2018]), intelligence sharing, best practices, and other advisory support[,]” as well as various defense articles and services, since they began their intervention in 2015.³⁸ Advocates of these policies maintain that they

³⁷ The only known exception to this policy was a 2016 airstrike on Houthi-controlled radar facilities in response to Houthi missile attacks on U.S. naval vessels in nearby international waters. See, “Letter from Barack Obama, President of the United States, to John Boehner, Speaker of the House of Representatives,” The White House, Office of the Press Secretary, Oct. 14, 2016, <https://obamawhitehouse.archives.gov/the-press-office/2016/10/14/letter-president-war-powers-resolution>.

³⁸ “Letter from William S. Castle, Acting General Counsel, U.S. Department of Defense, to the Hon. Mitchell McConnell, Majority Leader,” U.S. Senate 1-2, Feb. 27, 2018, <http://www.documentcloud.org/documents/4391679-Acting-GC-Letter-to-Majority-Leader-Re-Sanders.html> [hereinafter “Castle Letter”].

are necessary to oppose the Houthis' sponsors in Iran, provide technical capabilities that reduce the impact of the coalition's military operations on civilians, and give the United States important leverage in pushing for an end to the conflict. Opponents contend that these policies are only furthering an unprecedented humanitarian crisis that threatens to push a fragile country past the point of no return.

The debate surrounding U.S. involvement in the Yemen conflict serves as a valuable case study in the contemporary operation of war powers in the United States. The fact that the Trump administration has been able to continue supporting the Saudi-led coalition over the express opposition of a majority in Congress underscores the limits of Congress' formal ability to override the president's decision-making. That said, the strategies that opponents of U.S. involvement in Yemen have successfully employed to limit and build opposition to that support also highlight mechanisms that members of Congress may use to elevate issues, force debates, and leverage threats of political accountability and future legislative action in order to push for policy change. In this sense, the Yemen case study helps to illustrate what is, in many ways, the bleeding edge of contemporary congressional-executive relations around matters of war and peace, in both legal and political dimensions. It may also be an instructive case study for reformers who wish to move those relations onto different terrain.

The Separation of War Powers

The Constitution is vague on who, precisely, has the authority to decide when and how the United States goes to war. While Article I of the Constitution gives Congress the power to "declare War," "raise and support Armies," and "provide and maintain a Navy," Article II makes the president "Commander in Chief of the Army and Navy" and vests him or her with "[t]he executive Power."³⁹ Presidential administrations of both parties have argued that these Article II authorities — as informed by decades of inter-branch practice — permit the president to pursue military action overseas without express congressional authorization, so long as it serves important national interests and is limited in nature, scope, and duration.⁴⁰ The courts have, in turn, resisted weighing in on war powers issues,

³⁹ U.S. Const. art. I, § 8, cl. 11-13; *id.* art. II, § 1, cl. 1; *id.* art. II, § 2, cl. 1.

⁴⁰ See, e.g., "April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities," 42 Op. O.L.C. slip op. at 3-10 (2018), <https://www.justice.gov/olc/opinion/file/1067551/download/>.

leaving the executive branch's views more or less undisturbed.⁴¹ That said, executive branch lawyers have generally recognized that Congress can still set statutory limits on the president's ability to use military force.⁴² The president's authority is at its "lowest ebb" when acting contrary to such restrictions, meaning that he or she may act only where the Constitution gives him or her the exclusive authority to do so.⁴³ The exact scope of this exclusive authority is open to debate, but most agree that it is substantially narrower than what the president can pursue where Congress is merely silent.

The 1973 War Powers Resolution was Congress' attempt to use this lowest ebb to reassert some control over the use of military force following the Vietnam War.⁴⁴ Among other obligations, it requires that the president inform Congress within 48 hours whenever U.S. armed forces are "introduced ... into hostilities" absent statutory authorization.⁴⁵ If Congress does not authorize these "hostilities" within 60 to 90 days, the War Powers

⁴¹ See, e.g., *Smith v. Trump*, No. 16-5377 (D.C. Cir. July 10, 2018) (dismissing as moot service member's suit challenging executive branch interpretation of authorization for use of military force, after district court dismissed for lack of standing and due to non-justiciable political questions); *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000) (dismissing lawsuit alleging violation of War Powers Resolution due to lack of standing, as plaintiffs — all members of Congress — had additional legislative remedies they did not pursue). Some decisions, however, have suggested that the courts may feel more pressure to reach the merits of a dispute if executive branch action directly and indisputably conflicts with a statutory restriction. See, *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427-30 (2012); *El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F.3d 836, 855-59 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the judgment).

⁴² See, "Authority to Use Military Force in Libya," 35 Op. O.L.C. slip op. at 6 (2011), <https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya.pdf> (describing the president's authority as existing "at least insofar as Congress has not specifically restricted it"); "The President and the War Power: South Vietnam and the Cambodian Sanctuaries," 1 Supp. Op. O.L.C. 321, 333 (1970), <https://www.justice.gov/sites/default/files/olc/opinions/1970/05/31/op-olc-supp-voo1-p0321-o.pdf> ("Congress undoubtedly has the power in certain situations to restrict the President's power as Commander in Chief to a narrower scope than it would have had in the absence of legislation.").

⁴³ See, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1954) (Jackson, J., concurring).

⁴⁴ War Powers Resolution, Pub. L. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541-1548 (2018)).

⁴⁵ 50 U.S.C. § 1543(a)(1) (also requiring a report where U.S. armed force are introduced "into situations where imminent involvement in hostilities is clearly indicated by the circumstances"). The War Powers Resolution requires similar notification in certain other conditions, see, *id.* § 1543(a)(2)-(3), but these do not trigger the 60-to-90 day time limit discussed below. See, *infra* note 46 and associated text.

Resolution says the president must withdraw.⁴⁶ And if Congress adopts a concurrent resolution — a measure approved by a majority in both chambers but never presented to the president for signature or veto, meaning it lacks any independent force of law — directing the removal of armed forces from these hostilities, then the War Powers Resolution directs the president to comply.⁴⁷ To facilitate the latter, it also puts in place “priority procedures” that require both chambers of Congress to move such concurrent resolutions forward on a specified timeline so long as they enjoy majority support, thereby protecting them from filibusters and other procedural obstacles that can otherwise obstruct controversial legislation.⁴⁸ In effect, this puts a 60- to 90-day limit on how long the president can remain in hostilities without congressional authorization and allows a simple majority in Congress to direct the president to exit from them — at least insofar as the deployment in question is not within the president’s exclusive constitutional authority.

The Supreme Court, however, soon threw a wrench into this system. In a 1983 decision in *Immigration and Naturalization Service v. Chadha*,⁴⁹ the court invalidated an unrelated statutory provision that similarly made legal effects contingent on subsequent actions by congressional bodies, on the logic that such “legislative vetoes” evaded the constitutional requirement that Congress present legislation to the president for signature and a possible veto. This put the constitutionality of the War Powers Resolution’s own use of concurrent resolutions into serious doubt. Congress responded by enacting an additional set of priority procedures in the Senate (but not the House) that expedite efforts to force withdrawal by joint resolution,⁵⁰ a type of measure that is presented to the president for signature and

⁴⁶ See, 50 U.S.C. § 1544(b). The initial time period is for 60 days, but may be extended by another 30 days if the president certifies to Congress in writing that doing so is necessary due to “unavoidable military necessity[.]” *Id.*

⁴⁷ See, 50 U.S.C. § 1544(c).

⁴⁸ See, 50 U.S.C. § 1546. Congress adopts special procedures like these through its constitutional authority to make its own internal rules, not its legislative authority. See, U.S. Const. art. I, § 5, cl. 2. For this reason, either chamber may supersede or amend these rules in the same manner as other procedural rules it has adopted.

⁴⁹ *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

⁵⁰ See, Department of State Authorization Act, Fiscal years 1984 and 1985, Pub. L. No. 98-164, § 1013, 97 Stat. 1017, 1062-63 (1983), <https://www.govinfo.gov/content/pkg/STATUTE-97/pdf/STATUTE-97-Pg1017.pdf> (codified at 50 U.S.C. § 1546a). These incorporate and adapt related procedures for disapproving arms sales in the International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 601(b), 90 Stat. 729, 765-66 (1976), <https://www.govinfo.gov/content/pkg/STATUTE-90/pdf/STATUTE-90-Pg729.pdf>.

thus has the same full force of law. Using this process avoids post-*Chadha* constitutional concerns but raises the level of congressional support needed to countermand the president in most cases, from a simple majority to the two-thirds necessary to override his or her likely veto. This is a high threshold for action — so high, in fact, that it has been met only seven times in the last 20 years.⁵¹ As a result, perhaps, neither set of priority procedures for resolutions directing withdrawal has seen any serious use — that is, until the Yemen debate.⁵²

Applying the War Powers Resolution to Yemen

S.J. Res. 7 shares its basic operational language with several prior proposed concurrent and joint resolutions on Yemen. Each resolution states something to the effect of: “Congress hereby directs the President to remove United States Armed Forces from hostilities in [or affecting] the Republic of Yemen,” except for operations targeting al-Qaeda and associated forces, within 30 days, “unless and until a declaration of war or specific authorization for such use ... has been enacted.”⁵³ Paraphrased from the War Powers Resolution’s priority procedure provisions, this language is, no doubt, intended to make clear that these resolutions qualify for those procedures. According to the Trump administration, however, the “fundamental premise” underlying this language “is flawed.”⁵⁴

The Trump administration’s primary argument hinges on the definition of “hostilities,” a term used throughout the War Powers Resolution. The authors of S.J. Res. 7 and its predecessors maintain that the War Powers Resolution defines hostilities to include situations where members of the U.S. military “command, coordinate, participate in the movement of, or accompany” foreign military forces who are themselves engaged in hostilities — a definition that, in their view, extends to several of the forms of support that

⁵¹ See, “Presidential Vetoes,” History, Art & Archives: United States House of Representatives, <https://history.house.gov/Institution/Presidential-Vetoes/Presidential-Vetoes/> (last updated Apr. 4, 2019).

⁵² See, Matthew C. Weed, *The War Powers Resolution: Concepts and Practice*, Congressional Research Service, Mar. 8, 2019, <https://fas.org/sgp/crs/natsec/R42699.pdf>, 7–10 (discussing past use).

⁵³ S.J. Res. 7, 106th Cong., § 2 (as vetoed Apr. 16, 2019).

⁵⁴ Castle Letter, *supra* note 38, at 1; see also, “Statement of Administration Policy: S.J. Res. 7,” Office of Management and Budget, Executive Office of the President, April 1, 2019, https://www.whitehouse.gov/wp-content/uploads/2019/04/SAP_SJRes7_House.pdf [hereinafter “Statement of Administration Policy”].

the United States is providing to the Saudi-led coalition.⁵⁵ Since at least 1975, however, the executive branch has applied a far narrower definition of hostilities: “a situation in which units of U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces.”⁵⁶ Consistent with this interpretation, the Obama administration neither filed a 48-hours report after it began providing support to the Saudi-led coalition in 2015 nor ceased those activities after 60 to 90 days, implying that it did not consider the support it was providing to constitute hostilities.⁵⁷ For similar reasons, the Trump administration now maintains that any resolution directing the president to “remove” U.S. forces “from hostilities” in Yemen would have no legal effect.

Trump administration officials have also pointed out that the United States is providing a substantial amount of assistance to the Saudi-led coalition pursuant to existing security assistance authorities, including the Arms Export Control Act and those relating to Acquisition and Cross-Servicing Agreements.⁵⁸ This is sufficient “specific authorization,” they maintain, to exclude these types of assistance from the scope of S.J. Res. 7 and related resolutions.⁵⁹ Other forms of “military and intelligence support,” they assert, were directed “under [the president’s] constitutional powers,” meaning that any statutory restrictions on that support “would raise serious constitutional concerns to the extent it seeks to override

⁵⁵ See, S.J. Res. 7, § 1, cl. 8 (advancing this interpretation in non-binding findings provision).

⁵⁶ Letter from Monroe Leigh, Legal Adviser, U.S. Department of State, and Martin R. Hoffman, General Counsel, U.S. Department of Defense, to Hon. Clement J. Zablocki, Chairman, Subcommittee on International Security and Scientific Affairs, Committee on International Relations, U.S. House of Representatives, June 3, 1975, in, *War Powers: A Test of Compliance: Hearings before the Subcommittee on International Security and Scientific Affairs of the House Committee on International Relations*, 94th Cong. 38-40 (1975).

⁵⁷ The Obama administration also argued that providing similar types of support to partners in the Libya intervention did not trigger either of these War Powers Resolution obligations. See, “Libya and War Powers: Hearing before the Committee on Foreign Relations of the United States Senate,” 112th Cong. (2011), https://www.foreign.senate.gov/imo/media/doc/o62811_Transcript_Libya_and_War_Powers.pdf, 11-17 (prepared statement of Harold Hongju Koh, Legal Adviser, U.S. Department of State).

⁵⁸ See, 22 U.S.C. §§ 2341-2350 (2018) (relating to Acquisition and Cross-Servicing Agreements); *id.* §§ 2751-2799aa-2 (the Arms Export Control Act, as amended and codified). Notably, however, the Defense Department has conceded that it provided certain defense services in a manner not consistent with these authorities and is seeking reimbursement as a result. See, Eric Schmitt, “U.S. Bills Saudis and Emiratis \$331 Million for Refueling Warplanes in Yemen,” *New York Times*, Dec. 13, 2018, <https://www.nytimes.com/2018/12/13/us/politics/us-saudi-uae-yemen-fuel.html>.

⁵⁹ See, Statement of Administration Policy, *supra* note 54, at 1.

the President's determination as Commander in Chief."⁶⁰ This suggests that the Trump administration might view some of the activities it is pursuing in Yemen as being pursued under the president's exclusive constitutional authority, though it does not identify which.⁶¹

Even if one sets aside *Chadha* concerns, the Trump administration's interpretations of the War Powers Resolution and other relevant statutes would likely prove fatal to efforts to use concurrent resolutions to rein in U.S. involvement in Yemen. While not the only acceptable readings of these statutes, the executive branch's interpretations are longstanding and not clearly contrary to the statutory language in an area of law where many believe that the president should receive substantial deference⁶² — and where courts have been historically reticent to intervene. Until the federal courts issue a corrective or Congress enacts clearer statutory text, the executive branch's views are likely to remain in place.

The same is not necessarily true, however, for joint resolutions. As joint resolutions have the full force of law, they may supersede earlier statutes to, for example, adopt a broader definition of hostilities or expressly prohibit security assistance previously authorized by the Arms Export Control Act or other statutes. S.J. Res. 7 does precisely this by establishing that its definition of hostilities "includes in-flight refueling of non-United States aircraft conducting missions as part of the ongoing civil war in Yemen."⁶³ While some may doubt whether such joint resolutions are consistent with the intended purposes of the War Powers Resolution's priority procedures, the courts have suggested that such procedures are generally for Congress to police and do not bear on the validity of legislation once enacted.⁶⁴ Moreover, the War Powers Resolution's priority procedures for joint resolutions expressly permit amendment without setting any requirements that those amendments be germane, as other statutes do⁶⁵ — language that could be read as opening the door to using

⁶⁰ See, Statement of Administration Policy, *supra* note 54, at 1.

⁶¹ Earlier versions of this argument appeared to tie it to aerial refueling and U.S. participation in a joint combined planning cell. See, "Castle Letter," *supra* note 38, at 1.

⁶² See, e.g., *Al-Bihani v. Obama*, 619 F.3d 1, 38-41 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (arguing for judicial deference to the executive branch on the interpretation of national security-related statutes).

⁶³ S.J. Res. 7, 106th Cong., § 2 (as vetoed April 16, 2019).

⁶⁴ See, *Field v. Clark*, 143 U.S. 649, 672 (1892).

⁶⁵ Compare 50 U.S.C. § 1546a (allowing amendments with no germaneness requirements) with 2 U.S.C. § 688(d)(2) ("No amendment that is not germane to the provisions of a rescission bill shall be received.").

the War Powers Resolution's priority procedures as a fast-track for legislation on all manner of subjects.⁶⁶

For its part, however, the Senate has made clear that it is uncomfortable with this possibility. While debating a related joint resolution (and predecessor to S.J. Res. 7) in December 2018, the Senate voted 96-3 to adopt a “germaneness requirement” for the War Powers Resolution's priority procedures for joint resolutions,⁶⁷ meaning that any joint resolution or amendment being pursued through those procedures must be “germane” or be disqualified from the privileged status that the priority procedures provide. While determining the germaneness of amendments is complicated, such a requirement generally means that amendments must be on a related subject matter and not significantly expand the scope or effects of the underlying legislation.⁶⁸ In this case, one of the most notable effects of the germaneness rule is to make it more difficult to enact joint resolutions whose effects extend far beyond hostilities as currently defined. Perhaps this is why S.J. Res. 7 does not attempt to expand the definition of hostilities past aerial refueling to the other activities its co-sponsors wish to end. Absent such changes, however, there is reason to doubt whether measures like S.J. Res. 7 could successfully compel a legal end to U.S. activities in Yemen even if enacted.

Forcing a Debate, Building a Coalition

These characteristics make measures under the War Powers Resolution far from ideal vehicles for ending U.S. involvement in Yemen. So why have they proved so popular? The answer, it seems, may be that their utility has more to do with politics and less to do with their legal effectiveness — particularly given the limited alternatives available to congressional opponents of U.S. involvement in Yemen.

Congress would no doubt be better off pursuing legal limits on U.S. engagement in Yemen through conventional legislation not tied to the War Powers Resolution. But this is often

⁶⁶ See, H.R. Rep. No. 116-7, (2019), 8–9, <https://www.congress.gov/116/crpt/hrpt7/CRPT-116hrpt7.pdf> (dissenting view of Rep. Michael McCaul (R-Tex.) on H.J. Res. 37, 116th Cong. (as reported by the House Committee on Foreign Affairs on Feb. 8, 2019)) (expressing this concern).

⁶⁷ See, 164 Cong. Rec. S7482-S7483 (daily ed. Dec. 12, 2018).

⁶⁸ See, “Riddick’s Senate Procedure,” S. Doc. No. 101-28, at 854-62 (1992), [https://www.riddick.gpo.gov/UserData/SenateProcedures/Germaneness of Amendments.pdf](https://www.riddick.gpo.gov/UserData/SenateProcedures/Germaneness%20of%20Amendments.pdf).

easier said than done. Both in the House and especially in the Senate, a combination of formal procedural rules and informal institutional norms generally provide majority leaders and, to a lesser extent, committee chairs with substantial control over whether proposed legislation will be debated and voted upon.⁶⁹ This has allowed Republican congressional leaders — who controlled both chambers from 2017 through 2019, when the Democrats took control of the House — to limit debate on proposals that might compromise Trump’s policy agenda or otherwise prove politically costly for other Republicans, including those opposing the Yemen conflict.⁷⁰ In addition, senators can usually prevent legislation from proceeding to a debate or vote so long as they are not opposed by 60 of their peers. Within this context, the War Powers Resolution’s priority procedures provide a unique advantage: They allow the supporters of concurrent resolutions (in the House and Senate) and joint resolutions (in the Senate) to force at least one debate and vote on any eligible piece of proposed legislation, and to keep moving that legislation forward through the legislative process so long as it retains simple majority support. These votes and debates can, in turn, have real political consequences, even if there is a credible argument that the legislation at issue is fatally flawed.⁷¹

This is clearly the strategy that Rep. Ro Khanna (D-Calif.) had in mind when he introduced the first Yemen-related resolution, H. Con. Res. 81, in the House of Representatives in September 2017.⁷² Prior congressional opposition to U.S. involvement in Yemen had centered on oversight activities and unsuccessful efforts to disapprove of U.S. arms sales through a separate set of priority procedures.⁷³ H. Con. Res. 81 was the first effort to take on U.S. policy writ large. As a concurrent resolution, H. Con. Res. 81 would have been at serious

⁶⁹ For a detailed overview and analysis of these rules and norms, see, Barbara Sinclair, *Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress*, 5th ed. (Washington, DC: CQ Press, 2016).

⁷⁰ See, Jeremy M. Sharp and Christopher M. Blanchard, *Congress and the War in Yemen: Oversight and Legislation 2015-2019*, Congressional Research Service, Feb. 1, 2019, 17–23, <https://fas.org/sgp/crs/mideast/R45046.pdf> (listing Yemen-related legislative proposals in the 115th Congress, most of which never exited committee or received floor consideration).

⁷¹ Serious doubts regarding the legal effectiveness of proposed legislation may, however, reduce the political impact of related debates. For example, a member of Congress who votes for a measure widely understood to be ineffective may not be seen as equally willing to vote for an effective measure. This may, in turn, limit the perceived threat of corrective legislation and limit the executive branch’s incentive to respond.

⁷² H. Con. Res. 81, 115th Cong. (2017).

⁷³ See, Sharp and Blanchard, *Congress and the War in Yemen*, 2–8.

risk of being found unconstitutional under *Chadha* if enacted. But it still qualified for the priority procedures for concurrent resolutions included in the original War Powers Resolution, for which there was no parallel in the House for joint resolutions. As a result, Khanna was able to credibly threaten to use those procedures to force a floor debate and vote, both of which might have proved politically costly. Instead of following through on this threat, Khanna compromised: He accepted a debate and vote on a separate, nonbinding House resolution that raised concerns regarding U.S. policy toward the Yemen conflict and asserted that related U.S. actions were not authorized by Congress,⁷⁴ which ultimately passed by an overwhelming majority — 366-30.⁷⁵

A few months later, a bipartisan trio of senators — Mike Lee (R-Utah), Chris Murphy (D-Conn.), and Bernie Sanders (I-Vt.) — followed Khanna’s lead and introduced a parallel joint resolution, S.J. Res. 54, in the Senate.⁷⁶ Able to take advantage of priority procedures in the Senate while using joint resolutions to avoid *Chadha* concerns, their first attempt to bring S.J. Res. 54 up for a vote was tabled on a bipartisan 55-44 vote in March 2018 — but only after an extended floor debate that was timed to coincide with an official visit by Saudi Crown Prince Mohammed bin Salman, the architect of the Yemen campaign.⁷⁷ To secure votes for tabling the resolution, the then-chairman of the Senate Foreign Relations Committee, Sen. Bob Corker (R-Tenn.), promised to hold hearings on Yemen policy and move related legislation out of committee, both of which he did over subsequent months.⁷⁸ The proposed legislation, S.J. Res. 58 — co-sponsored by Sen. Todd Young (R-Ind.), a prominent Republican opponent of U.S. involvement in Yemen — threatened to cut off funding for the provision of aerial refueling unless the Trump administration certified that

⁷⁴ See, “Rep. Khanna Wins Debate on U.S. Involvement on Yemen and Strikes Compromise with House Leadership,” Press Release, Office of Congressman Ro Khanna, Nov. 2, 2017, <https://khanna.house.gov/media/press-releases/release-rep-khanna-wins-debate-us-involvement-yemen-and-strikes-compromise>.

⁷⁵ H. Res. 599, 115th Cong. (2017) (enacted); see also, 163 Cong. Rec. H9148-H9155, Nov. 13, 2017.

⁷⁶ S.J. Res. 54, 115th Cong. (2017) (as introduced in the Senate on Feb. 28, 2018).

⁷⁷ See, Nicholas Fandos, “Senators Reject Limits on U.S. Support for Saudi-led Fight in Yemen,” *New York Times*, March 20, 2018, <https://www.nytimes.com/2018/03/20/us/politics/senate-yemen-military-support.html>.

⁷⁸ See, Sharp and Blanchard, *Congress and the War in Yemen*, 9–10; see also, “Full Committee Hearing: U.S. Policy in Yemen,” U.S. Senate Committee on Foreign Relations, April 17, 2018, <https://www.foreign.senate.gov/hearings/us-policy-in-yemen-041718>.

certain conditions relating to the Yemen conflict had been met.⁷⁹ While it never received a debate on the floor of the Senate, S.J. Res. 58 was ultimately incorporated into the National Defense Authorization Act for 2019, which passed in August 2018.⁸⁰ The Trump administration made an initial certification that Saudi Arabia and its coalition partners had met the required conditions, but media coverage soon revealed that career State Department experts had almost uniformly objected that the certification was not credible.⁸¹ Within months, the Trump administration chose to end aerial refueling support to the Saudi-led coalition, which allowed them to avoid having to make another controversial certification.⁸²

Congressional concerns over the Yemen conflict's humanitarian consequences continued to escalate, however, as did bipartisan objections to the Trump administration's handling of the brutal murder of Saudi journalist and dissident Jamal Khashoggi at the apparent direction of the Saudi crown prince.⁸³ These frustrations boiled over shortly after the November 2018 midterm elections, when the Senate voted to move S.J. Res. 54 out of committee by a shocking 63-37 margin, with support from 15 Republicans (including Corker).⁸⁴ Republican support dwindled as the legislative process continued and the Trump administration conceded to some Republican demands, but the Senate ultimately adopted a lightly amended version of S.J. Res. 54 by a vote of 56-41, with seven Republicans in

⁷⁹ S.J. Res. 58, 115th Cong. (2018).

⁸⁰ See, John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub L. 115-232, § 1290, 132 Stat. 1636, 2081 (2018), <https://www.congress.gov/115/plaws/publ232/PLAW-115publ232.pdf>.

⁸¹ See, Dion Nissenbaum, "Top U.S. Diplomat Backed Continuing Support for Saudi War in Yemen Over Objections of Staff," *Wall Street Journal*, Sept. 20, 2018, <https://www.wsj.com/articles/top-u-s-diplomat-backed-continuing-support-for-saudi-war-in-yemen-over-objections-of-staff-1537441200>.

⁸² See, John Hudson and Missy Ryan, "Trump Administration to End Refueling of Saudi-coalition Aircraft in Yemen Conflict," *Washington Post*, Nov. 10, 2018, https://www.washingtonpost.com/world/national-security/trump-administration-to-end-refueling-for-saudi-coalition-aircraft-in-yemen/2018/11/09/do8ff6c3-babd-4958-bcca-cdb1caa9d5b4_story.html.

⁸³ See, Karen DeYoung, "Trump Administration Appears in No Hurry to Judge Saudi Arabia for Khashoggi Killing," *Washington Post*, Nov. 2, 2018, https://www.washingtonpost.com/world/national-security/trump-administration-appears-in-no-hurry-to-judge-saudi-arabia-for-khashoggi-killing/2018/11/02/86f79544-ddfd-11e8-85df-7a6b4d25cfbb_story.html.

⁸⁴ See, 164 Cong. Rec. S7155-S7165 (daily ed. Nov. 28, 2018).

support.⁸⁵ Meanwhile, in the House, Khanna attempted to move forward a new version of his concurrent resolution, H. Con. Res. 138,⁸⁶ only for it to be disqualified from the War Powers Resolution's priority procedures by a rule change that the House Republican leadership attached to an unrelated piece of legislation.⁸⁷

When the 115th Congress permanently adjourned a few days later, unenacted legislation like S.J. Res. 54 was rendered moot. But as soon as the new 116th Congress sat in January, legislators introduced new joint resolutions identical to S.J. Res. 54 both in the Senate and the House, where Democratic control now made priority procedures unnecessary. The House acted first, approving its joint resolution, H.J. Res. 37, with a handful of amendments on a 248-177 vote, with 18 Republicans in support.⁸⁸ Senate Majority Leader Mitch McConnell (R-Ky.), however, held that this resolution was not germane due to an amendment relating to anti-Semitism that House Republicans had successfully introduced, rendering it ineligible for priority procedures under the new germaneness rule the Senate had adopted during the December debate.⁸⁹ Instead, the Senate moved forward with its own joint resolution, S.J. Res. 7, which the Senate ultimately approved 54-46 with some

⁸⁵ See, 164 Cong. Rec. S7560-S7566 (daily ed. Dec. 13, 2018). The final version of S.J. Res. 54 adopted by the Senate included not only the expanded definition of "hostilities" discussed above, see note 63 and associated text, but reporting requirements on the consequences of ceasing support for the Saudi-led coalition and a rule of construction clarifying it should not be interpreted as affecting any cooperation with Israel. See, S.J. Res. 54, 115th Cong., §§ 2-4 (as passed by the Senate on Dec. 13, 2018).

The Senate also unanimously passed a Corker-backed joint resolution that held Crown Prince Mohammed bin Salman responsible for the Khashoggi murder and criticized aspects of the Trump administration's policy towards Saudi Arabia and Yemen. See, S.J. Res. 69, 115th Cong. (as passed by Senate on Dec. 13, 2018); 164 Cong. Rec. S7566 (daily ed. Dec. 13, 2018).

⁸⁶ H. Con. Res. 138, 115th Cong. (2018).

⁸⁷ See, H. Res. 1176, 115th Cong. (as passed by House on Dec. 12, 2018) (otherwise providing for consideration of unrelated agriculture-related legislation); see also, H. Res. 1142, 115th Cong. (as passed by House on Dec. 14, 2018) (adopting same rules restriction while otherwise providing for consideration of unrelated legislation).

⁸⁸ See, H.J. Res. 37, 116th Cong. (as passed by House on Feb. 13, 2019); see also, 165 Cong. Rec. H1543-H1556 (daily ed. Feb. 13, 2019) (recording debate and vote).

⁸⁹ See, Andrew Desiderio, *GOP Maneuver Will Block Yemen Bill from Getting Senate Vote*, Politico (Feb. 25, 2019), <https://www.politico.com/story/2019/02/25/yemen-civil-war-congress-1186302>.

minor amendments.⁹⁰ The House later approved S.J. Res. 7 as written on a 247-175 vote,⁹¹ but Trump vetoed it shortly thereafter.⁹² When the Senate held a vote on whether to override a few weeks later, it split along more or less the same margins that approved S.J. Res. 7 in the first place, falling short of the two-thirds necessary to override Trump's decision.⁹³

While some may see the lack of any new law as a sign of failure, that would be selling this process short. By forcing public debates and votes on Yemen-related resolutions, opponents of U.S. involvement in Yemen were able to force legislators to get off the sidelines and take a public stance on the issue. This appears to have helped unify Democrats in opposition to the Trump administration's policies and persuaded several Republicans to join as well. Other Republicans who stood by the Trump administration, meanwhile, were forced to publicly align themselves with the increasingly unpopular Yemen conflict. Similarly, by forcing Trump to exercise his veto authority, the supporters of S.J. Res. 7 have made clear just how isolated he is when it comes to his Yemen policies, even from many members of his own party. None of this has led the Trump administration to cut off support to the Saudi-led coalition to date. But it does appear to have led the Trump administration to temper various aspects of its policies, including by ending aerial refueling, more forcefully supporting ceasefires, and pushing harder for a negotiated solution.⁹⁴

Moreover, this bipartisan coalition appears to have some staying power. From S.J. Res. 54 onward, many of the same Republicans in the House and Senate consistently joined the

⁹⁰ See, 165 Cong. Rec. S1829-S1836 (daily ed. Mar. 13, 2019) (recording debate and vote). The final version of S.J. Res. 7 adopted by the Senate included all the provisions in S.J. Res. 54 plus two rules of construction clarifying that it was not intended to limit the collection, analysis, and sharing of intelligence that the president determines is in U.S. national security interests nor to authorize the use of military force. See, S.J. Res. 7, 116th Cong., §§ 4 & 7 (as passed by the Senate on Mar. 13, 2019).

⁹¹ See, S.J. Res. 7, 116th Cong. (as passed by the House on Apr. 4, 2019); 165 Cong. Rec. H3075-H3076 (daily ed. Apr. 4, 2019) (recording debate and vote).

⁹² See, 165 Cong. Rec. S2469-S2470 (daily ed. Apr. 29, 2019) (considering veto statement in the Senate).

⁹³ See, 165 Cong. Rec. S2585-S2593 (daily ed. May 2, 2019) (recording debate and 53-45 override vote).

⁹⁴ See, Gardiner Harris, Eric Schmitt, and Rick Gladstone, "U.S. and Britain Seek Yemen Cease-Fire as Relations with Saudi Cool," *New York Times*, Oct. 31, 2018, <https://www.nytimes.com/2018/10/31/world/middleeast/saudi-arabia-yemen-cease-fire.html> ("The administration's Yemen cease-fire proposal appeared aimed at least in part at heading off congressional fury and preserving the Saudi relationship.").

now-united Democrats in supporting Yemen-related resolutions. Similarly, when the Trump administration used an emergency waiver to bypass congressional opposition to certain Yemen-related arms sales in May 2019, most of these same legislators supported a series of 22 joint resolutions disapproving of those sales. This coalition may prove important as Congress moves forward with the annual defense authorization and appropriation bills, which will most likely be finalized and adopted late in the fall. Such omnibus legislation bundles a diverse array of provisions with funding and other authorities needed by the executive branch, making them more difficult for presidents to veto — and thus popular vehicles for statutory provisions that presidents oppose, including restrictions on U.S. activities in Yemen.

On July 12, 2019, the House voted 251-170 in favor of a Khanna-backed amendment to the House draft of the 2020 National Defense Authorization Act that would expressly prohibit any use of funds to support the Saudi-led coalition in Yemen in its counter-Houthi operations.⁹⁵ In the Senate, however, a similar amendment backed by Sanders failed to make it into the bill.⁹⁶ Whether some version of this restriction ultimately finds itself in the final National Defense Authorization Act now depends on the conference committee that will reconcile these two versions. If members from the House are able to persuade their Senate colleagues to acquiesce to some version of their provision, then it will likely be in part because a bipartisan majority of Congress has already shown its support for similar measures through the debate made possible by the War Powers Resolution.

Lessons for War Powers Reform

Generally speaking, one should be careful about drawing any firm conclusions about a topic as complex as war powers from a single case study. For war powers reformers, however, the Yemen conflict is a valuable point of reference, as it highlights certain important dynamics in how contemporary war powers operate. No doubt the Yemen debate

⁹⁵ See, 165 Cong. Rec. H5598 (daily ed. July 11, 2019) (introduction and text of amendment No. 26); see also, “National Defense Authorization Act for Fiscal Year 2020,” H.R. 2500, 116th Cong. § 1270H (as passed by House on July 12, 2019) (amendment as incorporated).

⁹⁶ Compare, 165 Cong. Rec. S4100 (daily ed. June 19, 2019) (introduction and text of S. Amdt. 783), with, “National Defense Authorization Act for Fiscal Year 2020,” S. 1790, 116th Cong. (as passed by Senate on June 27, 2019) (containing no such provision).

underscores just how difficult it is for even a majority in Congress to serve as a check on the president, especially post-*Chadha*. But it also highlights strategies that some in Congress have developed in order to exercise greater influence. Both are relevant for those considering how the process through which the United States approaches the use of military force and related policies might be restructured.

Perhaps the most important lesson of the Yemen debate is how impactful priority procedures like those installed by the War Powers Resolution can be. By permitting legislators to bypass many of the obstacles facing standard legislation — sometimes as individual legislators, sometimes with simple majority support — priority procedures can empower even small groups of legislators to elevate and force a public debate on qualifying issues, thereby bringing political pressure on other members of Congress and the president to justify or change their position. To expand the utility of these procedures, Congress could update them to apply to a broader range of activities or allow joint resolutions to propose a broader range of potential legislative responses. Combined with enhanced transparency requirements and oversight tools, such measures could increase the influence that members of Congress can have even where they do not have the level of support necessary to pursue legislative action — though that influence will remain indirect and political in nature.

Less clear is how reformers might improve Congress' ability to exercise more formal influence as a matter of law. As S.J. Res. 7 demonstrates, the post-*Chadha* shift from a simple majority to the two-thirds support required to override a presidential veto severely weakens Congress' ability to check presidential decisions, even where Congress has provided special statutory authorities for them to employ. And it's not clear that there is much Congress can do to avoid this possibility without incurring a substantial risk of constitutional invalidation. At best, Congress can make it painful for the president to exercise his or her veto by incorporating the statutory provisions that he or she opposes into other sought-after legislation, such as the annual National Defense Authorization Act. Reformers might be able to install priority procedures that would allow a simple majority to attach approved legislation to standing omnibus legislation, making this leverage easier for Congress to exercise. Even with such a mechanism, however, Congress' ability to reverse or limit the president's policy decisions will remain limited by its willingness to leverage its

control over other legislation — a common game in Congress, but one that some legislators may not always be willing or able to play.

Instead, if it wishes to reassert control over foreign and national security policy, Congress will most likely need to begin by setting more express limits on the authorities that it provides to the president in the first place, whether explicitly by statutory delegation or implicitly through acquiescence. Ambiguities in the War Powers Resolution and other relevant legislation have facilitated the executive branch's ability to adopt interpretations that allow Trump to pursue his preferred Yemen policies. If it wants to keep this from happening in the future, Congress could define vague terms such as hostilities with more specificity. Sunset provisions and mandatory cutoffs — such as the War Powers Resolution's 60- to 90-day requirement, which arguably has a somewhat effective track record in relation to activities that undisputedly qualify as hostilities⁹⁷ — would also help ensure that Congress has the opportunity to revisit authorizations that might prove overly broad. To provide some avenue for challenging presidential assertions of exclusive constitutional authority, Congress could even take the novel step of authorizing litigation on its own behalf or establishing some relevant private cause of action. These changes, however, are most easily implemented at the point of initial authorization, when the president is less able to reject congressional conditions without consequence. Absent support from two-thirds of Congress, reforming existing statutory regimes — or imposing limits in areas where the president already claims the authority to act on the basis of congressional acquiescence — may have to wait until there is a president who supports, or at least does not object to, such changes.

The difficulty with any such reforms, however, is reconciling the desire for congressional accountability with the need for presidential initiative. Whether expressly through statute or implicitly through acquiescence, Congress delegates authority to the executive branch for a reason: The president is more institutionally capable of responding to developments quickly and adapting his or her policy response to maximize its effectiveness. Given Congress' inherent inertia — a conservative approach that most in Congress seem intent to maintain, as evidenced by the Senate's 96-3 vote in support of a germaneness requirement — requiring more congressional authorization will most likely mean that the United States will pursue less military engagement overseas. For those who believe U.S. intervention does

⁹⁷ See, Weed, *The War Powers Resolution*, 9-63 (summarizing past practice).

more harm than good, this is a feature, not a bug. But others may reasonably fear that a less agile United States will be less able to ensure its own national security — or might even compromise the imperfect but relatively stable global order that U.S. military power has arguably helped to build and maintain over the past century.

In the end, how to balance these risks is not a question of law. It's a policy judgment that only Congress can make, in consultation with the executive branch. Whatever past practices the United States may have pursued, the Constitution gives Congress substantial authority to restructure how the United States approaches its foreign and national security policy through legislation, provided that reformers can muster enough support. Moreover, the correct balance may change over time as the United States and its position in the world evolve. Given this, Congress' best approach may be simply to remain engaged on these issues, even if it continues to delegate broad authority to the president. And post-*Chadha*, the ability to do so may require Congress to design institutions and processes that facilitate or even force such engagement by setting clearer limits on the scope of executive discretion, facilitating more effective oversight, and requiring periodic reauthorization.

Regardless, where Congress does not act, the executive branch is likely to step in with its own approach, for good reasons and bad. Once it does, any resulting policies that Congress may disagree with are likely to be far more difficult to amend or reverse. Hence, if it wants to play a stronger institutional role in the use of military force overseas, Congress must stop reacting to past conflicts and begin looking ahead to future ones in determining how it uses its legislative authorities.

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4. How to Revive Congress' War Powers

Oona A. Hathaway

The U.S. Congress has not approved a use of force since 2002. And yet the United States certainly has not been at peace in the years since. In 2001, Congress authorized the United States to go to war against those who carried out the 9/11 attacks and any nation, organization, or persons that harbored them. Seventeen years later, the U.S. military is still in Afghanistan battling insurgent and terrorist forces. In 2002, Congress authorized the president to invade Iraq. In 2003, the U.S. military toppled then-President Saddam Hussein and has been battling the insurgent groups that emerged in the aftermath ever since. The U.S. government is also using force against extremist groups outside Iraq and Afghanistan. The United States reportedly has missions in Pakistan, Syria, Yemen, and around 20 African countries, including most prominently Somalia and Libya.⁹⁸

None of these ongoing military operations has been separately authorized by Congress. Instead, as explained in greater detail below, they are grounded in capacious readings of Congress's 2001 and 2002 authorizations for use of military force.⁹⁹ And let's not forget the war in Libya, launched by President Barack Obama in 2011, and the use of force against the Syrian government by President Donald Trump in April 2017 and again in April 2018 — which were not authorized by Congress at all.¹⁰⁰

⁹⁸ Annika Lichtenbaum, "U.S. Military Operational Activity in the Sahel," *Lawfare*, Jan. 25, 2019, <https://www.lawfareblog.com/us-military-operational-activity-sahel>. Although many of the groups the United States is targeting have some current or historic ties to al-Qaeda, many of them are also indigenous to the countries where they operate.

⁹⁹ Some claim that Congress continues to vote to pay for the wars through authorizing the military budget and that is enough, but authorization and appropriations are two very different things.

¹⁰⁰ See Jack Goldsmith and Oona Hathaway, "Bad Legal Arguments for the Syria Strikes," *Lawfare & Just Security*, April 14, 2018, <https://www.justsecurity.org/54925/bad-legal-arguments-syria-strikes/> and <https://www.lawfareblog.com/bad-legal-arguments-syria-airstrikes>; Jack Goldsmith and Oona Hathaway, "The Downsides of Bombing Syria," *Lawfare & Just Security*, April 10, 2018, <https://www.lawfareblog.com/downsides-bombing-syria>, <https://www.justsecurity.org/54698/downsides-bombing-syria/>; Spencer Ackerman, Julian Borger, Ben Jacobs, and Ed Pilkington, "Syria Missile Strikes: US Launches First Direct Action Against Assad," *The Guardian* April 7, 2017,

Even though the United States has been at war around the globe for most of the last two decades, the vast majority of those serving in Congress has never voted to authorize a military operation. Only 18 of the 100 current senators were in office when the 2002 authorization for war against Iraq was enacted and only 58 of the 435 representatives were.¹⁰¹ As a result, there has been little democratic accountability for the many wars the United States has waged over the past 17 years,¹⁰² which have cost trillions of dollars and thousands of American lives.¹⁰³

The institutional structure for authorizing military force is obviously broken. Part of the problem is the absence of political courage among many of America's elected officials. Too many members of Congress are all too happy to abdicate their constitutional responsibility and allow the president to go it alone, taking all the political risk. Indeed, the lesson many learned from the Democratic primary in 2008, during which Hillary Clinton paid a steep political price for her vote five years earlier to authorize the war in Iraq, was that it is best to avoid taking hard votes on the use of force if at all possible. As long as the president is willing to act, Congress is perfectly content to sit on the sidelines and avoid bearing any responsibility.

<https://www.theguardian.com/world/2017/apr/06/trump-syria-missiles-assad-chemical-weapons>; Cory Booker and Oona Hathaway, "A Syria Plan that Breaks the Law," *New York Times*, Jan. 23, 2018, <https://www.nytimes.com/2018/01/23/opinion/syria-tillerson-constitution-trump.html>.

¹⁰¹ Calculations by author, based on the information available at https://ballotpedia.org/List_of_current_members_of_the_U.S._Congress.

¹⁰² Some argue that presidential elections, which occur every four years, are sufficient accountability. However, there are reasons to think this is not sufficient. First, due to term limits, direct accountability is only effective during a president's first term. Second, presidential elections are multi-issue elections. The candidates' positions on the use of military force is one of many issues of importance to voters. Although 54 percent of registered voters surveyed by the Pew Research Center thought Clinton would do the better job of making wise foreign policy decisions (compared to 36 percent who thought Trump would), Trump became president. (The two were closer on the question of "defending future terrorist attacks," with Trump having the slight edge at 48 percent to Clinton's 43 percent.) "Top Voting Issues in 2016 Election," *Pew Research Center*, July 7, 2016, <https://www.people-press.org/2016/07/07/4-top-voting-issues-in-2016-election/>.

¹⁰³ As of 2017, the wars in Afghanistan, Iraq, Syria, and Pakistan alone had cost American taxpayers \$5.6 trillion since they began in 2001. Gordon Lubold, "U.S. Spent \$5.6 Trillion on Wars in Middle East and Asia: Study," *Wall Street Journal*, Nov. 8, 2017, <https://www.wsj.com/articles/study-estimates-war-costs-at-5-6-trillion-1510106400>.

No institutional reform can fix a dearth of political courage. But at least part of the problem is that the system of checks and balances is broken, making it difficult for those who *do* want to act to do so effectively. A few revisions — some simple, some more ambitious — could significantly strengthen the tools available to members of Congress who want to press back against presidential assertions of unilateral authority to take the nation into war. Specifically, I argue for three separate reforms. First, the War Powers Resolution should be revised to include a definition of “hostilities.” Second, Congress should enact rules for limited war that would create a default sunset for all new authorizations. Third, the War Powers Resolution should be revised to reaffirm that any use of military force in contravention of international law is prohibited. While none of these suggested reforms addresses all of the problems plaguing the system for authorizing the use of military force, each would help reset the balance in the right direction.

1. Define “Hostilities”

One of the fateful decisions made by the authors of the War Powers Resolution was to tie the reporting requirements and the automatic withdrawal provisions not to “war” or “armed conflict,” but to “hostilities.” The House report on the War Power Resolution explained the choice of the word as follows:

The word hostilities was substituted for the phrase *armed conflict* during the subcommittee drafting process because it was considered to be somewhat broader in scope. In addition to a situation in which fighting actually has begun, *hostilities* also encompass a state of confrontation in which no shots have been fired, but where there is a clear and present danger of armed conflict. “*Imminent hostilities*” denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict.¹⁰⁴

¹⁰⁴ See, “The War Powers Resolution: Relevant Documents, Correspondence, Reports,” U.S. Congress, Committee on International Relations, Subcommittee on International Security and Scientific Affairs, 94th Cong., 2nd sess., January 1976, Committee Print 23, <https://ufdc.ufl.edu/AA00022638/00001/1?search=the+word+hostilities+was+substituted>. Interestingly, the explanation given by the House report is at odds with the common use of the term “hostilities” at the time —

Perhaps because the meaning was self-evident to those involved, the term was not a subject of significant debate during the many hearings on the proposed legislation,¹⁰⁵ nor was it defined in the legislation. That has left it open to wildly differing interpretations since.

Over the course of the decades following the passage of the resolution, administrations have adopted varying interpretations of the term “hostilities.” Many presidents evaded the consultation, reporting, and mandatory withdrawal provisions by arguing that military operations were not hostilities, even when they plainly were. For instance, according to the administration of President Ronald Reagan, the invasion of Grenada did not qualify as hostilities and so was not subject to the War Powers Resolution.¹⁰⁶ That incident was far from unique. In 1993, John Hart Ely observed,

Repeatedly — as in the final stages of the war in Indochina, the botched 1980 attempt to free our hostages in Iran, the tragic 1982-83 commitment of our troops to Lebanon, the 1983 invasion of Grenada, the Gulf of Sidra incident of March 1986, the bombing of Tripoli a month later, the 1987-1988 Persian Gulf naval war against Iran, and the 1989 invasion of Panama — the president filed either no report at all or a vague statement pointedly refusing to identify itself as a Section 4(a)(1) ‘hostilities’ report.¹⁰⁷

which was to refer to active fighting, as opposed to the legal state of war (which could begin after hostilities began and end before they were concluded). It is unclear whether the authors of the House report understood this. Interestingly, a Senate report better reflects this more common understanding of the term hostilities. It stated, “The essential purpose of the bill, therefore, is to reconfirm and to define with precision the constitutional authority of Congress to exercise its constitutional war powers with respect to ‘undeclared’ wars [i.e., hostilities] and the way in which this authority relates to the constitutional responsibilities of the President as Commander-in-Chief.” *War Powers*, report prepared by Mr. Fulbright, from the Senate Committee on Foreign Relations, 93rd Cong., 1st Sess., June 14, 1973, 2.

¹⁰⁵ The many hearings on the resolution use the term repeatedly, but there appears to be very little debate over its meaning. There was, by contrast, significant debate over the relative constitutional authorities of Congress and the president over the initiation, conduct of, and termination of hostilities. See, e.g., *id.*; “Congress, the President, and War Powers: Hearings before the Subcommittee on National Security Policy and Scientific Developments of the Committee on Foreign Affairs,” U.S. Congress, House of Representatives, 91st Cong., 2nd Sess., June-August, 1970.

¹⁰⁶ Stuart Taylor Jr., “Legality of Grenada Attack Disputed,” *New York Times*, Oct. 26, 1983.

¹⁰⁷ John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath* (Princeton, NJ: Princeton University Press, 1993), 49.

The War Powers Resolution was grievously ailing when the Obama administration dealt it what was arguably a death blow in 2011.¹⁰⁸ On June 28, 2011, State Department Legal Adviser Harold Koh defended the administration's decision not to seek congressional authorization to continue military operations in Libya past 60 days on the grounds that the military operations were not hostilities.¹⁰⁹ Stating that "hostilities" is "an ambiguous standard, which is nowhere defined in statute," he argued that because the mission was limited, exposure of U.S. armed forces was limited, risk of escalation was limited, and the military means the United States was using were limited, the Libya operation did not amount to hostilities and thus the War Powers Resolution did not apply.¹¹⁰ Never mind that the United States deployed a naval force of 11 ships and engaged in an extensive bombing campaign that included striking 100 targets in just 24 hours.¹¹¹

¹⁰⁸ Two months earlier, the Office of Legal Counsel issued an opinion concluding that "the President had the constitutional authority to direct the use of force in Libya because he could reasonably determine that such use of force was in the national interest." It further decided that he "was not constitutionally required to use military force in the limited operations under consideration." Both conclusions stretched the unilateral authority of the president to authorize the use of military force far beyond previous limits. Caroline Krass, "Memorandum Opinion for the Attorney General: Authority to Use Military Force in Libya," April 1, 2011, <https://fas.org/irp/agency/doj/olc/libya.pdf>.

¹⁰⁹ "Testimony by Legal Adviser Harold Hongju Koh, U.S. Department of State, on Libya and War Powers," U.S. Congress, Senate, Committee on Foreign Relations, 112th Cong., 1st sess., June 28, 2011, <https://2009-2017.state.gov/documents/organization/167452.pdf>.

¹¹⁰ This was not a consensus view within the administration — both the Office of Legal Counsel acting head Caroline Krass and Department of Defense General Counsel Jeh Johnson had counseled that the operation was, in fact, hostilities to which the resolution applied. The White House counsel agreed with Koh, and the president accepted that view. Charlie Savage, "2 Top Lawyers Lost to Obama in Libya War Policy Debate," *New York Times*, June 17, 2011, <https://www.nytimes.com/2011/06/18/world/africa/18powers.html>.

¹¹¹ By 2011, the budget of the Department of Defense was so large and the funds so fungible that the department did not even need to seek a separate appropriation to support the war effort (unlike during the 1999 U.S.-led NATO intervention in Kosovo). See Bruce Ackerman and Oona Hathaway, "Obama's Illegal War," *Foreign Policy*, June 1, 2011, <https://foreignpolicy.com/2011/06/01/obamas-illegal-war-2/> (noting that the war had already cost three-fourths of a billion dollars but had been funded entirely out of general appropriations). See also, Bruce Ackerman and Oona Hathaway, "The Clock Is Ticking on Obama's War," *Foreign Policy*, April 6, 2011; Bruce Ackerman and Oona Hathaway, "It's Not Up to the President to Impose a No-Fly Zone Over Libya," *Huffington Post*, March 9, 2011, https://www.huffpost.com/entry/no-fly-zone-libya_b_833426.

The most recent Senate hearing on war powers issues as of this writing once again reflected ongoing uncertainty about the meaning of the term “hostilities.” Sen. Tom Udall asked the acting State Department Legal Adviser Marik String whether the U.S. disabling of an Iranian drone counted as hostilities under the War Powers Resolution. String responded that his office had not yet made a determination as to whether it did or not — a puzzling answer given that if it did, it would trigger War Powers reporting obligations. Sen. Mitt Romney then asked what the Trump administration understands by the term “hostilities” under the War Powers Resolution. String responded that he could only discuss that in a closed setting.¹¹²

If the resolution is to be revived, Congress should start by filling this key gap in the statute and define the term “hostilities.” There are signs that many members of Congress think that the term “hostilities” has a broader meaning than the Obama administration gave it. In April 2019, House lawmakers passed a measure that would have used the War Powers Resolution to force an end to U.S. participation in the conflict in Yemen.¹¹³ Part of what was intriguing about the draft resolution was the way in which it defined hostilities.¹¹⁴ It found that “Since March 2015, members of the United States Armed Forces have been introduced into hostilities between the Saudi-led coalition and the Houthis, *including providing to the Saudi-led coalition aerial targeting assistance, intelligence sharing, and mid-flight aerial refueling.*”¹¹⁵ And it specifically stated that “For purposes of this resolution, in this section, the term ‘hostilities’ includes in-flight refueling of non-United States aircraft conducting missions as part of the ongoing civil war in Yemen.”¹¹⁶

This definition of “hostilities” is a far cry from the definition offered by the Obama Administration during the debate over the 2011 U.S. intervention into Libya. Indeed, many

¹¹² “Reviewing Authorities for the Use of Military Force,” U.S. Congress, Senate, Committee on Foreign Relations, 115th Cong., 2nd sess., July 24, 2019, <https://www.foreign.senate.gov/hearings/reviewing-authorities-for-the-use-of-military-force-072419>.

¹¹³ See, Missy Ryan, “After Yemen Vote, Question Remains: When is the U.S. at War?” *Washington Post*, April 5, 2019, https://www.washingtonpost.com/world/national-security/after-yemen-vote-question-remains-when-is-the-us-at-war/2019/04/05/08dbdcb6-57b4-11e9-9136-f8e636f1f6df_story.html?utm_term=.5de6fba7deb8.

¹¹⁴ “A joint resolution to direct the removal of United States Armed Forces from hostilities in the Republic of Yemen that have not been authorized by Congress, S.J. Res. 7, 116th Cong., 1st sess., 2019, <https://www.congress.gov/bill/116th-congress/senate-joint-resolution/7/text>.

¹¹⁵ “A joint resolution to direct the removal of United States Armed Forces,” (emphasis added).

¹¹⁶ “A joint resolution to direct the removal of United States Armed Forces.”

think it swings too far in the other direction, defining hostilities so capaciously that it would incapacitate much military cooperation with allies. But, at a minimum, the resolution suggests that there is a desperate need for clarity about the meaning of “hostilities” and an opportunity to rejuvenate the resolution as a more effective institutional constraint.

An ideal definition of hostilities would make explicit the original intent of the War Powers Resolution: that it encompass armed conflict and situations in which there is a clear and present danger of armed conflict. Indeed, the ideal definition would, in fact, specify “armed conflict,” a term on which there is substantial and robust legal authority both in domestic and international law, making it less susceptible to convenient reinterpretation to fit particular situations.¹¹⁷ Hence, “hostilities” ought to be defined as “armed conflict” or a “clear and present danger of armed conflict.” An alternative approach would be simply to replace “hostilities” in the resolution with “armed conflict,” or perhaps even, “armed conflict as that term is understood under international law.”

There are four other ways in which the definition of hostilities in the War Powers Resolution should be sharpened, as well. First, it would be wise to clarify that the definition of hostilities applies to cyber-attacks. Cyber has become an increasingly important operating environment. The U.S. government’s position has long been that the law of armed conflict applies to cyber just as it does to conventional warfare.¹¹⁸ Most experts agree that the way to assess a cyber operation is to examine its effects. Where the effects of a cyber operation are equivalent to a kinetic event that would trigger an armed conflict, that operation triggers an armed conflict as well.¹¹⁹ However, no war powers report has been submitted to date on a

¹¹⁷ In brief, an international armed conflict is triggered when there is a “resort to armed force between States.” *Prosecutor v. Tadić: Decision on Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-I, International Criminal Tribunal for the Former Yugoslavia, Oct. 2, 1995, 70, <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>. A non-international armed conflict is triggered when there is “protected armed violence between governmental authorities and organized armed groups or between such groups within a State”; *Prosecutor v. Tadić*. For more on the threshold for triggering a NIAC, see Oona A. Hathaway et al., “Consent is Not Enough: Why States Must Respect the Intensity Threshold in Transnational Conflict,” *University of Pennsylvania Law Review* 165, no. 1 (2016): 8–16.

¹¹⁸ See John Reed, “U.S. Gov’t: Laws of War Apply to Cyber Conflict,” *Foreign Policy*, March 25, 2013, <https://foreignpolicy.com/2013/03/25/u-s-govt-laws-of-war-apply-to-cyber-conflict/>.

¹¹⁹ See, e.g., Oona Hathaway, et al., “The Law of Cyber Attack,” *California Law Review* 100 no. 4 (2012): 847–48, 850–56.

pure cyber operation, even though news reports indicate that cyber operations have taken place that arguably would trigger an obligation to report.¹²⁰ This suggests that the executive branch may not have come to a determination that war powers reporting applies to cyber events. Thus, even though simply defining “hostilities” as “armed conflict” should be sufficient to bring cyber-attacks within the scope of the War Powers Resolution, it may nonetheless be worth making it explicit.

Second, the revised resolution ought to specify that “operational preparation of the environment” activities — both cyber and conventional — must be reported to Congress. Such activities suggest “imminent involvement in hostilities,” but might not meet the current reporting threshold, which requires that “imminent involvement in hostilities is clearly indicated by the circumstances.” While recent reporting requirements for “sensitive military operations” and “sensitive cyber operations,”¹²¹ have filled important gaps, operational preparation of the environment remains a key blind spot that falls between existing Title 10 and Title 50 reporting obligations. This could be rectified if such activities were designated evidence of “imminent involvement in hostilities” that requires reporting. (If necessary for operational security, that reporting could be done in a classified setting.)

Third, the revised War Powers Resolution should address partnered operations, which have become much more frequent in recent years. The Trump administration has apparently adopted the view that where the United States is engaged in military operations authorized under the 2001 Authorization for the Use of Military Force with partner forces — both state and non-state — that authority also encompasses defense of those forces from attack.¹²² For instance, until the recent reversal of policy by President Donald Trump, the Trump administration had made it clear that it was prepared to defend the Syrian Democratic Forces

¹²⁰ For example, there have been recent reports that the United States has escalated attacks on Russia’s power grid. David E. Sanger and Nicole Perlroth, “U.S. Escalates Online Attacks on Russia’s Power Grid,” *New York Times*, June 15, 2019, <https://www.nytimes.com/2019/06/15/us/politics/trump-cyber-russia-grid.html>, (noting that the actions by the U.S. carry “significant risk of escalating the daily digital Cold War between Washington and Moscow”).

¹²¹ *Notification requirements for sensitive military cyber operations*, U.S. Code 10 (2019) § 395.

¹²² “Reviewing Authorities for the Use of Military Force,” U.S. Congress, Senate, Committee on Foreign Relations, 116th Cong., 1st sess., July 24, 2019, (answer to question by Marik String, Acting Legal Adviser, U.S. Department of State), <https://www.foreign.senate.gov/hearings/reviewing-authorities-for-the-use-of-military-force-072419>.

in Northern Syria from attack by Syrian forces (and even Russian or Turkish forces). The administration never sought congressional approval for the use of such defensive force, because it claimed that it fell within the 2001 authorization for the use of military force. This is a novel legal position that no prior administration had embraced and it had the potential to embroil the United States in escalating hostilities without any clear congressional intent — or even notification to Congress, because it putatively falls within an existing congressional authorization. This could be addressed by revising the War Powers resolution to clarify that if the U.S. military is prepared to defend partner forces in an operation authorized by Congress, this would constitute “imminent involvement in hostilities” and must be reported to Congress.

Fourth, the resolution should clarify the context in which the War Powers Resolution stops and restarts. In 1993, President Bill Clinton committed troops to Somalia to assist in alleviating a humanitarian disaster without seeking congressional authorization. His administration claimed that the 60-day clock in the War Powers Resolution did not apply because the military operations were “intermittent” rather than “sustained.” These claims prompted a member of Congress to declare that “[a]nother casualty of Somalia has been the war powers resolution.”¹²³ The Reagan administration made similar arguments during the so-called “Tanker wars” in the 1980s. It treated each incident in the conflict as discrete, as if each one started the 60-day clock anew.¹²⁴ To avoid such claims, the revised resolution should clarify that the clock continues to run as long as “active hostilities” are ongoing between the United States and the other state or non-state actor as a matter of international law.¹²⁵

¹²³ Congressman Benjamin A. Gilman, “Remarks,” reprinted in 139 Cong. Rec. H7094 (daily ed., Sept. 28, 1993).

¹²⁴ For a helpful overview of the claims, see Todd Buchwald, “Anticipating the President’s Way Around the War Powers Resolution on Iran: Lessons of the 1980s Tanker Wars,” *Just Security*, June 28, 2019, <https://www.justsecurity.org/64732/anticipating-the-presidents-way-around-the-war-powers-resolution-on-iran-lessons-of-the-1980s-tanker-wars/>.

¹²⁵ Under the international law of armed conflict, the authority to detain those captured during the conflict continues only as long as “active hostilities” are ongoing. As the *Hamdi v. Rumsfeld* plurality noted, “It is a clearly established principle of the law of war that detention may last no longer than active hostilities.” *Hamdi v. Rumsfeld*, 542 U.S. 520 (2004) (plurality) (citing Geneva Convention (III), art. 118). See also, “Brief of Experts on International Law and Foreign Relations as Amici Curiae in Support of Initial Hearing En Banc,” *Al-Alwi v. Trump*, No. 17-5067 (D.C. Cir. Oct. 10, 2017) (arguing the 2001 Authorization for the Use of Military Force no longer authorizes detention of Guantanamo detainee held since 2002 because hostilities are no longer ongoing).

An advantage of defining “hostilities” as “armed conflict” is that it would anchor congressional involvement to instances where international legal obligations under the Geneva Conventions are triggered. After all, the Conventions provide in Common Article 2 that they “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”¹²⁶ While the international legal obligations that apply to non-international armed conflicts are less capacious, it is nonetheless clear that there are obligations on both parties to the conflict under Common Article 3.¹²⁷

One danger that must be acknowledged is that this approach could lead the executive branch to adopt a narrower view of when an armed conflict is triggered to avoid congressional involvement. But there are a couple of reasons to think this unlikely. First, as already noted, there is extensive existing domestic and international law on the meaning of the phrase “armed conflict.” An interpretation at odds with decades of legal interpretations is unlikely to be adopted by principled executive branch lawyers. It would, moreover, be subject to international criticism (unlike the current U.S.-specific term “hostilities”). Second, the existence of an armed conflict triggers immunities for members of the armed forces. In the absence of an armed conflict, members of the armed forces are not immune from prosecution for their actions in the course of a military conflict. When a member of the armed forces kills in the absence of armed conflict, she is committing murder, but when she kills a belligerent during an armed conflict, she is doing her job. Hence, the U.S. armed forces and its lawyers

¹²⁶ “Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,” art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; “Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea” art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; “Geneva Convention Relative to the Protection of Civilian Persons in Times of War,” art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; “Geneva Convention Relative to the Treatment of Prisoners of War,” art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

¹²⁷ “Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,” art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; “Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea,” art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; “Geneva Convention Relative to the Protection of Civilian Persons in Times of War,” art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; “Geneva Convention Relative to the Treatment of Prisoners of War,” art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

are likely to resist inappropriately cabined interpretations of when an armed conflict is triggered.

2. Require that all Future Authorizations Sunset.

The second proposed revision is more challenging politically, but, if successful, could help prevent the next forever war. In 2011, Bruce Ackerman and I proposed what we called, “Rules for Limited War.”¹²⁸ As we explained:

The new rules will work proactively through a three-stage process. The rules first require all new authorizations for the use of force to state clearly whether they contemplate an open-ended conflict or a limited war. In the absence of a clear statement, the rules will create a presumption for limited war; they will presume a two-year sunset unless the House or Senate specifies a different time period. Second, the rules permit the House or Senate to reauthorize the war for another period before the expiration date arrives. If the two houses fail to take affirmative action, the third and final stage kicks into operation: the rules prohibit all further appropriations for the conflict once the time limit has elapsed, with the exception of a one-year appropriation of funds for the orderly withdrawal of troops and other forces from the battle zone. During this withdrawal period, the president remains free to try to convince Congress and the public that a more extended war is in the national interest. But there is only one way for him to press onward: he must gain the explicit consent of both houses to another military authorization, which once again will be governed by a two-year sunset unless Congress provides otherwise. In the meantime, withdrawal must proceed in a responsible fashion.¹²⁹

The aim of this proposal is to challenge the process that led to the longstanding “limited” war inaugurated by the 2001 and 2002 Authorizations for the Use of Military Force, which even in 2011 had been interpreted to reach situations far beyond the intent of Congress at the time

¹²⁸ Bruce Ackerman and Oona A. Hathaway, “Limited War and the Constitution: Iraq and the Crisis of Presidential Legality,” *Michigan Law Review* 109, no. 4 (2011).

¹²⁹ Ackerman and Hathaway, “Limited War and the Constitution,” 497.

they were enacted. This sunset proposal does not necessarily require a revision to the War Powers Resolution itself — it can operate as a stand-alone legislative proposal — but it interacts with the War Powers Resolution in obvious ways. The vast majority of military operations undertaken by the U.S. military around the globe are currently carried out under the 2001 Authorization for the Use of Military Force, as generously interpreted by successive executive branch lawyers. The War Powers Resolution constraints do not apply to any of these operations because they have been “authorized” by Congress. However, as noted above, only a small fraction of the current members of Congress voted on that authorization, and most of those who did participate did not anticipate that the authorization would be used so broadly or for so long.¹³⁰

As the opening noted, all of the current, ongoing operations are grounded in capacious readings of authorizations for use of military force passed in 2001 and 2002. Specifically, the government argues that the operations in Iraq and parts of Syria are authorized by the 2002 Authorization for Use of Military Force Against Iraq, passed by Congress in 2002 after the George W. Bush administration assured Congress that Saddam Hussein, who was then president of Iraq, possessed weapons of mass destruction that posed an existential threat to the United States and its allies. Congress responded by authorizing the use of force to address that threat¹³¹ — a threat that the public would later learn did not, in fact, exist.¹³² And yet, the government continues to rely on the authorization almost 17 years later to justify ongoing operations in Iraq and parts of Syria that have little to do with the purposes for which Congress authorized the use of force: defending the “national security of the United States

¹³⁰ At a recent hearing of the Senate Foreign Relations Committee, Sen. Ben Cardin stated of the debate over the 2001 Authorization for the Use of Military Force, for which he voted: “I remember that debate very well. I participated in that debate and it was clearly aimed at those that planned the attack against us and those who harbored those who planned the attack against us. And the interpretation now of three administrations to apply that ‘01 authorization to contemporary issues is totally absurd. Absurd. It’s not what Congress intended.” “Reviewing Authorities for the Use of Military Force,” U.S. Congress, Senate Committee on Foreign Relations, 116th Cong., 1st sess., July 24, 2019, <https://www.foreign.senate.gov/hearings/reviewing-authorities-for-the-use-of-military-force-072419>.

¹³¹ *Authorization for Use of Military Force Against Iraq Resolution of 2002*, Public Law 107-243 (Oct. 16, 2002), <https://www.congress.gov/107/plaws/publ243/PLAW-107publ243.pdf>.

¹³² “Comprehensive Report of the Special Advisor to the DCI on Iraq’s WMD,” Director of Central Intelligence, Sept. 30, 2004, https://www.cia.gov/library/reports/general-reports-1/iraq_wmd_2004/index.html#sect1.

against the continuing threat posed by Iraq” and enforcing U.N. Security Council resolutions regarding Iraq.¹³³

The rest of the ongoing military operations carried out by the United States today are grounded in the 2001 Authorization for the Use of Military Force, passed a mere week after the 9/11 attacks.¹³⁴ That joint resolution authorized the president to use all “necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on Sept. 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.”¹³⁵ Through a series of interpretive moves over the course of the last 18 years by Republican and Democratic administrations alike, it has been stretched and pulled far beyond its plain meaning and is now treated by the government as a blank check for battling jihadist groups around the world.¹³⁶

Congress could prevent the expansive, and arguably highly inappropriate, use of these authorizations by refusing to authorize funding for the various ongoing war efforts. But there are three obstacles to exercising the power of the purse: First, appropriations for military operations are bulked together into massive Defense Department budgets. Even as early as the 1960s, political scientist Raymond Dawson observed that “the totals involved in the defense budget have become so great, the lump-sums and carry-overs so large, the discretion to shift funds from one category to another so extensive, that budgetary controls have actually provided Congress with little leverage over policy.”¹³⁷ That problem has only grown

¹³³ *Authorization for Use of Military Force Against Iraq Resolution of 2002.*

¹³⁴ *Joint Resolution to authorize the use of the United States Armed Forces against those responsible for the recent attacks launched against the United States*, Public Law 107-40, Sept. 18, 2001, <https://www.congress.gov/107/plaws/publ40/PLAW-107publ40.pdf>.

¹³⁵ *Joint Resolution to authorize the use of the United States Armed Forces against those responsible for the recent attacks launched against the United States.*

¹³⁶ The only post-9/11 U.S. military operations that have not been justified under either the 2001 2002 Authorizations for the Use of Military Force is the decision by the Obama administration in 2012 to use military force to topple Muammar Gaddafi in Libya, an operation that extended over 60 days in clear violation of the War Powers Resolution. And the Trump administration engaged in limited military strikes against the Syrian government twice in response to chemical weapons attacks on civilians.

¹³⁷ Raymond H. Dawson, “Congressional Innovation and Intervention in Defense Policy: Legislative Authorization of Weapons Systems,” *American Political Science Review* 56, no. 1 (March 1962): 42, 44.

and has been exacerbated by the normalization of emergency funding bills that further truncate the process of congressional review.¹³⁸ Indeed, the entire 2011 Libya operation did not require any new funding from Congress — it was paid for out of the existing military budget. The second obstacle is that any restriction of funding faces a likely presidential veto. Because the modern military budget lumps together so many programs, a presidential veto not only affects funding for the conflict over which Congress seeks to exercise some control, but it can put at risk programs that have nothing to do with it — including programs, projects, and bases in members' states and districts. Third, holding up funds for the U.S. military carries massive political risks: Members of Congress may face accusations not only that they are soft on terrorism but also that they do not support the troops and are prepared to put them in unnecessary danger. It's no surprise, then, that in the era of modern military budgets, the appropriations power has only rarely been used to constrain the president's use of the military.

The proposal Ackerman and I put forward was meant to establish a blanket *ex ante* commitment to a sunset for *all* new authorizations for the use of military force — one that could be modified or adjusted by Congress where circumstances warrant. We set the default sunset at two years plus one year for withdrawal, but that number could be set higher or lower. What matters most is that there is an established date by which Congress must affirmatively revisit its decision to authorize the use of military force, requiring an affirmative vote, rather than passive inaction, to continue military operations. An advantage of the two-year default is that it echoes the express terms of Article I of the Constitution, which forbids Congress from “support[ing] Armies” with any “Appropriation of money...for a longer Term than two Years” and ensures that every member of Congress, at some time during his or her term in office, faces the question of whether to vote in favor of continuing ongoing military efforts.¹³⁹ That, in turn, gives each member's constituents information on which they can base their votes in the following election.

¹³⁸ For more on the weakening of congressional control over war-making through use of its budgetary powers, see Ackerman and Hathaway.

¹³⁹ This is the only limit on the duration of appropriations in the U.S. Constitution. This was specifically designed for the purpose of requiring congressional review of presidential military activity on regular intervals. Alexander Hamilton explained in the Federalist Papers, number 26: “The legislature of the United States will be obliged, by this provision, once at least in every 2 years, to deliberate upon the propriety of keeping a military

3. Reaffirm that Use of Military Force in Contravention of International Law Is Prohibited

The War Powers Resolution should be revised to make explicit that any use of military force in contravention of international law is prohibited. A use of military force in violation of international law entails specific additional harm to the United States that a use of force in conformity with international law does not. Of course, if this prohibition were added to the resolution, Congress would retain the capacity to specifically and expressly authorize a violation in the future (because a later in time statute preempts an earlier in time one). But it would clarify that international law is, in fact, binding as a matter of both domestic and international law.

To be clear, the bodies of law discussed here *are already binding on the United States*. The United States is party to the United Nations Charter as well as to the four Geneva Conventions. Those treaties are binding on America as a matter of international law. They are also obligatory as a matter of domestic law, because the Supremacy Clause provides that “all Treaties...shall be the supreme Law of the Land.”¹⁴⁰ There has been some dispute, however, over whether the treaties are self-executing and, therefore, whether they are binding as a matter of domestic law.¹⁴¹ Adding language to the resolution would serve to clarify that these treaty obligations are, indeed, obligatory as a matter of domestic law. And it would serve to place the weight of Congress behind the proposition that international law should be carefully weighed in making the decision to go to war and in how that war is waged.

Turning to substance, there are two separate bodies of international law that regulate the use of military force by states. The first is *jus ad bellum* — the law governing the resort to force. Here, the key legal rules are found in the U.N. Charter. Article 2(4) of the charter provides the

force on foot; to come to a new resolution on the point; and to declare their sense of the matter, by a formal vote in the face of their constituents.”

¹⁴⁰ U.S. Constitution, art. 6, cl. 2.

¹⁴¹ See, e.g., Deborah Pearlstein, “Contra CIA, Non-Self-Executing treaties are Still the Supreme Law of the Land,” *Opinio Juris*, Oct. 28, 2015, <http://opiniojuris.org/2015/10/28/contra-cia-non-self-executing-treaties-are-still-the-supreme-law-of-the-land/>; Marty Lederman, “Why the Strikes Against Syria Probably Violate the U.N. Charter and (therefore) the U.S. Constitution,” *Just Security*, April 6, 2017, <https://www.justsecurity.org/39674/syrian-strikes-violate-u-n-charter-constitution/>.

key prohibition. It states that “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”¹⁴² Article 51, in turn, authorizes uses of force in self defense “if an armed attack occurs.”¹⁴³ A use of force by the United States against another sovereign state that amounts to an “armed attack” under Article 51 of the U.N. Charter would legitimize a use of force against the United States in self defense. Even a use of force that violates Article 2(4) but does not meet the Article 51 threshold can have serious consequences. It makes the United States vulnerable to legal, diplomatic, and economic sanctions. For example, during the 2003 Iraq War, some E.U. countries refused to allow U.S. troops to cross their territory by road, rail, or even by air, on the grounds that the war had not been authorized by the U.N. Security Council and thus was illegal.¹⁴⁴ Such a use of force also erodes the norm prohibiting the use of military force in contravention of the charter. That, in turn, makes the United States more vulnerable in the future to uses of force that might similarly violate the charter’s prohibition on force.

The second body of international law governing the use of force is *jus in bello* — the law that governs the way in which warfare is conducted. This is the law contained in the Geneva Conventions (to which the United States is a party), the Additional Protocols (which the United States has not joined but has accepted, in part, as customary international law), and customary international law. Any use of force by the United States in violation of the *jus in bello* brings with it serious consequences. There are possible criminal sanctions for members of the U.S. armed forces, who could be subject to prosecution for committing war crimes. And there is, once again, the danger of eroding law that protects U.S. forces and civilians in times of war.

It must be acknowledged that a danger of this provision is that it creates an incentive for executive branch lawyers to interpret international law prohibitions narrowly. After all, if an otherwise authorized use of force might violate international law, it would now not only be illegal under international law, it would be unauthorized as well (unless Congress specifically and expressly approved it). Yet, the incentives for narrow interpretations of international law

¹⁴² U.N. Charter art. 2(4).

¹⁴³ U.N. Charter art. 51.

¹⁴⁴ Barry James, “Nation Also Bans Military Overflights: Austria Bars U.S. Troops from Crossing Country,” *International Herald Tribune*, Feb. 15, 2003.

already exist. International law is binding as a matter of domestic law — the Supremacy Clause of the U.S. Constitution specifically provides that treaties are the supreme law of the land. The new provision would simply add additional weight to that already existing prohibition. Not only would a war waged in violation of international law violate international law and the domestic law giving it force, but it would also no longer be authorized by Congress. Of course, if Congress judges that an illegal use of force is warranted, Congress would have the ability to reverse its decision (subject to a possible presidential veto), but it would have to take responsibility for and explain that decision rather than simply letting the blame rest on the president alone.

Conclusion

At the moment, none of these reforms is likely to make it through Congress, and if they did, Trump would certainly veto them. But the story may be different after the 2020 election. To be sure, in the past presidents have run on pacific platforms that fell by the wayside when they entered office. Even the most well-meaning presidential candidates have found it less pressing to support constraints on the ability of the president to unilaterally deploy military force once they are in office. The question will be whether Congress and the president, whoever he or she may be, have learned a hard lesson from the recent past. The U.S. military is the most powerful in the world, with a capacity to destroy that is unprecedented in human history. Checks and balances over this power may be particularly difficult to design and enforce, but they are also absolutely essential. As John Hart Ely put it at the close of his book, *War and Responsibility*, “Whether or not the War Powers Resolution is ever amended, the Constitution requires no less.”¹⁴⁵

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¹⁴⁵ John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath* (Princeton, NJ: Princeton University Press, 1993), 114.

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