RECLAIMING CONGRESSIONAL WAR POWERS

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Tuesday, March 23, 2021

House of Representatives,
Committee on Foreign Affairs,
Washington, DC.

The committee met, pursuant to notice, at 1:15 p.m., via Webex, Hon. Gregory Meeks (chairman of the committee) presiding.

Chairman Meeks [presiding]. The Committee on Foreign Affairs will come to order.

Without objection, the chair is authorized to declare a recess of the committee at any point.

And all members will have 5 days to submit statements, extraneous material, and questions for the record, subject to the length limitations in the rules. To insert something into the record, please have your staff email the previously mentioned address or contact full committee staff.

As a reminder to members, please keep your video function on at all times, even when you are not recognized by the chair. Members are responsible for muting and unmuting themselves, and please remember to mute yourself after you finish speaking. Consistent with House rules, staff will only mute members as appropriate when they are not under recognition to eliminate background noise.

I see that we have a quorum, and I now recognize myself for opening remarks.

Pursuant to notice, we meet today to hear from distinguished witnesses about existing AUMFs and the reform of the War Powers Resolution, and the problem of constitutional balance between the executive branch and Congress on questions of war and peace.

On September the 11th, 2001, Al Qaeda terrorists flew two airplanes into the World Trade Center in my home city of New York. Another aircraft hit the Pentagon. A fourth plane was likely headed to the United States Capitol, and it would have but for the brave actions of the passengers on United 93. Thousands were murdered that day.

Congress passed the 2001 authorization of the use of military force just 3 days after 9/11. It was meant to target the terrorists who planned that attack and the entities that had protected them. That intent was very clear to me at that time.

Over 20 years, successive administrations have interpreted and reinterpreted the text of that resolution to use it in new countries against an expanding list of loosely connected groups. This process has all but cut Congress out of its fundamental responsibility to decide issues of war and peace.

Many of our servicemembers fighting these wars today weren’t even born when Congress passed the 2001 AUMF. Yet, Congress
still has not gone back to update that authority. Congress needs to step up and do the hard work of reforming this outdated law.

Congress has also yet to repeal AUMFs that no longer serve a purpose. The 2002 Iraq War AUMF, for example, is not needed for any current military operation, which is why our committee will take up legislation this week to repeal it.

Without objection, I would like to enter into the record a letter from Representative Barbara Lee, who has been a stalwart champion of congressional war powers and authored the measure we will be considering this week.

[The information referred to follows:]

Chairman MEEKS. And without objection, I would also like to enter into the record a letter from a coalition of 18 advocacy organizations supporting a stronger role for Congress in national security decisions.

[The information referred to follows:]

Chairman MEEKS. The 2002 AUMF was an act to authorize force against Saddam Hussein, not ISIS or Al Qaeda or Iran. Leaving an outdated AUMF on the books does not make America any safer. It just opens the door for future Presidents to use force without working through Congress.

Many Presidents are guilty of this, but in the most recent example just last year, the Trump Administration developed a novel legal theory to claim the 2002 AUMF authorized the killing of Qasem Soleimani, the leader of Iran’s Quds Force. Anyone who reads the text of the 2002 AUMF will know that it does not authorize war against Iran or strikes on Iranian officials.

Beyond considering current AUMFs, this hearing is an opportunity to examine how Congress can restore an appropriate balance with the executive branch through reform to the War Powers Resolution itself. The War Powers Resolution was passed in the wake of the Vietnam War as an effort to reassert Congress’s role. Unfortunately, the executive branch has chipped away at the law, reinterpreting its key terms to limit congressional authority and ignoring other requirements altogether.

Reforming the War Powers Resolution will not be easy. It will require a carefully considered balancing between preserving necessary Presidential authorities without delegating away Congress’s constitutional responsibility.

There is no question the Commander in Chief directs our Armed Forces and prosecutes our wars. The President has the legal authority in Article II of the Constitution to defend our country. That is not in question, but the President cannot take our Nation to war without authorization from Congress.

For decades now, Congress has not fully met this burden. It was President Obama who last sent Congress a draft AUMF that would have limited enduring ground operations and require regular reauthorizations. In failing to reach a compromise and bring a new AUMF for a vote, Congress once again abdicated its constitutional responsibility.

Thus, the time to reverse this trend is right now. We cannot shy away from the difficult task ahead. We must repeal authority that
is no longer needed, update authorities that still serve an important national security purpose, and develop a clearer war powers framework that reasserts Congress’s proper constitutional role.

The bipartisan panel before us today compromises the Nation’s foremost experts on these challenging issues, and I look forward to hearing their thoughts and their responses to our inquiries.

Our hearing builds on the hearing that Chairman McGovern and Ranking Member Cole of the Rules Committee held this morning to consider war powers resolutions reform. Progress on this issue will require close collaboration between our committees, and I would like to thank them for their partnership. These are tough matters to tackle, but we signed up for that job when we ran and were elected to Congress.

I will now recognize the ranking member, Representative McCaul, for his remarks.

Mr. Cicilline. Representative McCaul, you are on mute.

Mr. McCaul. Mr. Chairman.

Chairman Meeks. Now we hear you.

Mr. McCaul. OK. Thank you.

I want to thank you for holding today’s much-needed discussion, and I welcome the debate on rebalancing war powers between the executive and the legislative branches.

Congress exercises no power more solemn than committing our Nation to war, as you said, matters of war and peace, and that is within this committee’s jurisdiction. This year marks 20 years since 9/11. It is past time to review and reflect on the decisions made in the aftermath of that dark day.

Because many on our side of the aisle agree that it is time to reclaim our Article I responsibilities, I think we have an opportunity, Mr. Chairman, to make bipartisan progress toward real reform. In other words, I think we have the same goal here. We may have just a little bit different means of getting about it.

We should also avoid dismissive talk of forever wars because it implies that our ongoing counterterrorism engagements are illegal and unnecessary. When I was chairman of the Homeland Security Committee, I was briefed regularly about the ongoing threats aimed at Americans.

I believe our counterterrorism efforts over the past 20 years have safeguarded us from many terror attacks in this country. And with respect to General Soleimani, I believe the world is much safer and far better off without him.

The bipartisan 9/11 Commission, led by former Democratic chair of this committee, Lee Hamilton, made clear that the fight against radical Islamist terrorism would be a, quote, “generational challenge . . . likely to be measured in decades, not years.” End of quote.

During that time, Congress has held hundreds of briefings and hearings. We have continued to appropriate funds for those engagements, and we have not directed the withdrawal of our troops.

But wars should not be on autopilot, either. Congress owes our troops a clear commitment to the missions we are asking them to undertake. And for these reasons, I have repeatedly stated, Mr. Chairman, my desire for an updated authorization of military force, or AUMF, scoped to the current terrorist threats to replace the
2001 and 2002 AUMFs that are still on the books. And think about it, some people fighting these wars weren’t even born on 9/11.

It is also imperative, I believe, that we repeal and replace these AUMFs simultaneously to ensure that there is no lapse in critical counterterrorism authorities. This will avoid sending a message of premature U.S. disengagement that could destabilize Iraq, embolden Iran, and strengthen Al Qaeda and ISIS. Rushing a stand-alone repeal of an AUMF used by the last three administrations only 2 days after beginning this conversation is not a constructive way to consider this important national security authority.

A serious effort, in my judgment, requires consulting with the government of Iraq and regional and coalition partners. It involves hearing from the Biden Administration itself and the Departments of State and Defense. It also involves getting our members, especially the new ones, briefed by the intelligence community on the current threats. We have also had many members who have served in combat whose voices will be valuable to our deliberations.

So, with that said, Mr. Chairman, I look forward to our panelists' thoughts on what an updated AUMF would look like, and I would also appreciate their views on the War Powers Resolution, which has never forced the withdrawal of U.S. forces over a Presidential objection.

Mr. Chairman, today's issues are weighty, and they are complex, and should not be partisan if they are approached with the gravity and diligence that they deserve. So I join you in welcoming our distinguished witnesses. I look forward to the testimony, and I yield back.

Chairman MEEKS. Thank you, Representative McCaul.

I am honored to have our three distinguished witnesses joining us for today's hearing.

Oona Hathaway is a Gerard C. and Bernice Latrobe Smith Professor of International Law at Yale Law School, and holds several other prestigious positions at that university. She has been a member of the Advisory Committee on International Law for the Department of State Legal Advisory since 2005, and has served as Special Counsel to the General Counsel at the United States Department of Defense.

Our next witness, Bob Bauer, is a Professor of Practice and Distinguished Scholar in Residence at the New York University School of Law. Professor Bauer served as White House Counsel to President Obama from 2009 to 2011.

Our third witness, Mr. Jack Goldsmith, is a Learned Hand Professor of Law at Harvard University. Professor Goldsmith served as Assistant Attorney General in the Office of Legal Counsel from October 2003 through July 2004. Before that, he served as Special Counsel to the General Counsel at the Department of Defense.

For witnesses, you have 5 minutes to deliver your opening remarks. I will gently tap my gavel when you have 30 seconds left, so you may conclude.

Without objection, your prepared written statements will be made part of the record.

I now yield 5 minutes for purposes of her testimony to Ms. Hathaway.
STATEMENT OF OONA A. HATHAWAY, PROFESSOR OF LAW, YALE LAW SCHOOL

Mr. HATHAWAY. Chairman Meeks, Ranking Member McCaul, members of the committee, thank you so much for inviting me to speak.

I will address three matters today. First, I will explain why I think it is wise to repeal the 1991 and 2002 Authorizations for the Use of Military Force. Second, I will outline what I see as the key priorities in the effort to repeal and replace the 2001 Authorization for Use of Military Force. And third, I will speak about top priorities for war powers reform more generally.

So, first, I begin with the 1991 and 2002 AUMF repeal. The 1991 AUMF permitted the President to use military force pursuant to U.N. Security Council Resolution 678, a resolution that required the Iraq, then led by Saddam Hussein, to withdraw from Kuwait no later than January 15, 1991. The 2002 AUMF was enacted primarily in response to fears that Saddam Hussein’s Iraq possessed weapons of mass destruction that posed a direct threat to the United States and its allies.

The purposes of these authorities have long ago been met. The government of Iraq was expelled from Kuwait in 1991. The U.N. resolutions referred to in the AUMFs have long since been expired. And Iraq does not pose a threat to the United States or its allies. Although it is true that new terrorist threats emerged in Iraq after the war, they are more properly addressed under the authority Congress provided in the 2001 AUMF. So, leaving the 1991 and 2002 AUMFs on the books simply leaves the door open to their misuse without giving Presidents any additional legitimate basis for military action.

Next, I turn to the 2001 AUMF. There has long been bipartisan agreement that the 2001 AUMF is outdated. The devil has been in the details of the replacement. Here, I will outline three key elements that reflect a fairly broad consensus as to what should be included in a replacement.

First, a new AUMF must include a reauthorization requirement. If we have learned anything in the last two decades, it is that authorizations without a requirement for continued congressional engagement become quickly outdated and take on a life of their own. Congress must engage in the process of defining our military operations abroad. Indeed, the Constitution envisions such a requirement. Article I of the Constitution forbids Congress from supporting armies with any appropriation of money for a longer term than 2 years. And this was meant to ensure that every Member of Congress at some time during his or her term in office had the opportunity to make a decision about whether to continue any ongoing military efforts.

Alexander Hamilton explained in the Federalist Papers that “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 force on foot; . . . to declare their sense of the matter, by a formal vote in the face of their constituents.”

The logic behind this principle applies not only to appropriations, but to AUMFs as well. A 2-year reauthorization requirement would reaffirm this constitutional requirement and ensure that every
Member of Congress has an opportunity to vote to reauthorize our military efforts.

Second, a new AUMF should define the enemy. The current practice of deferring to the executive branch to determine which groups are, quote, “associated forces” of Al Qaeda cuts Congress out of its constitutional role. While that may have sense in the early days after the 9/11 attacks, it no longer does. Congress should be directly engaged in deciding when and with whom we are at war. And it should make clear that the concept of co-belligerency should not be used to expand the footprint of the war without seeking specific authority from Congress.

Third, a new AUMF should include clear reporting requirements to the appropriate committees, including the House Foreign Affairs Committee, about the progress of military operations. The expectation should be that the wars will not be endless. There must be clear, achievable objectives, and Congress should be regularly apprised of progress toward them.

Last, I want to say a few words about war powers reform. Now, war powers reform is incredibly complex, and I cannot cover it comprehensively here, but I will focus on what I consider to be some of the top priorities.

First and foremost, it is essential to define the term “hostilities.” One of the fateful decisions made by the authors of the War Powers Resolution was to tie several requirements to “hostilities,” but then fail to define that term. That has left it open to wildly differing interpretations since. If Congress wants to make the resolution effective, it needs to define hostilities in the legislation.

Second, the resolution must be much more effectively enforced. The most effective tool Congress possesses is the power of the purse; that is, the power to terminate funding. Right now, when the President acts, Congress has very little recourse. To avoid this, Congress should make clear that the President is prohibited from using any funds for any activity by United States forces that is inconsistent with the War Powers Resolution. That would give the resolution bite.

And, third, there should be a better mechanism for effectively challenging an interpretation of the revised resolution by the executive branch. For too long, the executive branch has held a virtual monopoly on legal interpretations in the war powers space, and a revised War Powers Resolution should make clear that there is recourse to the courts.

Thank you again for giving me this opportunity to speak with you today, and I look forward to your questions.

[The prepared statement of Ms. Hathaway follows:]
Reclaiming Congressional War Powers

March 23, 2021 1:00 PM

Oona A. Hathaway
Professor of Law
Yale Law School
(Former Special Counsel to the General Counsel, U.S. Department of Defense)

Chairman Meeks, Ranking Member McCaul, members of the Committee, thank you for inviting me to speak with you today.

I want to address three matters today. First, I will explain why I think it is wise to repeal the 1991 and 2002 Authorizations for the Use of Military Force in Iraq. Second, I will outline what I see as key priorities in the effort to repeal and replace the 2001 Authorization for the Use of Military Force. Third, I will speak about top priorities for war powers reform more generally.

(1) 1991 and 2002 Authorization for the Use of Military Force Repeal

I will begin with 1991 and 2002 AUMF repeal. I understand that Senators and Representatives on both sides of the aisle have introduced legislation that would formally end the Gulf and Iraq wars by repealing these now effectively defunct AUMFs.

At the time the 2002 AUMF was passed, only 15 of the current members of the Senate were in office, and only 37 of the current members of the House. At the time of the 1991 AUMF, only 4 of the current members of the Senate were in office, and only 7 of the current members of the House.

These authorizations were enacted by past Congresses for purposes that have long since been achieved. The 1991 authorization permitted then-President George H.W. Bush to use military force pursuant to UN Security Council Resolution 678, a resolution that required Iraq, then led by Saddam Hussein, to withdraw from Kuwait, which it had invaded and occupied, no later than January 15, 1991. The 2002 AUMF was enacted primarily in response to fears that Saddam Hussein’s Iraq possessed weapons of mass destruction that posed a direct threat to the United States and its allies. It authorized the President “to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to—(1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.” The purposes of these authorizations have long ago been met. The government of Iraq was long ago expelled from Kuwait, the UN resolutions referred to in the resolutions have long since expired, and Iraq does not pose a threat to the United States or its allies. Although it is true that new terrorist threats emerged in Iraq after the war that began in 2003, they are more properly addressed under the authority Congress provided in the 2001 AUMF. Leaving the 1991 and 2002 AUMFs on the books simply leaves the door open to their misuse without giving Presidents any additional legitimate basis for military action.
The last reference to the 2002 AUMF by the Executive Branch illustrates these concerns. During the debate over President Donald Trump’s decision to take a lethal strike against Qasem Soleimani in early 2020, members of the Administration improperly relied on the 2002 AUMF as a source of legal authority—which most experts agree did not in fact provide any authority for the operation. It is important here to focus on the specific and limited authority Congress granted in the AUMF. As noted earlier, it gives authority for two purposes: to “defend the national security of the United States against the continuing threat posed by Iraq,” and to “enforce all relevant United Nations Security Council resolutions regarding Iraq.” The Security Council Resolutions referenced in the AUMF are no longer operative. And Soleimani was an Iranian, not Iraqi, government official. Hence a use of force against him cannot be said to be a use of force to “defend the national security of the United States against a threat posed by Iraq.” Indeed, the only way in which the AUMF has any ongoing relevance is if we believe that the government of Iraq, which we are actively assisting and supporting, poses an ongoing threat to the United States’ national security.

(2) 2001 Authorization for the Use of Military Force Repeal and Replace

Next, I turn to the 2001 AUMF. Here, I will note that the authorization was enacted mere days after the horrific attacks on the United States on September 11, 2001. The authorization was necessarily vague because the government was not yet entirely confident as to the group or groups responsible for the attack.

There has long been bipartisan agreement that the 2001 AUMF is outdated. That is not news. The devil has been in the details of the replacement. Here I will outline three key elements that reflect a fairly broad consensus as to what should be included in a replacement.

I will preface this by saying that while some would argue that no replacement is necessary, I worry that the United States will continue to face terrorist threats, and in the absence of a statute, the President would rely on his Article II authorities as Commander in Chief to carry out counterterrorism operations he thinks necessary. If Congress speaks clearly in outlining the scope and limits of an updated counterterrorism authority, it will likely be in a better legal position to press back against Presidential uses of force that exceed those express authorities.

There are three key priorities for AUMF reform:

First, a new AUMF must include a reauthorization requirement. If we have learned anything in the last two decades, it is that authorizations without a requirement for continued congressional engagement become quickly outdated and take on a life of their own without any input from Congress. Congress must stay engaged in the process of defining our military operations abroad. That is its constitutional role. It should not delegate that authority for all time. Indeed, the Constitution itself envisions such a requirement. Article I of the Constitution forbids Congress from “support[ing] Armies” without any “Apropritation of money…for a longer Term than two Years.” This was meant to ensure that every member of Congress, at some time during his or her term in office, had the opportunity to make a decision about whether to continue any ongoing military efforts. Alexander Hamilton explained in the Federalist Papers (No. 26): “The legislature of the United States will be obliged, by this provision, once at least in every two years, to deliberate upon the propriety of keeping a military 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.” The logic behind this principle applies not only to appropriations, but to AUMFs as well. A two-year reauthorization requirement would reaffirm this constitutional requirement and ensure that every member of Congress has an opportunity to vote to reauthorize our military efforts.

Second, a new AUMF should define the enemy. The current practice of deferring to the Executive Branch to determine which groups are “associated forces” of al Qaeda cuts Congress out of its constitutional role. While that may have made sense in the early days after the 9/11 attacks, it no longer does. Congress should be directly engaged in deciding when and with whom we are at war. And it should make clear that the concept of co-belligerency should not be used to expand the footprint of the war without seeking specific authority from Congress. Any decision to expand the AUMF to new (not simply rebranded) groups or new geographic locations should be reported and approved by Congress.

Third, a new AUMF should include clear reporting requirements to the appropriate committees, including the House Foreign Affairs Committee, about the progress of the military operations. The expectation should be that the wars will not be endless. There must be a clear, achievable objective and Congress should be regularly apprised of progress toward it.

(3) Priorities for War Powers Reform

Last, I want to say a few words about war powers reform. War powers reform is complex, and I cannot cover it comprehensively here. But I will focus on what I consider to be some of the top priorities.

First and foremost, it is essential to define the term “hostilities.” One of the fateful decisions made by the authors of the War Powers Resolution was to tie the reporting requirements to “hostilities,” but then fail to define that term. The House report on the War Powers 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.

Perhaps because the meaning was self-evident to those involved, the term was not defined in the legislation. That has left it open to wildly differing interpretations since. For example, during the Libya intervention, the Obama Administration argued that it did not need to seek Congressional authorization to continue military operations past 60 days because the U.S. military operations in the country were not “hostilities.” Recognizing that the statute did not define the term “hostilities,” the administration adopted a novel four-factor test that excluded the Libyan operation. If the Resolution is to be revived, Congress should start by filling this key gap in the statute. An ideal definition of “hostilities” would make explicit the original intent of the War Powers Resolution: that it encompasses any situation involving any use of lethal or potentially lethal force by or against
Hathaway—Reclaiming Congressional War Powers

United States forces. This would apply regardless of the domain and intermittency, intensity, or severity of such force. It might include, as well, actions taken to directly participate in lethal operations by partners—such as the “in-flight refueling of non-United States aircraft conducting missions as part of the ongoing civil war in Yemen” identified as “hostilities” in the 2015 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. This level of U.S. participation in an active armed conflict can be clearly distinguished from security cooperation and assistance activities that do not entail direct U.S. participation in lethal operations.

Second, the Resolution must be more effectively enforced. The most effective tool Congress possesses is the power of the purse—that is the power to terminate funding. Right now, a central problem for Congress is that when the President acts, Congress is left with little recourse. It could theoretically vote to cut off funding for an operation already underway, but aside from the political challenges that would face, any such resolution faces the certainty of a veto from the President who has ordered the very operation Congress seeks to stop. To avoid this difficulty, Congress should instead make clear in the text of the War Powers Resolution that the President is prohibited from using any funds for any activity by United States forces that is inconsistent with the revised War Powers Resolution. It is crucial that the termination not require a separate Congressional vote but instead is automatic and tied to compliance with the resolution. This would give bite to the Resolution that it presently lacks.

Third, there should be an effective mechanism for Congress to challenge an interpretation of the revised Resolution by the Executive Branch in court. For too long, the Executive Branch has held a virtual monopoly on legal interpretations in the war powers space. This is due in part to the dominance of the Office of Legal Counsel in the Department of Justice as an interpreter of the law for the Executive Branch—and its issuance of memoranda on contested war powers matters. This has stacked the decks heavily against Congress, because while the lawyers in that office are generally outstanding lawyers, they work for the President and across administrations have adopted views that favor the institutional interests of the President. Meanwhile, previous efforts to seek judicial review by members of Congress have been dismissed on both standing and political question grounds. The revised War Powers Resolution should designate actors to represent each House in challenging misinterpretations of the War Powers Resolution in court. Under recent judicial precedent, such a provision could help overcome the justiciability barriers that have impeded judicial review in the past.

Thank you again for giving me this opportunity to speak with you today. I look forward to your questions.
Chairman Meeks. Thank you.
I now recognize Mr. Bauer for 5 minutes.

STATEMENT OF BOB BAUER, PROFESSOR OF PRACTICE AND DISTINGUISHED SCHOLAR IN RESIDENCE, NEW YORK UNIVERSITY SCHOOL OF LAW

Mr. Bauer. Thank you, Mr. Chair, Ranking Member, and members of the committee, for this opportunity to speak to these significant issues.

Professor Goldsmith and I, in our book “After Trump,” have called for a range of reforms: the updating of the 2001 AUMF, the repeal of the 2002 AUMF, and significant amendment of the War Powers Resolution. But we have also called—and I would like to focus today in my brief remarks here—on the executive branch lawmaking process. And we believe that Congress should press the executive to withdraw very broad and ill-founded OLC opinions on the question of anticipatory self-defense that give the President, we think, dangerously expansive authority.

Now, I approach this with some humility. I am a former executive branch lawyer, and all executive branch lawyers do do what they can to provide good-faith, reasonable interpretations of the law that will afford the President flexibility and discretion in national security matters. And that has led to controversy in the administrations that I have served and in all others that I know of.

But Presidents, nonetheless, I think are accountable for the law that they make and that they espouse publicly and that they act on. And in the area that we are addressing today, I think it is a critical companion to what Congress would do with war powers reform to hold the President accountable for opinions like those in 2001 and 2002, and to seek to have them withdrawn; and to engage, frankly, on the same basis with other lawmaking in the war powers area that Congress deems to be inappropriate, ill-founded, and potentially dangerous.

I just mention very briefly, in the 2001 opinion, one of the two that we discuss and urge the withdrawal of, language to this effect: that Congress can place no “limits on the President’s determination as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response.” That is a sweeping statement of Presidential authority really unbounded in application.

And as we point out in our book, this is dicta. Congress had already provided the necessary authorization for what the executive needs to do to defend the country. And yet, nonetheless, the executive reached for more authority on a reasoning like what I just read.

Furthermore, in discussing the interests on which Presidents could unilaterally act, the Office of Legal Counsel, in those opinions, and in subsequent opinions, have used extremely broad definitions of what the national interest is on which the unilateral action could be taken. References have been made to important interests or just interests or a variety of interests.

And in distinguishing between what the President can do in the exercise of an unilateral Article II authority, and what the President should not be able to do and infringe on Congress’ war-making
powers, the language that these OLC opinions have used—and we
go to 2001 and 2002 as, I think, the exemplars and the most seri-
ous cases—the language that has been used simply affords the
President too much room.

I will not go into great detail on that. I am happy to discuss it
in the Q and A. But I do think that it is important—and I want
to emphasize this for my part just in these brief comments—that,
as hard as it is for Congress to push the executive branch on these
issues, it can do more, and that is an important part of the effort,
it seems to me, to achieve what you refer to, Mr. Chair, as the care-
fully considered balance of authority between Congress and the ex-
ecutive in war-making.

And so, with those comments, I will conclude here and look for-
ward to answering your questions. Thank you very much.

[The prepared statement of Mr. Bauer follows:]
United States House of Representatives
Committee on Foreign Affairs

Hearing on “Reclaiming Congressional War Powers”

March 23, 2021

Written Statement of Bob Bauer
Professor of Practice and Distinguished Scholar in Residence
New York University School of Law

First, I would like to thank the Committee for the opportunity to testify on these matters. I look forward to your questions.

The book that Jack Goldsmith and I wrote, *After Trump: Reconstructing the Presidency*, sets out at length my views on the war powers reforms before the Committee today, and Committee staff advised me that the discussion in that book was the basis for the invitation for us to testify. So I look forward to discussing these specific proposals with the Committee and answering your questions.

In making the case for nonpartisan, institutional reform of the presidency, Professor Goldsmith and I argue that the Trump Administration exposed glaring weaknesses in legal controls and norms governing the exercise of Article II authority. But, and I emphasize “but,” we also set out, chapter by chapter, the contributions, in varying degrees, that other presidencies have made over the years to these problems.

This especially true in the area that this Committee is exploring today: war powers. It was in relation to other administrations and their views of presidential use of force that Arthur Schlesinger made famous the term “The Imperial Presidency,” the title of his famous book on the subject. And other administrations, affiliated with both parties, have since jostled with Congress—when Congress was in the mood to joust—over the allocation of authority for the use of force. As the constitutional scholar and now Judge David Barron has written, it can be viewed as a “persistent but never settled power struggle”—a complicated dance between the branches.” Or, in an earlier observation, John Lehman, former Navy Secretary and 9/11 Commission member, wrote that this “200-year old battle between the President and Congress” has resulted in periods of presidential dominance followed by “a reaction toward a more restricted presidency and an expanded congressional role.”

However one views this messy form of constitutional politics—as a “dance” or a “struggle”—this appears to be a moment in time for bipartisan congressional action in cooperation with a willing executive. And it appears that the goals in view are reforms of the 2001 and 2002 Authorizations to Use Military Force. While there are other issues, such as the revision at long last of the War Powers Resolution, that should continue to command congressional attention, AUMF reform (along with congressional pressure for the withdrawal of related Office of Legal Opinions issued in 2001 and 2002) seem clearly the right priorities.
In the “complicated dance” around war powers issues, Congress should take particular care to protect against presidents’ attempts to stretch the boundaries of congressional authorizations for the use of force in one particular setting, responding to one set of specific circumstances, and claim authorization for different or prolonged engagements that Congress did not intend to approve. Of course, presidents may also decide to stake their assertion of authority on the basis of inherent Article II powers, a position that raises a host of other issues, as I will note shortly. But Congress should resist presidential claims that Congress has somehow authorized what it plainly did not. This is a critical element of the concern with constitutional accountability for the “forever war”—that presidents can publicly maintain the fiction that in pursuing prolonged military engagements, they are not acting alone but in a fully authorized partnership with the Congress. Only through AUMF reform can Congress address this fundamental accountability issue.

Second, and relatedly, we argue for the withdrawal of the Office of Legal Counsel’s 2001 Opinion on “The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them,” and the 2002 opinion on “Authority of The President Under Domestic and International Law to Use Military Force Against Iraq.” As we discuss in our book, these opinions argue for exceptionally broad statements of presidential power to deploy military force in anticipatory self-defense, but in both cases, because Congress had authorized the military actions at issue, they are essentially “dicta.” Their withdrawal would not undermine presidential capacity to act on a rigorously drawn self-defense rationale. Leaving them on the books is perilous: as we suggest in our book, they are “loaded guns that should be unloaded and stored safely.”

We view the withdrawal of these opinions as a matter within the Congress’ appropriate concern in addressing the set of issues raised by the 2001 and 2002 AUMFs. Congress can and should press for their withdrawal in conjunction with the AUMF reform we hope it undertakes. If there is bipartisan agreement between the Executive and Congress about reform of the AUMF landscape, it seems that there should be space for agreement on this clearly related housecleaning of the OLC corner of these issues. It seems self-defeating for Congress to take steps to clarify what it has authorized and what it has not, only to leave uncontested presidential law-making that, at least for “legal” purposes, more or less moots the need for a president to seek authorization in the first place.

I will close by noting that we also argue for Congress to take up long overdue revamping of the War Powers Resolution and to consider measures to make presidents more accountable for the use of nuclear force. These are hard issues, we recognize, and it appears that the bipartisan support for AUMF reform now in evidence may be more challenging to achieve in addressing these other, wider war powers concerns. Still, there is reason to hope that if Congress seizes the moment to achieve what it can, on a bipartisan basis, on AUMF reform, it will have started down a road that will lead to still more comprehensive action on war powers reforms.
Chairman Meeks. I will recognize Mr. Goldsmith for 5 minutes.

STATEMENT OF JACK GOLDSMITH, LEARNED HAND PROFESSOR, HARVARD LAW SCHOOL

Mr. GOLDSMITH. Thank you, Chairman Meeks, Ranking Member McCaul, members of the committee, for this opportunity to testify.

The hearing is entitled, "Reclaiming congressional War Powers." As I explain in my testimony, congressional war powers need reclaiming along three important dimensions along which they have been lost.

First, while Congress has stood silent over the last few decades, and going back further in some senses, the President has asserted basically limitless power under Article II to use force whenever he sees fit. Article II war powers are no longer remotely tied to self-defense, which was the primary justification at the founding for unilateral Presidential war powers. They are tied, rather, to a very vague phrase called “the national interest,” a phrase that is determined entirely by the President's discretion, according to the Office of Legal Counsel opinions, and that includes matters far beyond self-defense, even broadly construed, including humanitarian intervention, supporting the United Nations, and maintaining regional stability.

Second, the War Powers Resolution has completely failed to control unilateral Presidential war powers. Indeed, Presidents have read the War Powers Resolution to confirm their inherent power in the first 60 days, and through a number of ways that I outline in my testimony, they have basically emasculated the War Powers Resolution.

Third, the executive branch has interpreted the 2001 and 2002 authorizations to use military force to justify military force, as my colleagues suggested, in ways that do not match the original aims at all.

So, in my view, the most important reform here, in the first instance, is reform of the 2001 AUMF. The reasons are many. I think it is vital that Congress examine the war that is being fought, to have a good sense of how it is being fought, to decide whether it agrees with the scale and scope and strategy, if it should be blessed as it is, if it should be expanded, if it should be narrowed. Congress needs to weigh in on that expressly, not in a reactive way through appropriations, as tends to be the case, but actually in an affirmative way, engaged with the executive branch in deciding what the war effort requires. That would legitimate the war as it is now being fought. It would also legitimate the war going forward in the first few years, because we haven't had an update of these authorities literally in almost 20 years.

It would also, hopefully, make the war more transparent to the American people. There has been a disjunction between wars being fought in the name of the American people and the American people and, seemingly, Congress' awareness of what is going on. I do not know what happens in classified briefings, obviously. But, as warfare has become a lighter and lighter footprint, and as U.S. troops have become less and less at risk, they just do not attract the political attention that they used to.
Senator Kaine said, four or 5 years ago in a speech, that he thought there was a tacit bargain between Congress and the President just to keep this stuff off the radar screen. And that is certainly one interpretation.

Another reason, as Ranking Member McCaul suggested, is it is vital that the troops we have deployed overseas know that Congress is behind the mission.

And, finally, I believe that a properly amended AUMF would keep Congress in the game through some kind of sunset provision where it would have to re-engage with the President every several years.

I outlined my detailed proposals in the book with Bob Bauer and in my testimony. Briefly, the second most urgent set of reforms concerns the War Powers Resolution. In my judgment, from no constitutional perspective can it be that the President of the United States can use force whenever he wants. He decides by himself; that is our law right now. And Congress in the War Powers Resolution has done nothing to stop that from happening. Congress needs to re-engage on that. As Oona Hathaway said, that is much harder, but it is very important to do so, as well. And I explain in my book and in my testimony how I think the WPR should be reformed.

Thank you very much.

[The prepared statement of Mr. Goldsmith follows:]
United States House of Representatives
Committee on Foreign Affairs

Hearing on “Reclaiming Congressional War Powers”

March 23, 2021

Written Statement of Jack Goldsmith
Learned Hand Professor, Harvard Law School
Written Statement of Jack Goldsmith  
Learned Hand Professor, Harvard Law School  
March 23, 2021

Chairman Meeks, Ranking Member McCaul, and members of the Committee, thank you for the opportunity to testify.

In recent years Congress has, on some dimensions been actively involved in exercising its constitutional powers related to war. On other dimensions, however, it has lost significant control of its constitutional war powers. This testimony offers my views on why and how it lost control, and why and how it should regain control through reform of the post-9/11 authorizations to use military force ("AUMF") and the War Powers Resolution ("WPR").

How Congress Lost Control

Congress has lost control of its presidential war powers along at least three dimensions.

A. Article II.

The executive branch has interpreted Article II of the Constitution to authorize the president to deploy “light-footprint” military force — air strikes (drone and manned), cruise missiles, cyberattacks, and actions by special operations forces — in any situation that serves “the national interest.” It construes the “national interest” very broadly to include protection of, or assistance to allies, preserving regional stability, preventing humanitarian disaster, supporting the United Nations, and self-defense (which includes defense against distant, non-realized threats).

This interpretation of Article II, in light of modern technological developments, means that the executive branch, without congressional authorization, can project significant U.S. military force around the globe for long periods of time in any context where it would plausibly want to do so. The executive branch has also interpreted Article II to permit introduction of large numbers of ground troops in foreign theaters in many situations without congressional authorization. Some executive branch opinions go even further than these permissive interpretations of Article II. And finally, the executive branch has expanded its effective authority to use force simply by applying the traditional unit or soldier self-defense rationale to troops — especially special operations forces — widely deployed around the globe.

B. The WPR

The WPR aimed to curb unilateral presidential uses of military force. It failed. The executive branch has interpreted the sixty-day window before it needs to secure congressional authorization as recognition of independent presidential power to use force within that window. It has also interpreted the “hostilities” trigger for requiring congressional authorization to cover only extended engagements of U.S. troops that pose a serious risk of U.S. casualties and escalation. And its broad interpretations of congressional force authorizations, discussed below, render the WPR irrelevant in those contexts. Congress has acquiesced in the executive branch’s emasculation of the WPR. As a result, the WPR today poses practically no obstacle to presidential unilateralism.
C. The AUMFs.

The executive branch has interpreted the AUMFs of 2001 (in response to the 9/11 attacks) and 2002 (concerning Iraq) to justify the use of military force in many nations, against terrorist groups that were not in existence when the statutes were enacted, and for purposes that do not match the original aims of the statutes. Many members of Congress expressed concerns about these interpretations and actions at the time they were announced. But Congress as a body has approved them through appropriations and other support after the fact.

**Why Congress Lost Control**

The executive branch has dominated constitutional war powers for many reasons. First, as U.S. global power and responsibilities grew after World War II, presidents perceived ever-widening national interests that required deployments of U.S. troops. Second, Congress has supplied the president with a two-million-strong armed force and an array of weapons, with few real restrictions on their use. Third, Congress has generally acquiesced in the steadily growing presidential assertions of military authority. It has done so because some members support these actions; because a “rally around the troops” effect after unilateral presidential action makes it hard for some members to oppose the action; because some members do not want to take public responsibility for war powers decisions; and because Congress under extant law must muster veto-proof majorities to reverse or check unilateral presidential uses of force.

And yet Congress has significant authority to control war power should it choose to exercise it. As early as 1801, the Supreme Court upheld congressional restrictions on the circumstances in which the U.S. Navy could seize enemy ships during the Quasi-War with France. And as the Justice Department’s Office of Legal Counsel (“OLC”) has acknowledged, unilateral uses of force “cannot be sustained over time without the acquiescence, indeed the approval, of Congress, for it is Congress that must appropriate the money to fight a war or a police action.”11 In 1983 and 1993, Congress forced presidents to change missions (in Lebanon and Somalia, respectively) through the use of conditional funding restrictions. Congress’s funding restrictions were also a major contribution to the end of the Vietnam War.

There are indications that Congress has renewed interest in reclaiming more of its traditional role in war powers. This hearing is an encouraging example. Another example is Congress’s unprecedented effort last year under Section 350 of the WPR to terminate any presidential use of force against Iran except in strictly limited circumstances.12

**AUMF Reform**

The 2001 and 2002 AUMFs are nearly two decades old and have been invoked by the Executive branch for military actions that have little if any connection to the purposes that animated the statutes when enacted. Congress’s top priority should be to repeal and replace the 2001 AUMF with a statute that addresses the war against Islamist terrorists as it is currently fought. It should also repeal and not replace the 2002 AUMF, which serves no valid useful role.
A. 2001 AUMF

The 2001 AUMF authorized the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons. . . .” Congress clearly aimed here to authorize force against at least al Qaeda and Afghanistan (which was then governed by the Taliban). But it enacted the 2001 AUMF before it had full clarity on who was responsible for the 9/11 attacks, and so it described the enemy in broad, general terms and did not impose a temporal or geographical limitation. Presidents subsequently interpreted the 2001 AUMF to include forces “associated” with al Qaeda or the Taliban, broadly conceived, and to include the Islamic State, which is not associated with either of those entities. They have relied on the 2001 AUMF to use force in many nations in addition to Afghanistan.

At the moment the 2001 AUMF so interpreted is the central legal basis for the vast majority of uses of force in the wars against Islamist terrorists that began two decades ago. It is also a central legal basis for military detention at the facility at Guantanamo Bay.14

Congress should — as President Biden and President Obama before him requested — replace the 2001 AUMF with a new statutory regime for the war against Islamist terrorists. The current 2001 AUMF gives the president too much unchecked discretion to alter the scope of the war that Congress originally approved but that has grown into something unrecognizably different. Congress should thoroughly examine the war as it is being conducted now to determine whether the executive branch’s interpretation and implementation of the 2001 statute matches strategic aims that Congress — as representatives of the American people charged by the Constitution with significant responsibilities for war — shares. It should also structure a revised authorization to pre-commit to staying involved in reviewing and legitimating (or constraining) the ever-morphing conflict going forward.

Such a reform of the AUMF should include at least four elements:

1. **Specify the Enemy**

Almost twenty years after the 9/11 attacks, Congress can and should be more specific about the enemies against whom the United States is at war. At the moment, based on public news reporting, it is not entirely clear who the AUMF-enemy is. The list appears to include al Qaeda, the Taliban, and the Islamic State, as well two associated forces (al Qaeda in the Arabian Peninsula and al-Shabaab). It is unclear whether other al Qaeda, Taliban, or Islamic State affiliates are on the list, or whether (if they are on the list) they are deemed covered by the 2001 AUMF directly or via the “associated forces” rubric.

2. **Future Associated Forces**

Congress needs to establish a mechanism for clarifying and updating the list of associated forces against which the president can use force in the future. Terrorist organizational boundaries are fluid, and related forces that are not formally or obviously part of the groups against whom force is authorized can be excluded from a too-rigid definition of “associated forces.” But too loose
a definition of “associated forces,” and too little congressional oversight, give the president too much discretion to shape the war.

To address these challenges, Congress should expressly authorize force against associated forces using the basic definition that guided the last three administrations: An associated force is one that “has entered the fight alongside” and “is a cobelligerent with” al Qaeda, the Taliban, or the Islamic State “in hostilities against the United States or its coalition partners.” It should also add congressional notice and review to the identification of new associated forces, as contemplated in a bipartisan 2010 Senate proposal. That bill authorizes the president to identify new groups of associated forces, but it also requires him or her to notify Congress of the designation within forty-eight hours. It then provides for an expedited review mechanism by Congress and guaranteed congressional debate on whether the designation should be repealed.

3. A Sunset Provision

Especially in light of the experience of the last two decades with the 2001 AUMF, it is vital that Congress and the executive branch commit to revolting the scope of the war against Islamist terrorists on a two- to three-year basis. A sunset provision to this effect would require the president to publicly explain and defend the nature of the conflict and the reasons why it must continue (and how). It would force Congress to exercise its constitutional responsibilities to deliberate about and vote on (or at least face) the issue. And it would prevent the situation that has prevailed for two decades: a morphing, sprawling, indefinite war with only sporadic and reactive public congressional involvement.

A sunset clause in an authorization to use military force poses risks. One is that Congress might not renew the authorization. Another is that it will renew it in a way that the president dislikes, thus forcing the president to rely on politically riskier Article II authority to continue the conflict, or to narrow the conflict further than he or she would like. If history is any guide, however, political pressures tend to push Congress toward rather than away from authorizing force that a president requests. And in any event, Congress should not shy away from the possible consequences of democratic deliberation on a vital question like war. Some critics of sunset clauses have claimed that they send a signal to the enemy of weakness or a lack of resolve. Not so. All a sunset signals, and means, is that Congress must exercise its constitutional responsibilities to assess and update the president’s authorities to use force every few years in light of new conditions.

4. Detention Authority

If Congress repeals and replaces the 2001 AUMF, it will need to pay attention to the legal basis for continued military detention at the facility at Guantanamo Bay, Cuba. Should Congress wish detention there to continue, the replacement AUMF would need to make clear that the authorities provided by the 2001 AUMF, and by the 2011 detention statute that references the AUMF, continue under the replacement AUMF.

B. 2002 AUMF

In 2002 Congress authorized the president “to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to . . . defend the national security of
the United States against the continuing threat posed by Iraq. The authorization aimed at the threat posed by Iraq’s past aggression, international law violations, and the supposed threat of weapons of mass destruction. But the language of the authorization swept more broadly and has been construed by the executive branch as authorization to use force unrelated to the threat actually posed by Iraq. For example, the Obama administration invoked it as one basis for using force against the Islamic State in Iraq. And the Trump administration used it as one basis for targeting Qasem Soleimani in Iraq.

The 2002 AUMF is an undisciplined, overbroad, and unnecessary authorization for the use of force. It should be repealed. Such a repeal would not impact the president’s counterterrorism authorities in the area, since every use of force in which the 2002 AUMF was invoked could have been justified independently by some combination of the 2001 AUMF (or the proposed successor) and Article II.

G. The AUMFs and the Forever Wars

The “forever wars” is a term that typically refers to the military conflict against Islamist terrorists that began in 2001 in Afghanistan but that sprawled to the war in Iraq and to many new enemies in many countries over the last two decades, based on a combination of the legal authorities discussed above. As a general matter, AUMF reform — at least the reforms discussed above, and the main ones expressed in recent congressional proposals for reform — would not end the forever wars.

This is so for at least two reasons. First, the United States’ massive global military and intelligence deployment would remain in place. And second, if the president needed to respond to a perceived terrorist threat in a way not authorized by the replacement AUMF, he or she could rely on broad independent Article II power to use military force, among other sources of authority. Of course, presidents act with greater political risk when they rely on Article II alone for counterterrorism actions beyond what Congress has authorized.

Broader War Powers Reform

Repealing and reforming the AUMFs is a first step for Congress to reclaim its constitutional war powers. A second step is to rethink from top to bottom the failed WPR in order to reign in some of the more extravagant claims of unilateral presidential war powers under Article II. The current state of affairs — in which the president has claimed legally unchecked offensive military power under Article II — cannot be justified under a Constitution that clearly sought to prevent that state of affairs.

I have outlined my views on how to reform the WPR in my recent book with Bob Bauer. In brief: Congress should expressly authorize the president to use military force under all the circumstances needed to protect U.S. national security, with an emphasis on an express authorization for a precisely defined self-defense power. Congress should prohibit presidential uses of force that fall outside this justification, and in particular ban humanitarian intervention without congressional authorization. The revised WPR would require more demanding consultation with and reporting to Congress than the current WPR, and would take more robust steps than the
current WPR to bar unauthorized uses of forces. And it would bar the executive from spending funds in ways inconsistent with these provisions.


2 Large parts of this testimony draw on my book, After Trump: Reconstructing the Presidency (2020), co-authored with Bob Bauer. Though many elements of that book respond primarily to the Trump presidency, its views on conventional war powers do not. As the book makes plain, “Trump has not been as aggressive as his two predecessors in expanding available unilateral presidential war powers,” and “the most dangerous expansions of presidential [war] power took place prior to Trump.” Bob BAUER & JACK GOLDMITH, AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY I, 261 (2020).


4 See 2018 Syria Opinion, supra note 3; 2014 ISIL Opinion, supra note 5; 2011 Libya Opinion, supra note 3.

5 The only acknowledged constraint on the use of light-footprint warfare in the OLC opinions is that the executive branch says it may need congressional authorization in situations that pose significant and immediate risk to American personnel or of escalation. OLC has concluded that this situation will likely arise only in “prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period.” 2010 Syria Opinion, supra note 3, at 9 (quoting 2011 Libya Opinion, supra note 5, at 31). This is not a meaningful constraint. It did not prevent President Obama from conducting the 2011 Libya operation, which lasted seven months, reportedly involved Central Intelligence Agency personnel on the ground, and resulted in at least many hundreds (and probably thousands) of air sorties including a substantial percentage of targeting sorties. Nor did it prevent President Trump from ordering the lethal targeted strike against General Qasem Soleimani in 2019, which many at the time feared would lead to significant escalation of hostilities with Iran.


8 See, e.g., Erica Gaston, Soldier Self-Defense and the States in Syria, LAWFARE (June 22, 2017).


12 In 2020, both houses of Congress passed resolutions to this effect, see S.J. Res. 68, 116th Cong. (2020); H.R. Con. Res. 83, 116th Cong. (2020), but the Senate failed to override a presidential veto, see Clare Fetter & Ted Barrett, Senate Fails to Override Trump Veto of Iran War Powers Resolution, CNN (May 7, 2020).


17 See 2012 NDAA, supra note 14.


21 See BAUER & GOLDSMITH, supra note 2, ch. 12.
Chairman MEEKS. Thank you, Mr. Goldsmith. I thank all of our witnesses for your testimony. Thank you very much.

I will now recognize members for 5 minutes each, pursuant to House rules. All time yielded is for the purposes of questioning our witnesses. I will recognize members of the committee in seniority order, alternating between Democrats and Republicans. If you miss your turn, please let our staff know and we will come back to you. If you seek recognition, you must unmute your microphone and address the chair verbally and identify yourself so that we know who is speaking.

I will start by recognizing myself for 5 minutes.

While listening to our witnesses—and again, thanking them for their testimony—all of our witnesses, both the Democratic and Republican witnesses, have called for the 2002 AUMF to be replaced, and specifically not replaced. So, let me ask you, I guess, first, Mr. Goldsmith, can you explain this view and why does the 2002 AUMF not need to be replaced?

Mr. GOLDSMITH. Yes, sir. My view is that the 2002 authorization had a very specific purpose. It had its purposes defined in the statute itself. It had to do with Iraq's weapons of mass destruction and violating international law. It concerned and aimed toward the government of Saddam Hussein. It has stayed on the books and it has been used for all sorts of reasons that maybe you could squeeze into the language, but it has basically been used by President Obama and President Trump as an alternate justification for using force in Iraq—in Iraq, not against Iraq, under various circumstances.

I do not believe that that is what the Congress meant to authorize. I do not believe it is necessary. I do not think anything turns on it, frankly. I do not think much turns on it, frankly, but I do not think it should be on the books, either.

Chairman MEEKS. So how would the President, then, be able to combat ISIS and Al Qaeda and defend our troops?

Mr. GOLDSMITH. ISIS and Al Qaeda are clearly covered the 2001 AUMF.

Chairman MEEKS. And, Ms. Hathaway, do you agree with that?

Ms. HATHAWAY. I one hundred percent agree with that. I think the 2002 AUMF was very clearly defined quite narrowly. It says it authorizes the President to defend the national security of the United States against the continuing threat posed by Iraq. And what Congress meant by that was Saddam Hussein's Iraq, which at the time we believed possessed weapons of mass destruction. It turned out that that was not, in fact, accurate, but that was the basis for the authorization. And then the second basis was to enforce U.N. Security Council resolutions, which have all expired.

And so this authorization, while it has been called on by some Presidents, and referenced, I think almost every one of those references, experts agree, were not actually effective references to the 2002 AUMF. And all the operations, counterterrorism operations, against Al Qaeda, ISIS, and affiliated forces are much more properly done under the 2001 AUMF, or its replacement that we will be discussing, as well.

Chairman MEEKS. So, let me ask this question. Mr. Bauer, having served as a White House Counsel, do you think Congress
should always take the legal opinions of the executive branch lawyers at face value?
You may have to unmute yourself, Mr. Bauer.

Mr. Bauer. My apologies. No, sir. I would say Congress does need to pay close attention to the legal claims that the President makes for unilateral action under Article II, or any interpretations that Presidents make of the authority they believe that Congress provided them in an authorization to use military force.

And so I agree with both Professor Goldsmith and Professor Hathaway. And I would add I think it is particularly dangerous to the Congress, and misleading to the public, so many years after 2002, and so clearly not consistent with Congress’ intent, for the President, in a particular context, to claim that he or she is acting in partnership with the Congress, when, in fact, that is not true.

And I think that is a fundamental question of leveling with the American public and holding the President accountable for the justification that he or she proposes to provide. If the President wants to stand on Article II authority, then the President ought to make that case, and then the President’s lawyers provide the basis for the exercise of Article II authority. And the Congress should be very attentive to what executive branch lawyers are saying and be prepared to hold the executive to account for those legal opinions.

Chairman Meeks. Thank you. Now, when discussing a potential replacement for the 2001 AUMF, all of you have said and called for including a specific requirement that Congress reauthorize the AUMF after two or 3 years. Mr. Bauer, can you explain why you think that requirement is important?

Mr. Bauer. I'm sorry, the sunset provision, Mr. Chair? Just to be sure——

Chairman Meeks. Yes, that's it.

Mr. Bauer. Yes, I think it is very important, if Congress is going to get into the game, for Congress to remain in the game. And the history suggests that there needs to be reconsideration over some period of time. Whether it is two or 3 years, I know there have been congressional proposals for more extended sunset allowances, but, one way or the other, I think the objective is for Congress to reestablish itself, as the title of your hearing suggests, to reclaim its possession in war powers. And for that to happen, it has to remain continuously engaged. And that is the purpose, certainly, of a sunset provision.

Chairman Meeks. Thank you. I am just wondering, a quick answer, yes or no, Ms. Hathaway, do you agree, yes or no?

Ms. Hathaway. I completely agree, yes.

Chairman Meeks. And, Mr. Goldsmith, do you agree, yes or no?

Mr. Goldsmith. I do.

Chairman Meeks. Thank you. Thank you for your answers. I will now call on—my time has expired. I now call on the ranking member, Mr. McCaul, for his questions. He is now recognized for 5 minutes.

Mr. McCaul. Thank you, Mr. Chairman. And I think we all take this issue very seriously. It is probably the most serious question that Congress has to decide. I think the last time that Congress actually declared war, as expressly provided by the Founding Fathers under the Constitution, was before World War II. Then, after Viet-
nam, the War Powers Resolution came into place, and then we have this battle between that and Article II. I think, in some respects, the War Powers Resolution maybe limited Congress from the inherent constitutional authority.

But, having said that, Professor Goldsmith, I just had a question. In your view, does an outright repeal of the 2002 AUMF standing alone represent a significant reform of the war power authorities?

Mr. Goldsmith. No, sir. I think it is not nothing, because it is good for whenever Congress gets in the game to examine legal authorities related to war. But I think it is the lowest-hanging and smallest fruit of everything on the table. I do not think it accomplishes very much. It is mostly symbolic, and it depends on what you think of the symbolism. I do not think it is as important as the other reforms.

Mr. McCaul. Yes. And then I would like to get to those other reforms that you are talking about. Would it, in your view, be better, instead of—well, first of all, not to rush this process, it is a very important thing that we are doing on this committee that is inherent to our jurisdiction. And I commend the chairman for exercising our jurisdiction and constitutional authority. I think it would be better to do this with a little more time to get this right and make it bipartisan.

But, having said that, do you think it would be better to, instead, take up a 2002 repeal concurrently with a repeal of the 2001 AUMF, and the enactment of a new counterterrorism AUMF scoped to today’s critical threats?

Mr. Goldsmith. I defer to Congress about how it shapes its legislation, obviously. When I said the 2002 AUMF repeal wouldn’t accomplish much, that doesn’t mean I do not think you should do it. I meant, I want to be very clear: I think you should do it.

I, myself, think you should take them up together. They are both about the President’s, effectively, as they have been used, counterterrorism authorities in the so-called global war on terrorism. And I think they are most fruitfully considered together. And I think, with the 2001 AUMF, the issue is much more vital for Congress to engage in, while not suggesting that you shouldn’t engage with the 2002 also.

Mr. McCaul. Right. So, in other words, if we were repeal both AUMFs, and then enact, with our inherent constitutional authority, a new counterterrorism AUMF that encompasses the threats of today since 9/11, in my judgment, do not you think that would be a better way for us to proceed?

Mr. Goldsmith. Yes, I believe that what Congress’ role is here is to do a comprehensive examination of the global war on terrorism as it has been involved for 20 years. I would look at all the authorities that the President has invoked. I would try to figure out how important the 2002 and 2001 AUMFs are to the President. And I do think that they are most fruitfully considered together, but, again, not purporting to tell you how to proceed with your legislation.

Mr. McCaul. Right. And in the limited time I have, for our other two witnesses, I mean, there has been a ton of constitutional scholar analysis. All three of you, I mean, how do you reconcile the war powers clause of the Constitution, which is very clear, then the
War Powers Act resolution that took place in the seventies—or, actually, yes, a little bit prior—and then the Article II self-defense arguments that were made in the case of Soleimani, along with the 2002 AUMF? Does that make sense?

Ms. HATHAWAY. It does. I can say a few quick words. I think that the way to understand it is that Congress is the one that has the authority to declare war, and that includes formal declarations of war. It also includes authorizations for use of military force. The President retains the capacity to defend us in the case of attack, and that is an authority that he retains regardless of whether Congress has authorized it. But it is a fairly narrowly circumscribed, independent authority of the President, appropriately so, right?

So, you do not want the President to sort of claim that something is a defensive use of force and launch a massive war under a claim of self-defense. There has to be some narrowly circumscribed role. But it has always been clear from the time the Constitution was written that the President has the authority to defend us. But, for other uses of use of force, he needs to consult with Congress and get Congress’ authorization in order to use force.

Mr. McCaul. And I tend to agree with that.

I see my time has expired. I yield back.

Chairman MEEKS. Thank you. The gentleman yields back.

I now recognize Mr. Sherman from California for 5 minutes.

Mr. SHERMAN. Thank you. I thank the chairman for holding this hearing. This is an issue that has vexed our Republic since the very beginning. Jefferson sent American naval and marine forces to the shores of Tripoli, actually closer to Benghazi, to fight pirates who preyed on American ships. And doing so, he did ask for congressional authorization and got it, but kind of asked for it as an afterthought. So, while more recent conflicts are our focus, the founding generation had not worked out the difference between Article I and Article II, the right to declare war versus the right to command our troops.

I am not sure that the Soleimani attack triggered the War Powers Act because it was conducted in an hour rather than the 60 or 90 days. But, putting that aside, and some other issues aside, we certainly have seen a violation of the War Powers Act, at least in my mind, in Bosnia, Kosovo, and Libya.

There are three aspects that we need to focus on. The first I think people have talked about: the AUMFs. 2002 ought to be repealed. 2001 will be more difficult to deal with because we do not have a consensus in Congress as to what our policy should be in Afghanistan, but I am hoping that we can at least trim the 2001 AUMF to say it doesn’t authorize any new wars. Because if you read 2001, it authorizes war just about anywhere where the supporters of Al Qaeda may reside, and that is a lot of different places.

The second thing we have to do on the War Powers Act is define “hostilities.” President Clinton and President Obama both asserted that we are not entering forces into hostilities when we are just bombing, or, in the case of Libya, bombing using drones, or bombing in a way that has a low risk of American casualties. And, of course, around the world we face the issue of whether we are there to do training or whether we are fighting.
But the final issue I would like to focus on is, even with all this, every President since Nixon, since the War Powers Act was passed, and to some degree since Jefferson, have asserted that they have the constitutional right to send our forces anywhere anytime; Congress is just there to provide the money or not provide the money.

I commend our first witness, Ms. Hathaway, for her comment about how important it is that any revised War Powers Act give Congress standing to go into court and enforce it. And, finally, I want to commend her for pointing out the importance of using our power of the purse to win this constitutional battle.

In 2011, I proposed an amendment to our appropriations bill that said no money can be spent in contravention of the War Powers Act. Since then, I do not think we have had a violation of the War Powers Act, and we have been able to include that amendment in every spending bill. It was a big controversy in 2011. Now we put it in every bill. I want to thank 30 of our colleagues for co-sponsoring the bill to make that permanent law, not having to put it in every appropriations bill.

Ms. Hathaway, how useful is it, or is it useful, to use Congress’ power of the purse to further underline and buttress our constitutional right to have a War Powers Act?

Ms. HATHAWAY. It is not only useful, it is absolutely essential. This really is fundamentally the power that Congress has. It has the power to cutoff the use of funds to wage a war that Congress doesn’t support.

And the reason that I support an automatic cutoff of the kind that you describe is that, if Congress has to separately vote to cutoff funding for an ongoing war, that is almost certainly going to be vetoed by the President. So that imposes a supermajority requirement. You have to muster a veto-proof majority in both Houses, and that is just fundamentally impossible. We have seen that. And that is not what the Constitution ought to require. What the Constitution makes clear, Congress is the one that ought to be able to make the decisions about this. So, having this automatic cutoff is really essential to an effective War Powers Resolution.

Mr. SHERMAN. Thank you. I believe my time has expired.

Chairman MEEKS. The gentleman yields back. I now recognize Representative Wilson of South Carolina, who is the ranking member of the Subcommittee on the Middle East, North Africa and Global Counterterrorism, for 5 minutes.

Mr. WILSON. Thank you very much, Mr. Chairman.

And given the ongoing and evolving nature of the threats posed by terrorist groups in the global war on terrorism, the conversation around an authorization for use of military force and its effectiveness is an important one. The realization that certain elements of the existing 2001 and 2002 Authorizations for Use of Military Force may be outdated does not negate the need for their existence. Any efforts to repeal an AUMF without a concurrent replacement addressing today’s threats would be a disaster for the U.S. national security, American families, and it would be, sadly, welcomed by our adversaries. To me, it is crucial that we defeat the terrorists overseas to protect American families at home. It is critical that the President have the authority to conduct counterterrorist efforts around the globe in real-time.
And we are so grateful to have the witnesses with us today. All are quite distinguished and knowledgeable.

Professor Hathaway, I have a question for you. And that is: over the course of the global war on terrorism, we have learned that terrorist groups deliberately obscure their activities, conceal their memberships, and change their names to make it difficult to identify them. In the context of the narrowing [inaudible], this tactic could have a strategic impact. Should Congress have a role in approving by name lists of terrorist groups associated with Al Qaeda? Would that enhance or detract from the flexibility of the existing AUMF?

Ms. Hathaway. That is a great question. I think it is a really important one. So, it is important to note how this happens now within the executive branch. So, within the executive branch, there is a list. So, there is an ongoing list as to which groups are approved for use of force under the 2001 Authorization for Use of Military Force. In its final days, the Obama Administration published a framework, a guidance, where they listed all of these groups. In the sort of public, unclassified document were listed all of the affiliated groups against whom force was authorized. And they can be fairly broadly defined, as they were in that document. And I think it is appropriate for Congress to be consulted if new groups are going to be added to that list or if the geographic scope of that authority is going to be expanded.

Mr. Wilson. Thank you for your input. That is very helpful. Hey, I am glad to know that they actually do have lists. And so that is critically important.

And then, Professor Goldsmith, a fellow general: Presidents Trump and Obama used the 2002 AUMF as partial justification for a number of operations, including operations against ISIS, as well as operations against Iranian-backed terrorist militia Hezbollah. How would the repeal of the 2002 AUMF affect the legality of the operations mentioned above?

Mr. Goldsmith. I do not believe they would affect the operations mentioned above under current authorities that the executive branch asserts under Article II of the Constitution, and perhaps, depending on the groups—I didn't hear them all—perhaps, in part, under the 2001 AUMF. All of the authorities under the 2002 AUMF, as best I can tell, have been in the alternative with Article II.

Mr. Wilson. Thank you. And given, indeed, the global war on terrorism will extend well beyond any President's term, what are the practical ramifications for requiring congressional authorization on sunset clauses?

Mr. Goldsmith. What are the ramifications of doing that? I mean, my view is that, especially if you think the war is going to go on for a very, very long time, that makes sunset clauses all the more important to force Congress and the President to debate the scope and justification and legitimacy of the war and to reauthorize it in a way that Congress sees fit, exercising the congressional powers that this hearing is about reclaiming.

And I will say that some people worry that this is going to cause problems with the operation as it is going on. I do not believe that that is true, for a whole bunch of reasons, one of which is, if any-
thing, appropriations problems come up much more often. And those things, when they expire and after the emergency appropriations, they actually have to get done. And they do not seem to have an impact on the operations. As long as Congress is engaged on a regular basis, as a sunset would encourage it to do, I do not think that it should have any negative impact.

Mr. WILSON. Well, thank you very much, and my time is up. And I yield back. Thank you, Mr. Chairman.

Chairman MEEKS. Thank you. The gentleman yields back.

I now recognize Representative Albio Sires of New Jersey, who is the chair of the Subcommittee on Western Hemisphere, Civilian Security, Migration and International Economic Policy, for 5 minutes.

Mr. SIRES. Thank you, Chairman, for holding this hearing. And thank you to our witnesses for being here today.

It just seems that every President uses these resolutions as they see fit. I was just wondering, are these resolutions a strong enough foundation that we should work to amend them or should we be working to serve and draft entirely new legislation? I mean, are they strong enough? Any of the three.

Ms. HATHAWAY. I am happy to say a quick word, and then hope that my colleagues will jump in.

I think that the 2002 AUMF, I agree with my colleagues, should be just repealed. The 2001 AUMF, frankly, it is so outdated that I do not see a whole lot of reason for retaining its structure. I think what we want to do is maintain the scope of the central authorities that are contained within it, but I think that probably it requires a pretty entire rewrite that would take the authorities that Congress continues to support, but will update it for the current era.

Many of the authorities against which we are fighting today under the 2001 Authorization for Use of Military Force did not exist with the 2001 Authorization for Use of Military Force was enacted. And so it doesn’t make a whole lot of sense to rely on the text of that authorization, which, again, was enacted mere days after the 9/11 attacks, when Congress, like the rest of the country, was just reeling from the horror of those attacks and didn’t know exactly who the enemy was, and so wrote in it in this fairly broad-brush way, appropriately, given the circumstances. But we know a lot more now almost two decades later, and it is appropriate for Congress to write an AUMF that is much clearer, that is much more pointed, that gives authority to wage war against the actors that we are currently at war with, and not give an open-ended authority to the President to expand that significantly without coming back to Congress.

Mr. SIRES. Anyone else like to add?

Mr. BAUER. Congressman, I would just say I agree that—and I think as my colleague, Professor Goldsmith, said—I think these, without suggesting how Congress should go about shaping its legislation, I see this as a concurrent exercise in which the repeal of 2002 and the updating of 2001, all of this is sort of a package of reforms. And so whether you call it a revision or you call it an updating, I do think, in the ways that we have discussed of identifying clearly who we are at war with, who would be considered an associated force co-belligerent with those we are at war with, all of
that could be contained in a revision that I think would give it a strong foundation for addressing these issues, without it being sort of an open-ended invitation to the President for very aggressive interpretations.

Mr. Sires. Mr. Goldsmith.

Mr. Goldsmith. I agree with my colleagues. I would simply add that the way it has been working now is that the President—and many Presidents—several Presidents have expanded the AUMF as they see fit. Congress eventually finds out about it. Congress, in my view, kind of quietly, through appropriations, which do not have the same salience as the kind of conversation now, Appropriates for it. And so Congress has just entirely reacted, as best I can tell. Now, maybe there is more going on, but, from a public perspective, it seems like that Congress is basically just completely deferring to the President about the shape of war, and that should not be going on. That is not Congress’ role, in my opinion.

Mr. Sires. That is just basically any President we have had the last few terms; they just use it as they see fit. All right. I do not have any more questions. Thank you. Thank you, Chairman.

Chairman Meeks. Thank you. The gentleman yields back his time. I now recognize Representative Scott Perry of Pennsylvania for 5 minutes.

Mr. Perry. Well, thank you, Mr. Chairman. Thanks for bringing this issue to the fore and having this hearing.

I would say that I hope that, if we are going to discuss something as weighty as this—and I cannot think of many things that are more weighty in context—that this isn’t the only hearing and the only discussion we have on this subject.

I think maybe I’ll just start with Mr. Goldsmith. It seems to me that certainly President Trump used the 2002 AUMF for the justification of the removal of the battlefield from Qasem Soleimani, and I agree with his removal. Now, I guess what we are talking about functionally here is simply eradicating the 2002 AUMF, which I am not necessarily opposed to. I wrote my own AUMF five or 6 years ago to replace it. But my concern is we are not talking about replacing it; we are talking about just eradicating it and moving forward, where we have international terrorist organizations operating solely to destroy the United States of America and Western civilization.

I guess, that having been said, I think I would like to get into a little bit of a discussion with you about the President defending the United States. And in that regard, as a servicemember myself who served for many years, including in Iraq, I saw Soleimani as a belligerent and an enemy of the United States of America who was conducting offensive operations with impunity in-country, in the region, and around the globe, and we did nothing about it.

If we repeal the 2002 AUMF without anything replacing it, so to speak, would—I’ll let me back up. If there was no 2002 AUMF when President Trump eliminated Soleimani from the planet, would there be any justification for doing that? Or would there be no justification, or an even more strained justification than the Trump Administration used?

Mr. Goldsmith. Sir, given my understanding of the low-level conflict that had been going with Iraq for not just years, but for
a very long time in Iraq and Syria, and given Soleimani’s hand in that, I actually—the answer, the stark answer to your question is I do not believe the 2002 AUMF, if it were abrogated, would have any impact on the President’s authority to do that under his understanding of Article II.

And, frankly, as the Article II justification has gone in recent years, my view is that was a relatively easy one. The reason it was controversial is because it took place in Iraq and it was a very high-level official, and that was the difference. But, in terms of the actual self-defense threat, as explained by the government, and reports prior, I think it was greater there than some other circumstances.

But I would also say, sir, that if you believe that these entities pose a threat, I think that you should address it. I think you should have hearings. I think you should figure out who the enemies are. It is, obviously, a very large step to authorize force, for Congress to authorize force, against Iranian militias. And I do not know if Congress is willing to do that. But I do think that Congress should step in and figure out where the President should be using force as much as it possibly can.

Mr. Perry. I agree with you to a certain extent with that, but with the understanding that I think it is somewhat myopic. And I am not saying that you are being myopic or inconsequential here, but I just do not see the practicality of having a discussion in a committee or the Committee of the Whole in Congress about whether we should take Soleimani out, or somebody like Soleimani, right?

Terrorists act and operate with impunity and secrecy and they are wily and they cheat, they lie, they do whatever they have to to be effective. And you cannot really have those kinds of discussions out in the open if you are going to be effective. And so, while I agree wholeheartedly that Congress needs to be involved, I am concerned about where we are headed with this, even though I agree that we need to replace both of them. But the word is “replacement,” and I think we are just talking about repeal.

Would you say that you think that there is a role for the AUMF, aside from the War Powers Act in the Constitution, or that they should just be repealed and we should just rely solely on the Constitution in the advent of a world that includes international terrorists and the activities that they conduct?

Mr. Goldsmith. I absolutely do believe that. I mean, I believe you should conduct comprehensive reform about the use of Presidential force in the terrorism context. And I think that involves looking at the whole array of threats and figuring out as best you can what you think you should be supporting the President doing.

Article II is a backup. Article II has been used by the President in an increasing array of circumstances, a lot of them not related to direct self-defense. I believe Congress should weigh in as much as it can to address the President’s proper Presidential authorities in these contexts.

Chairman Meeks. Thank you. The gentleman’s time has expired. Mr. Perry. Thank you, Mr. Chairman. I yield.
Chairman MEEKS. I now recognize Representative Gerry Connolly of Virginia, the President of the NATO Parliamentary Assembly, for 5 minutes.

Mr. CONNOLLY. Thank you, Mr. Chairman, and thank you for pulling together this hearing. This is one of the most thoughtful hearings I can remember, and I think all three of our witnesses are outstanding and have really contributed to the intellectual dialog we need to be having about war powers, not just the AUMF, but war powers in general.

My view is more of the strict constructionist point of view about what Article I means and what Article II means. I am going to assert that the Founders severely limited the role of the President as Commander in Chief. It was entirely within the purview of Congress in Article I to decide where and when and how to engage in a military activity, and it was the limited role of the President to then command the troops required to engage in that military activity.

Now, we do not live in that same world today, but, my God, have we strayed far afield of the original intent, clearly, of the Founders, who had grave suspicions even about a standing army, let alone envisioning the kind of dilution of congressional power today and the incredible increase of executive power we have allowed to happen since World War II. And part of it is Congress' own lack of fortitude and irresponsible behavior and not wanting to take responsibility for hard decisions, but a lot of it has come from speeches and legal arguments made by the executive branch.

So, what I would like each of the three of you to do in the remaining time I have got, you know, the expanded powers of the executive are sort of all about imputed powers to the role of the Commander in Chief provided in Article II. I would like you to address, well, if the executive gets to have imputed powers, why doesn't the legislative branch in the Article I have imputed powers? And if so, what ought those imputed powers to be? And, Ms. Hathaway, maybe you could start.

Ms. HATHAWAY. Yes, I am happy to. I think you put your finger on something really important, which is you have got the constitutional provisions which give up much more authority, on the face of it, to Congress than it does, really, to the President. The President is Commander in Chief, but it is Congress that has the authority to declare war, to raise and support armies, to regulate the military. So it is strange that we have gotten ourselves to a place where Congress is so often kind of read out of the picture almost entirely and rarely has a role to play in making decisions about whether to use military force.

And that, I think, is the result of a couple of things. I think one is these Authorizations for Use of Military Force are enacted, and then Presidents' lawyers get in on the act. And all of us have been lawyers for the President at one time or another, so we know how this works. And you take the authorities that are there and you interpret them as broadly as you can. The Office of Legal Counsel plays a significant role in this. The so-called lawyers' group plays an important role in this. And they interpret these authorities to allow the President to act in a wide range of scenarios.
And Congress really doesn't have the tools to press back. It neither has the kind of counterpart to the Office of Legal Counsel, and it only finds itself in a position of only being able to respond by legislation. And, again, the response through legislation, it faces a likelihood—in fact, almost certainty—of a veto from the President, which is nearly impossible to overcome.

So, by not being willing to really engage and revisit the War Powers Resolution and these AUMFs, Congress has really sort of let itself be read out of the process almost entirely.

Mr. CONNOLLY. Thank you. Mr. Bauer? Professor Bauer?

Mr. BAUER. Yes, thank you, Congressman.

Yes, I would add, because you raise this whole question of executive branch interpretation—and Professor Hathaway has addressed it—that what happens is it is a snowball, that over time each administration—and again, I may be slightly overstating the case—but there are expansions in the language, extensions of the reasoning that provide lawyers and successive administrations more and more opportunities to build more and more expansive cases for the President's interpretation of AUMF and the President's interpretation of unilateral Article II authority.

Professor Hathaway is correct, Congress obviously cannot shut down the President's ability to interpret the law, but the Congress can, as part of an overall reform effort, put some significant pressure, particularly if an executive is willing to be a partner in the reform effort, on the executive to reconsider some of these Office of Legal Counsel opinions and to introduce a little bit of discipline into that process.

And we sort of refer to them in our book—Jack and I do—as "loaded guns." And Congress does have a role in putting it back in the storehouse. I think Congress can put some significant pressure on the executive to account for some of the really extraordinarily expansive positions that have been taken, with each Legal Counsel's Office able to take advantage of the expansive interpretation of the previous one.

Chairman MEEKS. Thank you. The gentleman's time has expired.

Mr. CONNOLLY. Thank you, Mr. Chairman.

Chairman MEEKS. I now recognize Representative Darrell Issa from the State of California for 5 minutes.

Mr. ISSA. Thank you, Mr. Chairman.

And I want to thank all our witnesses. I think we are on a very good track, and I see a lot more concurrence than I do disagreement, which is always the hallmark of this committee.

I am going to go down the list, but, Ms. Hathaway, as we were talking, and you were talking, about the power of the purse and getting standing, would you say that in a perfect world—and we will assume for a moment that Congress can do whatever it wants to do—would you say that what we should do is, in fact, draft a new bill that would define the use of military force for the various areas that we believe need to go forward, but that if that bill, no matter how broad or narrow it is, failed to, in fact, link future funding and a standing, if the President exceeds it, that we would be right back where we were? In other words, this whole exercise is not a permanent change unless we enact those two changes?
Ms. HATHAWAY. Yes, I think this is a really important point. So we are talking about sort of two things here. We are talking about the Authorizations for Use of Military Force and repealing and replacing those with a more clearly updated authority that more specifically defines the enemy. So then separately we are talking about war powers reform, which would include within it the kinds of enforcement tools that you have described. And you really need to do both.

You would need to not only reform or revise the Authorization for Use of Military Force, but also think ahead to what happens if the President wants to use authority outside the scope of those AUMFs and how are you going to enforce those authorities. And for that, you really need these more systemic reforms that would come with revising the War Powers Resolution.

Mr. ISSA. Thank you.

For all of the witnesses—and please be brief in your answer—but I am going to ask two fairly complicated questions and hope to get simple answers. Is it fair to say that, to a great extent, we have been at war/in a hostile relationship with Iran since 1979? If you can answer yes or no, I would appreciate it.

Ms. Hathaway, how about you? Would you say that that hostility has been pretty much continuous since 1979?

Ms. HATHAWAY. So I am an international lawyer. As a matter of international law, I would say, no, because that is a very sort of specific legal term.

Mr. ISSA. Are they still holding our embassy in Tehran adverse to international law?

Ms. HATHAWAY. Certainly we have been engaged in adverse relations with Iran at least since the seventies, if not before. Whether that sort of formally meets the definition of active hostilities, that is harder to say.

Mr. ISSA. So in a sense, I am saying this because Iran, our relationship with Iran is much like our relationship with Russia, the Soviet Union, during the cold war. It is essentially a continuous adversarial relationship which periodically has hot spots that include the use of force. Would that be fair to say there is a similarity?

Ms. HATHAWAY. Yes. Well in some ways, there is a similarity. We have adverse interests in the region, and we have had significant—there have been points at which that has flared up into direct hostilities and times when it has been cool. We also have managed to collaborate at times, obviously in a particular way—

Mr. ISSA. Right, but that also would be true of the Soviet Union during the entire time in which our spies were killing each other.

Ms. HATHAWAY. Absolutely.

Mr. ISSA. So let me go through a couple of quickies. I use that example because it would appear as though the use of military force and/or declarations of war really do not fit relationships like the historic Soviet conflict or the Iran conflict after more than half a century, or a half a century now.

Similarly, the use of military force does seem like it does not well fit non-State actors such as Al Qaeda and ISIS. So if we reform the use of military force, is it fair to say that there will always be—and this goes to Congressman Perry—there will always be this inherent obligation of the President to deal with non-State actors in
a way different than anything we draft in the way of a War Powers Act? And there will always be the strained relationship/diplomacies like we had with the Soviet Union, China, North Korea, Iran, a number of these countries? Would it be fair to say that those two examples will continue to be outside the reforms that Chairman Meeks is trying to achieve?

Chairman Meeks. Very brief, because the gentleman’s time has expired.

Mr. Issa. But I really want an answer for you, Chairman.

Chairman Meeks. Go ahead. You can go ahead as long as it is brief.

Ms. Hathaway. So I would say that I would like to see Congress be engaged in these decisions and not have these be outside the scope of the authorities that are granted by Congress. The AUMF, the 2001 AUMF, is specifically against non-State actors. So Congress has demonstrated that it is capable of authorizing a use of force against non-State actors. And if Congress thinks that we should be involved in an armed conflict with Iran, I do think that is a matter that ought to be debated and discussed and an express decision made along those lines. And if not, then that decision should be made as well.

Chairman Meeks. Thank you.

Mr. Issa. Thank you for the time, Chairman. I yield back.

Chairman Meeks. I recognize the Representative Ted Deutch of Florida, chair of the Subcommittee on the Middle East, North Africa and Global Counterterrorism, for 5 minutes.

Mr. Deutch. Thanks, Chairman Meeks, for convening this important hearing. In your short time as chair, you have shown true leadership in asserting jurisdiction of this committee. We all appreciate it greatly.

Thanks to our witnesses for testifying.

A decision on going to war is the greatest choice a Member of Congress can make. Article I, Section 8, of the Constitution entrusted substantial authority over war and peace to Congress. As we have been discussing, it declares that Congress shall have the power to declare war. Unfortunately, we have increasingly shirked this solemn responsibility, a trend that accelerated after the 9/11 terrorist attacks.

And as my colleagues have noted, authorizations for the use of military force that passed in 2001 and 2002 still provided legal authority for most U.S. military operations around the globe. Congress and the world have changed significantly in the intervening years. Only 20 percent of the current Members of the House and Senate—20 percent—were in office when the 2002 AUMF passed. Last Saturday marked the 18th anniversary of the beginning of the Iraq War. In October, we will mark 20 years since the start of U.S. military operations in Afghanistan. Contemporary international challenges and foreign policy priorities are far different than they were throughout the turn of the century.

That is why Congress must repeal the 2002 AUMF, which is no longer necessary. It authorized the use of military force in Iraq, an action against former dictator Saddam Hussein. As long as it remains on the books, the 2002 authorization will tempt Presidents
to act unilaterally, ignore the will of the public, and further marginalize the role of Congress in foreign policy.

We must also work with the Biden Administration to reconsider and modernize the 2001 AUMF. It will not be easy to define the contours of a new AUMF, but it is our duty to do so. The challenge of terrorism persists, but its nature and scope and our Nation’s preparedness and counterterrorism objectives have transformed dramatically in the last two decades.

So I appreciate the willingness of the Biden Administration to work with Congress on this initiative. President Biden served honorably in the Senate for 36 years. If there was ever a President who could serve as a partner in rebalancing congressional war powers, it is he.

I also commend Chairman Meeks for elevating this issue and ensuring that this committee plays an active role in discussions and actions over war powers. As chairman of the Subcommittee on the Middle East, North Africa and Global Counterterrorism, I look forward, Chairman Meeks, to supporting your efforts.

Professor Bauer and Professor Goldsmith, let me direct this one to you. Presidents often point to associated forces which are additional entities that can be targeted under the 2001 AUMF. And since the demise of core Al Qaeda in Pakistan and Afghanistan, the term is often used to justify strikes against Al Qaeda affiliates around the world. However, associated forces has never been defined in law. It is not included in the text of the 2001 AUMF. And the question—Professor Bauer, I will start with you—is whether Congress should incorporate that term “associated forces” in a future AUMF.

Mr. B AUER. Yes, Professor Goldsmith and I think that is precisely what an amendment to the 2001 AUMF should include, and that is to have Congress not just specify the current enemies, but to provide a process for the executive to report to Congress on the designation of additional groups and to force Congress essentially, or to invite Congress to engage in a very transparent debate within an expedited timeframe on those additional groups and their inclusion within the AUMF. And so we think that is an important part of the reform program.

Mr. DEUTCH. Well actually, Professor Hathaway, let me just turn to you for a second. How would that be defined? And how do you do it to provide flexibility, but also limit abuse by future Presidents?

Ms. HATHAWAY. So this is one of a few points of disagreement between me and my colleagues. I think that it is potentially dangerous to include a term as vague as “associated forces” in a new AUMF. It is a term that has become a term of art. We have used it as if it appears in the 2001 AUMF, but if you read it, as you said, it is not anywhere in the text. It was a term that was sort of come up with by lawyers for the President, and then it has been given meaning over time.

And what my fellow panelists want to do is sort of incorporate that meaning that has been given, including in a speech by Jeh Johnson which he gave at Yale Law School at my invitation, to include that in the revised AUMF. But the problem with that is that that gives the President the power to add new enemies, and then
Congress has to veto that. And then, of course, Congress has to reject it, and then the President can veto that.

I think that we should flip it around. I think Congress should be the one that has the authority to make the decision about whether we expand the list of enemies, not the President. And that is why I would say you should include a list, and then have an expedited process for adding to it if the President thinks that is necessary.

Mr. DEUTCH. Thanks. Thanks, Mr. Chairman. This is a tremendously important exchange of ideas. Appreciate it. Thank you.

Chairman MEEKS. Thank you. The gentleman’s time has expired.

I now recognize Representative Adam Kinzinger of Illinois for 5 minutes.

Mr. KINZINGER. Well thank you, Mr. Chairman.

And thank you to everybody for being here. It is important we all remember obviously 9/11. Some of us, maybe a few of us here were actually in Congress; some of us were deployed as a result of these AUMFs. So I do think this is an important discussion.

But 20 years later, I think an important question needs to be asked, which is are we safer today than we were on September 10th of 2001? And I actually think the answer is yes. And the reason is not that we have defeated radical terrorism ideologies, but because we are fighting them on their own soil.

Sometimes we can be a victim of our own success. So if there hasn’t been a terrorist attack in a while, and terrorists do not pose as a big of a threat maybe as they once did, we think the threat is gone. And we have done this many times in our history, basically relaxed our posture only to see, like we have seen in ISIS, these groups regroup and have to be attacked again.

I also think it is important to remember that, in this discussion, we talk about different groups and how associated groups change. Our Founding Fathers probably never imagined a war on terror, a worldwide war, where a threat can be kind of nebulous like it is. And so I think that is important, too.

But I do think it is a good discussion to have. I do think there needs to be some reforms. And I think though regardless of political party, one of the things I can proudly say is I have been consistent on this under President Obama, President Trump, and now President Biden. The President needs the power to fight against terrorism, and we have to be careful to kind of go into this realm of having 535 different commanders in chief because we all think we could do it better. And we ultimately end up doing nothing. And I think that is also what the Founding Fathers were concerned about. So there’s merits to repeal and replace, but to have a blanket repeal of this policy I think would only make us far less safe.

So I want to start, and maybe focus primarily on Mr. Goldsmith. In 2015, President Obama proposed a new draft AUMF that would have authorized him to use force against ISIS while excluding the use of ground combat operations. So should AUMFs micromanage hostilities, or should Congress just identify the enemy and let the President keep America safe? And let me also add to that, what would that have done to our current fight against ISIS, had that actually been the governing document?

Mr. GOLDSMITH. So that is a question I am not in a great position to answer. Professor Bauer and I do not propose a ground
troop limitation. We think it is more important, given the fluid nature of terrorists, that an AUMF focus on defining the enemy.

We still have ground troops in Afghanistan and Iraq. President Obama had a very particular definition of ground troops. I cannot remember whether it would be satisfied by this. Congress has the authority to limit ground troops, if it wants. It has done it before. But that is not something that we proposed.

Mr. Kinzinger. And I think anytime you decide you are going to fight and go to war, I think when Congress comes in and determines that, because of a political decision, we want to limit ground forces or whatever, then you are never serious about going and fighting, and we probably shouldn't go in the first place. We should engage in war obviously judiciously, but when we do, go to win.

Let me also ask you—and I do not actually know the answer to this question; it is not leading to anything—but if we repealed the 2002 Iraq AUMF, what does that—anybody on the panel can answer—what does that actually do to our posture to defend our troops in Iraq against Iran, for instance, when they get attacked by these forces? I will start with you, Mr. Goldsmith.

Mr. Goldsmith. I believe that one of the most foundational elements of self-defense is unit and personal self-defense. And if U.S. troops are attacked anywhere in the world, they can exercise self-defense in response, independent of the 2002 AUMF.

Mr. Kinzinger. But does that allow us offensive operations against maybe a forming group in Iraq or Afghanistan?

Mr. Goldsmith. Well that is a tough question. That depends on how broadly you read self-defense and anticipatory self-defense. The executives have read it very broadly, and that is a pretty fine-grained discussion.

Mr. Kinzinger. And let me ask you, too, some Members of Congress propose geographic limitations on an AUMF. When you are dealing with transnational terrorist groups that move like Osama bin Laden, Al Qaeda did prior to 9/11, does it make sense to tie our legal authority to a particular country?

Mr. Goldsmith. For me?

Mr. Kinzinger. Yes.

Mr. Goldsmith. Yes. Again, we do not propose tying it to a particular country. Let me say that the ground troops discussion has not really been on the table for a while because, in fact, the way the United States has conducted wars for about 8 years now has been through so-called light footprint warfare. President Obama basically switched to this, relying more heavily on drones and cyber, special operations forces. And so we have developed capacities to use force at a distance that are quite extraordinary. That, I think, is where the focus needs to be because that is where all of the decisionmaking is being made.

The ground troop discussion, that is a policy discussion for Congress. I mean, to me, it doesn't seem like near the top of the list of issues.

Mr. Kinzinger. Thank you.

Chairman Meeks. The gentleman's time has expired.

I now recognize Representative Karen Bass of California, the chair of the Subcommittee on Africa, Global Health, and Global Human Rights, for 5 minutes.
Ms. Bass. Well once again, Mr. Chairman and Ranking Member, thank you for holding this meeting. This has been a topic that we have talked about for a very long time.

And I wanted to talk about the War Powers Resolution. So just so long as I am clear, I believe that our Witness Hathaway said that we need to have systemic reforms to the War Powers Resolution. Because if we come up with a new AUMF, it still relies on the President to authorize the use of force. But with the gaps in the War Powers Resolution, I wanted to know what you might be proposing when you said systemic reforms. And then Congress currently lacks an effective mechanism to enforce the War Powers Resolution. So what options would we have, even with your suggestions of systemic reforms?

Ms. Hathaway. Yes, I think this is exactly right. So if we are going to repeal and replace the AUMFs, we want to also be thinking about the War Powers Resolution because, as Professor Goldsmith, for instance, rightly said, when you repeal the AUMFs and replace them with a more narrow authority, you still have some Article II authority for the President to act. And that should be governed, the reporting process for that should be governed by the War Powers Resolution.

And so I mentioned in my testimony a few things that I think are essential. One is we should define “hostilities.” Right now, the War Powers Resolution hinges so much on the term “hostilities,” and it never defines it. And this has been the source of real difficulty for Congress because that then has left the door open for executive branch lawyers to interpret that term in ways that essentially mean the War Powers Resolution never applies or very rarely applies.

So one of the real low-hanging fruits here is define the term “hostilities.” And I think one way to do that is to define it to entail any instance that involves lethal operations. And I think that there is a kind of growing consensus that that would be an appropriate way to define it.

And then second, I think an automatic funding cutoff, which is not currently included in the War Powers Resolution, is crucial, one that Congress doesn’t have to separately vote on, but that automatically enters into force if there is an act of force that exceeds the authority in an existing AUMF or in the War Powers Resolution. So that Congress doesn’t have to vote to terminate funding, which then goes to the President, and the President can veto it. And then Congress is stuck not being able to overcome that veto with a veto-proof majority. So I think that is a second element.

And then the third is some way of pushing back in the court if all the rest of it fails. And we have had some good decisions in the last few years that allow Congress to have standing to challenge decisions of the President. And I think Congress can take advantage of that by authorizing Members of Congress, either a committee or legal representatives, to file suit on behalf of Congress or one or both Houses, if the President is acting in a way that exceeds his authority.

So those are at least a few steps that could be taken to really make a big difference.
Ms. Bass. What do you think about how we define a threat? For example, the strike that took place in Iraq to the Iranian general, how do you define—I mean, I do not know what the imminent threat. Yes, he was a bad guy, but how do we define that to justify a strike?

Ms. Hathaway. Yes, I think you are absolutely right to point to that as a really difficult question. Now obviously I am not privy to the classified briefings that you all are privy to. But from what has been publicly disclosed, there has not been a really strong case made that there was an imminent threat posed, and therefore, that this strike was necessary to address a threat. Now really that should be up to Congress to assess. Part of the difficulty here is the President didn’t seek advance authority from Congress, didn’t even notify Congress in advance that a strike was going to happen. And so that is a kind of strike really that a President should be notifying Congress of in advance and seeking authority to take, unless it falls within one of the existing authorities.

But because he was a general in the Iranian army, not in the Iraqi government——

Ms. Bass. Thank you.

Ms. Hathaway [continuing]. It is really not appropriately covered under the 2002 Authorization for Use of Military Force, which is about a threat posed by Iraq, not by Iran. And he was an Iranian government official, not an Iraqi government official. And that is why that really is not an appropriate use of the 2002 AUMF.

Ms. Bass. Where do covert actions fall in this?

Ms. Hathaway. So there are separate authorities, as you know, under Title 50, for covert operations. The President has to make a finding, and those are reported to the intelligence committees. And so that is a separate process that Congress has provided for under a separate set of statutory authorities.

I do think there’s real questions about what we call the Title 10/Title 50 kind of tradeoff, or the Title 10/Title 50 blurring of the lines that I think Congress should be briefing pretty carefully, but that is covered under a different set of authorities.

Ms. Bass. Yes, it does seem like——

Chairman Meeks. The gentlelady’s time has expired.

Ms. Bass. OK. Thank you.

Ms. Hathaway. Thank you.

Chairman Meeks. I now recognize Representative Ann Wagner of Missouri, the vice ranking member of the full committee, for 5 minutes.

Mrs. Wagner. I thank you, Mr. Chairman, for organizing our hearing today.

And let me go straight to Mr. Goldsmith. If either the 9/11 or the Iraq AUMF were repealed or replaced, how would terrorist groups like Al Qaeda and its affiliates, ISIS, Iran and its proxies, and other U.S. adversaries, respond, do you think?

Mr. Goldsmith. That depends on entirely how you replace it. And so it is very hard to answer in the abstract. So Congress has been in recent years appropriating in support of the current conflict, which basically involves an authorized war against Al Qaeda, the Islamic State, the Taliban, and a few associated forces. I take it that is a measure of congressional consensus, at least about what
the core of legitimate authorities are. So if you reaffirm those authorities, I do not think you would have any impact there.

As for the Iranian proxies, if you included the Iranian proxies within your AUMF, which you could do, that would make them more squarely—that would put Congress behind that effort. Otherwise, you are leaving it to Article II, which is how the President basically, with a little bit of assistance from the 2002 AUMF, has been conducting those operations.

Mrs. WAGNER. Following up on it, Mr. Goldsmith, I understand some have proposed the replacement AUMFs to support ongoing efforts abroad to prevent future terrorist attacks on the U.S. homeland. I imagine a replacement counterterrorism AUMF would capture the groups currently subject to targeting under the 2001 AUMF—Al Qaeda, the Taliban, ISIS, and so forth. Are there other terrorist groups that pose a serious threat to the United States, but do not have enough of an Al Qaeda or Taliban nexus to qualify as, say, associated forces under the 2001 AUMF? And if so, is the threat urgent enough that they should be included in any new AUMFs?

Mr. GOLDSMITH. Well, I am obviously not privy to the classified intelligence that would give an answer to that question. All I know is, basically, what I read in the newspapers and what I see the government telling us.

The most obvious example to me of a group like that are the Iranian proxy militias that we have been in very low-level skirmishes with for quite a while now. I think it is a very, very consequential question whether Congress should extend force to them. That obviously has huge implications. But that seems to be the main, based on what I have heard from public reporting, that seems to be the main area of hostilities that do not fall against the terrorist organizations that do not fall within the AUMF.

Mrs. WAGNER. Yes, I agree, and that is part of my next kind of followup here about the Iranian-sponsored proxy militias currently active in Iraq. How do existing AUMFs affect Iran’s activities, I guess, against the United States in this regard?

Mr. GOLDSMITH. So I do not believe the existing AUMFs have any real impact on that. President Trump invoked the 2002 AUMF when he targeted Soleimani. But as I understand it—and again, this is all very opaque, and this is one of the problems; the government is very opaque about what the groups are and what the authorities are—as I understand it, those encounters are justified under Article II, often in response to attacks on U.S. forces, which is at the core of what Article II would allow. So that’s my main, my basic understanding of that.

Mrs. WAGNER. Is it appropriate, Mr. Goldsmith, for an AUMF to exclude certain types of force; for example, enduring offensive ground combat operations?

Mr. GOLDSMITH. Whether it is appropriate is Congress’ decision. And I am not trying to dodge this. It is Congress’ decision, based on what the strategic needs of the United States are. Whether it is constitutional, yes, the answer is clearly yes. There are examples of that in U.S. history.

Mrs. WAGNER. Ms. Hathaway, technological advances like cruise missiles and armed drones allow us to project force without signifi-
cant risk to our soldiers. Ms. Hathaway, what are the legal implications of this technological shift, do you think?

Ms. HATHAWAY. That is a great question, and I think it is a really important point for us to think about, which is that there used to be much more significant limits on our capacity to project force around the world, just the physical limits of getting people around the world and moving troops around the world. Now you have drones in the air for weeks on end, and you can effectively put that force anywhere in the world. This means the President can project a great deal of force almost anywhere in a very short period of time.

And so even at the time the War Powers Resolution was enacted, the idea that 60 days was a sort of time limit for the President to act seems like that was not very long for the President to get the forces together. To move them, to muster them——

Mrs. WAGNER. Right.

Ms. HATHAWAY [continuing]. You know, that took 60 days. Now you can wage a whole war in 60 days because you have already got the forces effectively mustered and capable of engaging in force pretty much anywhere in the world. So this is an argument for at least thinking about whether that 60-day period remains an appropriate one in the modern era.

Mrs. WAGNER. I fully——

Chairman MEEKS. The gentlelady's time has expired.

Mrs. WAGNER. And I know my time has expired, Mr. Chairman. Thank you for your indulgence. I hope that we can consider that as we move forward. Thank you.

Chairman MEEKS. Thank you.

Unfortunately, Mr. Bauer has a previous arrangement that we knew about. He will be excused.

We want to thank you, Mr. Bauer, for your testimony today, and I know that the committee will be back in touch with you for your expertise as we dig deeper into this issue dealing with AUMFs and war powers. Thank you very much for your testimony.

Mr. BAUER. Thank you, Mr. Chairman. Thank you.

Chairman MEEKS. I now recognize Representative David Cicilline of Rhode Island for 5 minutes.

Mr. CICILLINE. Thank you, Chairman Meeks, and thank you to you and Ranking Member McCaul for calling this really important hearing.

And thank you to our witnesses. I am really grateful that the committee is gathered to chart the way forward on ending decades-old conflicts and reestablishing congressional authorization as the legal basis for the United States using force abroad.

The costs of blank-check force authorizations enacted decades ago are sobering, and Brown University actually has done some really good work at the Watson Institute about the real costs of war. The trillions of dollars spent and the burden shouldered by our men and women in uniform and their families is too great, often, to rationalize.

And so there is really no good reason, according to the testimony of our witnesses, as to why Authorization for the Use of Military Force granted in 1991, some 30 years ago, for the narrow purpose of launching Operation Desert Storm, is still in effect. There is also
no good excuse or reason as to why an authorization of force for conflict in Iraq, granted in 2002, nearly two decades ago, is still in effect, when the merits of that authorization were deemed to have no basis in fact long ago and after the U.S. declared a formal end to its mission in 2011.

So I guess my first question for both of our witnesses is, do you agree then, am I creating the consensus of the witnesses, that we should repeal the authorization from 1991, to repeal the authorization from 2002, and repeal and replace the authorization from 2001? Is that right, Professor Hathaway?

Ms. HATHAWAY. That is my view, yes.

Mr. CICILLINE. And, Mr. Goldsmith?

Mr. GOLDSMITH. Yes, sir, that is my view.

Mr. CICILLINE. And I believe it is Mr. Bauer’s view, too, if he were here?

Mr. GOLDSMITH. It is, yes. It is his view as well.

Mr. CICILLINE. OK. And so my question is, with respect to the reauthorization of the 2001, Professor Hathaway, you have spoken about the concern that you have about associated entities—I haven’t got the exact language—but that would be used by the executive branch to basically be a blank check and they would simply argue this is an associated force.

And so Mr. Goldsmith, my question is: what about that argument? Doesn’t that, in fact, present the potential of recreating a scenario in which Congress is basically cut out of the process by crafty White House lawyers and an overreaching executive? And aren’t we better off requiring that the enemies be identified and creating an expedited way to add to that list, if the President considers it appropriate?

Mr. GOLDSMITH. A two-part answer, sir. One is, these terrorist organizations and terrorists do not fall into neatly prepackaged boxes. It is often very difficult to tell, even with significant intelligence capabilities, what relationships are and the like. And so if we stopped it and said only these boxes count, it would be very easy for these organizations to reconstitute themselves in different boxes. That is why we, Bob Bauer and I, propose having an associated forces provision, but I also agree with you that it is subject to abuse. We do not have any insight, or at least the public doesn’t have any insight, into how the government makes these determinations. We believe, following a proposal by Senator Kaine four or 5 years ago, that the President should be required to, within 48 hours, report what the associated forces are. Congress would have an expedited opportunity to debate them. I do not believe that the Congress is very often going to overturn those debates.

I am also not sure, setting aside the Islamic State, that the executive branch has been terribly promiscuous in this. It is very hard to tell. So we think it is necessary, because of the varying amorphous nature of these terrorist organizations, that we would deal with the problem you identify with a very quick ex post notice requirement.

Mr. CICILLINE. And would you also recommend that we include a definition for associated forces so that we constrain it in some appropriate way?
Mr. GOLDSMITH. I do. What we propose is the definition that basically the U.S. Federal Courts have been using and that three Presidents have been using in defining associated forces as co-belligerents. There are variations in the language. You could tighten it up, if you wanted. You could make it looser. That basic definition has a lot of practice under it. Again, it can get out of control. I do not believe, to my knowledge, that it has really gotten out of control, but I think that there is a worry that it could. And that's why there should be ex post reporting.

Mr. Cicilline. Thank you.

And Professor Hathaway, with respect to the War Powers Act, you already testified about the difficulties with the undefined term of “hostilities” that grants the President enormous power and tremendous flexibility. Do you have suggestions for us, as we think about reforms of the War Powers Resolution, as to how we should define that term?

Ms. Hathaway. Yes. Well the most important thing is you give as precise and clear a definition, honestly. There is a range of different possibilities as to what the appropriate answer to that question would be. There is a proposal that has been developed—and I know it has been circulating—to define that as any operations where the U.S. is engaged in, or potentially subject to the use of lethal force. That seems like a fairly clear, bright line, and I think an appropriate one. There may be other alternatives, but that strikes me as a good one.

Mr. Cicilline. Thank you.

Mr. Chairman, I want to yield back. But before I do, I want to acknowledge your courage in beginning this conversation. I think if we are all honest, Congress has benefited from our failure to engage in this work because we have left the difficult decisions to the executive branch, and we have complained about it, but we have never done anything about it. And I really compliment you for taking on this issue. I think it is critical for our country and for the world. And I salute your leadership, and yield back.

Chairman Meeks. Thank you, Mr. Cicilline.

I now recognize Representative Brian Mast of Florida for 5 minutes.

Mr. MAST. Thank you, Chairman.

And thank you to our witnesses for your answers and your testimony.

And I want to go to the testimony for each of you, which I read, but where I saw something missing, and that is where I want to get to it. We heard a lot of things listed numerous times. Specify the enemy. It has been one of the biggest points of this entire debate that we have been having today. Specify the enemy. We talked about mechanisms to decide when a conflict is going to be over or how to add associated groups, or whether we could detain enemies, or in what way, or how we keep Congress informed.

There is something that I heard very little conversation of from our witnesses, and I would like to have you all elaborate on it, in whatever order you feel like piping up and speaking. I heard no emphasis on articulating the end State. What is the political objective to be achieved through that use of force, whether it is in Iraq, whether it is in Afghanistan, whether it is in Syria, whether it is
in Bosnia, Somalia, Kosovo, Panama, Grenada, Vietnam, Europe, you name it? What is that end State? And I was curious from you all why I hear very little on end State.

Ms. Hathaway. I will say a brief word about that. So I mentioned very briefly in my testimony, and in my written testimony, that one of the key elements of defining the enemy is also defining what your strategic objective is. And I think this is such an important point that you raise, because when you are fighting a non-State actor group, they are not going to sign a treaty with you to bring an end to the conflict. That is not going to be the end point of the war, as traditionally was the case when we were engaged in wars with States. And the end result of the war cannot be that we have killed everybody on the other side. That is (a) not realistic, and (b) probably not an appropriate aim either.

So I do think this is exactly the kind of conversation that we ought to be having, is what is the end of these military operations? And that part of what Congress can do is be engaged. Part of the reason for this reauthorization requirement is that that keeps Congress engaged in that conversation, having regular reporting back to Congress as well as to what has been the progress, and to what end. That is exactly the question to be asking. And so I think you are completely right to raise that concern, and I think we haven’t had enough of that conversation in the last 20 years.

Mr. Mast. Mr. Goldsmith, do you want to add anything?

Mr. Goldsmith. I will just say briefly, I agree with Professor Hathaway. This is one of the most important issues that Congress needs to weigh in on. Presidents are risk-averse; Congress is risk-averse. President Obama and DoD General Counsel Jeh Johnson actually outlined a vision in general terms of what the end of the war looked like, which may be one that Congress should look at. It is basically a State where, as Professor Hathaway says, you haven’t killed every threat; you haven’t eliminated every threat. It is a dangerous world; you cannot do that.

The question is whether you have diminished the threat such that you can disengage from what has been endless war, while also at the same time not allowing the threat to reappear. That is the challenge. And frankly, that has been the big challenge for 20 years after 9/11. And frankly, I do not know of a whole lot of people who have a great answer to that question.

Mr. Mast. Mr. Goldsmith, let’s have a little conversation here. You said something important. I do not want to cut you off, but you said that the threat will not reappear. And that seems to me [inaudible] and we should be concerned about that. No doubt, it has to be taken into the calculation, but it is one of those difficult things to ever reach, given the creativity of people, right? I am sure we could all have that debate.

I would take the last minute—does somebody have something they wanted to offer here? I heard somebody. Maybe not.

All right. So I would take this last 40 seconds and just give it to any of my colleagues, if they wanted to venture out there and say that this is what they believe the end State for Afghanistan should be.

Chairman Meeks. Mr. Mast, I will tell you it is something that Congress needs to discuss. That is what this is about. So that we
are engaged and not just leaving it to the executive branch. So it is something that there has to be a conversation, so that we are involved in it—the beginning, the middle, and the end. Congress should be working there.

So I do not know if there is a specific definition——

Mr. MAST. I will reclaim, Mr. Chairman. I appreciate it. I totally agree with what you are saying. I just wanted to close out, I just wanted to hear if any of my colleagues had a speculation on what that end State should be. I look forward to talking to you about it, Mr. Chairman. Take care.

Chairman MEEKS. Thank you. The gentleman yields back, and I thank you for that.

I now recognize Representative Dina Titus from the great State of Nevada for 5 minutes.

Ms. TITUS. Thank you, Mr. Chairman. It has been a very interesting debate this morning.

We have heard a lot of technical and legal discussion. I want to kind of look at the big picture. I recall from all those years I spent teaching third-level science at UNLV that Congress enacted the War Powers Resolution basically for three reasons: to take back power that it had lost as an institution to the executive, going back to World War II and FDR’s New Deal; tying Nixon’s hands, and reassure the public that there would never be another Vietnam.

So I would ask our witnesses to kind of address it in that historical-sociological perspective. How has Congress changed, both as an institution and vis-a-vis the executive, over the years since this was enacted? What is the public’s perception of Congress’ inability or impotence when it comes to this area? How has partisan politics shaped this whole debate? And what about Congress just getting comfortable—somebody mentioned risk-averse—having taken the monkey off its back, so that they can now put the responsibility and the blame on the executive?

Mr. GOLDSMITH. Do you want me to start with that?

Ms. TITUS. For you both.

Mr. GOLDSMITH. Oona, do you want to go first?

Ms. HATHAWAY. You go ahead, Jack.

Mr. GOLDSMITH. So basically that is a good description of what the War Powers Resolution sought to achieve. It has been an almost complete failure. It has been an almost complete failure for several reasons. One, primarily—well not even primarily—one is that the executive branch has interpreted “hostilities” to not require implication of the War Powers Resolution in many modern circumstances where it conducts armed conflicts. Another is that the Congress said explicitly in the War Powers Resolution that appropriations would not count as authorizations, but the Office of Legal Counsel from the Justice Department found a way to flip that on its head.

So all of the efforts—another one, I will just mention one more. The 60-day window, which has been interpreted by the Office of Legal Counsel to actually recognize the President’s full-blown constitutional authorities in that window. So basically, Congress has basically been on its heels since it passed that; the executive has interpreted it away.
On the Congress, I tend to agree with your analysis of Congress. Basically what has happened is we had a big engagement by Congress in the 1970’s, and we have had a couple of big engagements since then, not nearly like we had in the seventies. But basically, with regard to 9/11 and all sorts of other unilateral Presidential uses of force, many in Congress have complained, but Congress, as a body, has gone along with it. Twice in the last few years, remarkably, with regard to Yemen and with regard to Syria, Congress took significant steps, but on the whole, Congress has basically been happy, it seems, to sit back, watch the President do what he is doing, criticize him if it goes bad, appropriate if it thinks it is going well.

And there have been lots of hearings like this about what Congress should do. Indeed, I have been to these hearings for 14 years now. But the Congress hasn’t done anything yet. So I am very encouraged that there seems to be movement toward Congress re-engaging.

Ms. HATHAWAY. And I will just say I agree with all of that. And I would add to that the decision at the Supreme Court to strike down a legislative veto, and the War Powers Resolution included the legislative veto provision that would have given Congress a way to respond to uses of force. But once that got struck out, it made it much more difficult for Congress to press back; and the fact that appropriations, these budgets have become so huge that Presidents can effectively fund whole wars out of existing budgets. The Libya operation, for instance, was funded entirely out of existing funds. The President didn’t have to come to Congress to seek additional funding to carry out that operation.

And so this is a really important moment. This has been a moment that has been a long time coming. I am hopeful that there seems to be some desire on the part of Congress to take action, to press back, to readjust those authorities, to reclaim some of the constitutional role that it has ceded to the President around the decisions to use force, which really is among the most consequential decisions that our government makes.

Ms. TITUS. How do you think this will affect maybe our diplomatic relations, both with allies and enemies, if they see this action being taken? Will it make much of a difference?

Ms. HATHAWAY. Well I think that, on the whole, I actually think that it would be positive because there is a sense that these decisions are going to be democratically enacted, that they are going to be decisions that the United States makes consistent with the Congress. And therefore, the American people are going to be behind any operations that the United States undertakes. So I think, if anything, it is likely to have a positive effect rather than a negative one.

Ms. TITUS. Right. That is encouraging.

Chairman MEEKS. The gentlelady’s time has expired.

Ms. TITUS. Thank you, Mr. Chairman.

Chairman MEEKS. I now recognize Representative Mark Green, the ranking member of the Subcommittee on the Western Hemisphere, Civilian Security, Migration and International Economic Policy, for 5 minutes.
Mr. GREEN. Thank you, Chairman Meeks and Ranking Member McCaul.

And thank you to our witnesses for being here today. I really appreciate it.

Under Article I of the Constitution—and everybody has said this today, but I mean it just bears repeating—Congress has the power to declare war, to raise funds for the military, and to make rules for the military. Article II makes the President the Commander in Chief. It is really that simple. Unfortunately, over the years, Congress has abdicated its constitutional authority to the executive branch. The President may be the Commander in Chief, but Congress, and Congress alone, has the power to authorize the use of force.

And while I believe we should replace the AUMFs, we must narrowly tailor them to current terrorist threats as well, and this should be done in a bipartisan manner through regular order, and only after thorough due diligence is done. And that includes hearings with the White House, DoD, the intelligence community, and our regional partners.

What we should not do is make a political statement by jamming through a standalone 2002 AUMF repeal without any replacement whatsoever. This would unnecessarily inhibit our troops from responding to our national security concerns in the region. There are terrorist groups active in Iraq that are not covered under the 2001 AUMF because they are not an associated force of Al Qaeda, the Taliban, or ISIS.

And I served 3 years of duty in the Middle East. So I know first-hand that terrorist groups are crafty, they are adaptive, transnational. If they can take advantage of a repeal of the 2002 AUMF, they will. We do not want them to thwart our protection just by changing their name or stepping across some border.

And I say this with my party out of the White House. We cannot let a turf war between Congress and the executive branch interfere with our national security objectives and the safety of our constituents. And I urge my colleagues to remove the standalone 2002 AUMF from repeal from Thursday’s markup and to work with our side of the aisle and their side of the aisle and the Administration, to craft a balanced, bipartisan solution.

My question, in 2015, several months after he began operations against ISIS, pursuant to the 2001–2002 AUMFs, President Obama proposed a new draft AUMF that would have specifically authorized him to use force against ISIS, except for, and I quote, “enduring offensive ground combat operations,” end quote, which is expressly excluded. But my question is, should AUMFs get into managing the conduct of the hostility itself, identify the enemy, and then let the President prosecute the hostilities as the President sees fit? And really anyone can tackle that question.

Ms. HATHAWAY. I can lay in on this because I think Jack has effectively already answered it. And I unfortunately agree with his view on this, which is that it really is up to Congress to make that determination as to whether and how to authorize force. So there is no constitutional prohibition on that, but as a policy matter, it is up to Congress as to whether that is a limitation that it thinks is appropriate to put in place. And it is the basis of discussions
among this committee and others that would make that determination. There is no constitutional bar to it, but I have certainly heard and understand that there are significant policy objections to that, and those are appropriately a matter for Congress to debate and discuss and make a determination about.

Mr. GREEN. So you guys, I may have heard a little bit of an issue. If I am asking a question that has already been answered, I apologize. But this whole notion of associated force, is that something that has to be articulated every time by Congress, or can it be broad enough at the beginning? Is that term, in and of itself, enough?

Mr. GOLDSMITH. So this is something I believe that Professor Hathaway and I might disagree on. My view is that Congress should define it basically in accordance with the way it has been defined by courts and the executive branch. And it should do its best to identify current associated forces, and it should force the President, very soon after he makes another determination of an associated force, to notify Congress and have special procedures for debate on that issue.

So I do not think Congress needs to ex ante authorize associated forces. And the main reason I think that is because, as you said and as others have said, these terrorist organizations, it is very easy for them to move from one box to another, and they do not actually self-identify in boxes—oftentimes do not self-identify the way we like to put them in boxes.

So I do think the President needs a little bit of flexibility here, but I would insist—and I think Congress should insist—on knowing about it and having a very quick tally and weighing in against it, if it thinks it is inappropriate.

Mr. GREEN. Thank you.

And, Mr. Chairman, I think my time has expired. I yield.

Chairman MEEKS. The gentleman's time expired.

I now recognize Representative Susan Wild of Pennsylvania for 5 minutes.

Ms. WILD. Thank you, Mr. Chairman.

I would like to direct my question to Ms. Hathaway. In February, the President ordered a strike against militia groups operating in Syria, a country in which Congress has never authorized any military action. And he cited his authority under Article II of the Constitution, presenting this action as a self-defense measure taken in response to the February 15th attack on U.S. troops and contractors in Iraq, in which a servicemember was wounded and a contractor tragically lost his life 10 years earlier. President Biden has since said that he supports reforming the 2001 and 2002 AUMFs that are still in effect, but the President did not cite an AUMF in this case involving Syria. So my question to you is: what effect would repealing and replacing those two AUMFs have on a situation like the strike that was ordered?

Ms. HATHAWAY. That is a great question. And the answer is it wouldn't have any effect, because as you rightly pointed out, in both the Administration's war powers letter and in the Article 51 letter filed with the United Nations, there was no citing of any statutory authority. The authority that was cited was the President's own existing authority under Article II to defend the troops.
Now we can assess and raise questions as to whether that is appropriate, but that was the only authority cited. So whatever we do with the AUMFs, whatever you do with the AUMFs, is not going to have any impact on that kind of operation.

Ms. WILD. So that leads into the second part of my question, which is following the strike, the Pentagon in a statement described it as being designed to send an unambiguous message that President Biden will act to protect American and coalition personnel. Obviously any attack on U.S. troops is unacceptable and demands a response. But it also seems important that Congress be consulted in formulating that response, particularly when there are as many potential consequences as there are in Syria. So based on the information you have, was the Administration responding to an imminent threat in this situation?

Ms. HATHAWAY. So I have written about this. And I need to preface this by saying that, of course, I am not privy to the classified briefings that preceded the decision to make this strike. So it is hard for me to make a proper assessment as to whether, in fact, this is justified under self-defense.

But in terms of the information that the Administration has made public, I and many other international lawyers and foreign relations scholars have raised serious doubts about whether the justification was sufficient. And thus far, the information made public has not put those doubts to rest.

Ms. WILD. So what would you say should be done in a situation like this with attacks on our troops and a contractor? Granted, this was 10 days earlier that the strike had been taken. So do you believe that Congress should have been consulted with in the intervening time?

Ms. HATHAWAY. I do think it would have been appropriate to consult with Congress. And I think this is a very complicated situation because the group that was targeted, at least what we are told, is a group that is closely affiliated with Iraqi forces. And so while they are Iran-supported, non-State militia groups, the group at least one of them that has been identified, is actually formally incorporated into the Iraqi armed forces. And so we are providing support to the Iraqi government and Iraqi armed forces that is supporting and working closely with the very same non-State actor group that we are now taking strikes against. And that raises real questions as to whether there are alternative ways for us to address the threat through, for instance, using our influence with the Iraqi government as opposed to taking strikes in a totally different country, in Syria.

And it was reported—but again, I cannot speak to the truth of the matter—that the reason we took this strike in Syria, as opposed to in Iraq, was for political reasons, because we didn’t want to embarrass the Iraqi government. And that is not a kind of legal basis really for making a decision about where to use military force.

Ms. WILD. Thank you. Mr. Chairman, I yield back. Thank you so much.

Ms. HATHAWAY. Thank you.

Chairman MEEKS. Thank you. The gentlelady yields back.
I now recognize Representative Andy Barr of Kentucky for 5 minutes.

Mr. Barr. Thank you, Mr. Chairman. I appreciate you holding this very important hearing.

And I really appreciate the testimony and expertise of our witnesses. It is a great discussion. And it reminds me a little bit of my constitutional law class in law school, but it is probably better than that.

Let me ask you a question, to both of our remaining witnesses here that is kind of basic, a basic question. Does the President ever have the power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation? And answer that question irrespective of the War Powers Resolution.

Ms. Hathaway. I do not believe so. In my view, the President only has unilateral authority to defend the Nation in the face of an imminent attack. Exactly how imminent it must be is a matter for some dispute, but the power is limited to a fairly narrow scope of self-defense.

Mr. Barr. Professor Goldsmith.

Mr. Goldsmith. I would tend to agree. I might define it a little bit more broadly than that. But the main problem with many of the Article II uses of force by the President in recent decades is that it has no self-defense justification; it is far removed from self-defense. And these are, in my view, the low-hanging fruit for War Powers Resolution reform.

So, defining self-defense is a difficult question, and I think that you should do it, but there are lots of things that are obviously not self-defense where the President has been using force.

Mr. Barr. This concept of anticipatory self-defense is a tricky one, and obviously the Founding Fathers couldn’t envision the spectrum of threats that we face today. But I will be interested in a followup question. How does the declaration clause and the spending power limit the Commander in Chief’s authority to conduct foreign relations as Commander in Chief if Congress doesn’t exercise it?

And in that context, let’s go back to the Youngstown decision, Justice Jackson’s analysis in the Steel Seizure Case. The way I look at this, Congress has really abdicated its authority in many of these cases. The President is operating in a zone of twilight, if you will. And congressional acquiescence has really given—and this is a bit of a self-criticism of the institution in which I serve—but this has given the President quite a bit of power. Do you agree that Justice Jackson’s analysis in Youngstown applies in many of these contexts today?

Ms. Hathaway. So I will say yes. The question is: how much authority does the President have to act on his own? So of course, Youngstown suggests the President, when Congress is silent, the President has the authority that he has on his own. And then we go back to the question of how extensive Article II authorities, in fact, are, if Congress has not rejected the President’s action. And I think Jack and I both agree that it is not unlimited by any means, but you’re right that Congress’ silence has been interpreted
in many instances to authorize the President to act more broadly than that.

Mr. BARR. Professor Hathaway, can I follow up on your suggestion about involving the courts now and providing a mechanism for Congress to push back in the courts? I appreciate that suggestion, but do judges really have the competency, putting aside the political question doctrine and justiciability, do judges really have the competency to make national security decisions?

Ms. HATHAWAY. You know, they really already do. So this question gets raised all the time. And it is so striking to me that we think that somehow judges suddenly lose their capacity to make decisions when it comes to war powers questions. They are making the exact same decisions when it comes, for instance, to issues of detention. So they are interpreting the scope of the 2001 Authorization for Use of Military Force when they are making determinations about the scope of the President’s detention authority, whether he can hold certain people on Guantanamo or not.

And we have the FISA Court. The FISA Court is specifically made up of Article III judges whose whole job——

Mr. BARR. Fair point.

Ms. HATHAWAY [continuing]. Is to make national security decisions.

Mr. BARR. Fair points.

Ms. HATHAWAY. So I do think they can, yes.

Mr. BARR. Fair points.

Final question on sunset. As you know, we are nearing a self-imposed deadline for withdrawal of our presence in Afghanistan. Are there any lessons from this? Do you all feel that our enemies in future engagements would take note of an end date on an AUMF, and then simply re-engage in hostilities after our forces have left?

Ms. HATHAWAY. That is a fear that has been articulated. And I think that if it is understood as a reauthorization requirement, that there is no reason to believe that our enemies are going to see that as a sort of date certain end date. Congress is capable of acting to reauthorize. It does that in all kinds of circumstances. The NDAA is reenacted every year. So Congress is quite capable of reauthorizing, and I expect it would reauthorize on a regular basis. So I think that worry is not necessarily well placed.

Chairman MECKS. The gentleman’s time has expired.

Mr. BARR. Thank you.

Chairman MECKS. I now recognize Representative Dean Phillips of Minnesota for 5 minutes.

Mr. PHILLIPS. Thank you, Mr. Chairman.

I have in my hand a bipartisan opinion piece that I coauthored in 2020 that appeared in The Washington Post entitled, “We Differ in Our Politics; We Agree on Congress’ Power to Declare War.” Without objection, I move to enter it into the record, Mr. Chairman.

Chairman MECKS. Without objection.

[The information referred to follows:]
Opinion: We differ in our politics. We agree on Congress’s power to declare war.

Opinion by Justin Amash, Ken Buck, Jared Golden, Scott Perry, Dean Phillips, Chip Roy and Abigail Spanberger

Jan. 16, 2020 at 3:50 p.m. CST

We are members of Congress whose political ideologies and priorities run the gamut, but we are united in our determination to safeguard the constitutional duty of Congress to declare war and to ensure that the American people have their voices heard. This duty is essential to providing the men and women of our armed forces the support and clarity of mission they deserve.

Leaders from across the political spectrum have too often avoided that responsibility — and the full debate and engagement it brings. Congress must act now, before our inaction irrevocably undermines our constitutional separation of powers and endangers lives.

Article I, Section 8 of the Constitution places the power to declare war in Congress. As representatives of the people, we have a responsibility to engage with them on the purposes, goals and risks of war. The Founders rested this authority with Congress to guarantee that the decision to send Americans into harm’s way would be made by the individuals most accountable to the people.

Today, less than half of 1 percent of Americans serve in the armed forces. Too often, military families experience multiple deployments while the rest of us, including members of Congress, go about our lives disconnected from their sacrifice. Our broken system is failing them.

We have been at war in the Middle East for nearly two decades, under authorizations for use of military force (AUMFs) that our predecessors in Congress passed almost a generation ago. Men and women of our armed forces continue to risk their lives as presidents of both parties stretch these authorizations to justify often tenuously related military engagements. Rather than debating and voting on present conflicts, Congress habitually acquiesces to the executive branch’s actions. This must change; the Constitution demands it, and the people we represent deserve it.

Last week, the House of Representatives voted on a concurrent resolution regarding the use of force against Iran or its agents. For some of us, this vote was a positive step toward reasserting Congress’s constitutional responsibilities. For others, it was an inadequate and inapt substitute for real action. Regardless of our respective positions on that vote, we firmly agree that Congress must reclaim its Article I responsibility regarding the use of force.

To start, it is time to have a serious debate and vote on repeal of the 2002 AUMF, which authorized the use of force against Saddam Hussein’s government in Iraq. This authorization has fully outlived its purpose, given the death of Hussein, regime change and the withdrawal of U.S. forces in 2011, regardless of how one views the merits of that withdrawal.
Just last year, the full House supported, on a nonpartisan basis, repeal of the 2002 AUMF as an amendment to the National Defense Authorization Act, but this provision was later stripped from the final text as the House and Senate conferred. The 2002 authorization — as well as a lingering 1991 authorization — should be removed from the books, lest either be used to justify further military engagement beyond what Congress intended.

We also must foster an informed debate on a strategic alternative to the 2001 authorization. It granted the president authority to use force against those responsible for the attacks on 9/11, or those who harbored such organizations or people, yet it has been used to justify an array of military engagements against targets that, although perhaps worthy, were in some cases nonexistent or unimagined 19 years ago. We are committed to developing and debating a new approach that provides the executive branch with the latitude necessary to fight the ongoing transnational terrorist threat, while also ensuring that Congress takes responsibility, as the Constitution requires, for the decision to send men and women off to war.

Our debates and votes must affirm that the decision to proceed with war-making resides in Congress. The declarations or authorizations we pass must have a clear scope and requirement of periodic congressional reconsideration to ensure the proper defense of our nation and prevent ill-defined forever wars.

We expect that any effort to reconsider the 2001 authorization will be difficult, contentious and emotional, but it must not be partisan. In the face of geopolitical challenges and transnational threats, it is more important than ever that Congress affirm its willingness to do its job, debate the hardest of topics and vote — expressing the will of the people — on the wars that may take the lives of those we represent.

At a time of divisive, angry partisanship, the call to do right by our service members, their families and the Constitution is one that can and should unite us. We are a group of representatives who, despite our disagreements, stand together to affirm the role and duty of Congress. In the halls of Congress and at gatherings around the country, let us lay down our partisan swords and commit to do better by the men and women in uniform who take up arms on behalf of our nation and the Constitution we swore to support and defend.

Reps. Justin Amash (R-Mich.), Ken Buck (R-Colo.), Jared Golden (D-Maine), Scott Perry (R-Pa.), Dean Phillips (D-Minn.), Chip Roy (R-Tex.) and Abigail Spanberger (D-Va.) are members of the House of Representatives.

Read more:
Karen Tumulty: Congress doesn't seem to have the courage that our Founding Fathers expected
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Tom Udall and Richard J. Durbin: Trump is barreling toward war with Iran. Congress must act to stop him.
Here’s what you need to know to understand what this moment means in U.S.-Iran relations.

**What happened:** President Trump ordered a drone strike near the Baghdad airport, killing Maj. Gen. Qasem Soleimani, Iran’s most powerful military commander and leader of its special-operations forces abroad.

**Who was Soleimani:** As the leader of the Revolutionary Guard Corps’ elite Quds Force, Soleimani was key in supporting and coordinating with Iran’s allies across the region, especially in Iraq. Soleimani’s influence was imprinted on various Shiite militias that fought U.S. troops.

**How we got here:** Tensions had been escalating between Iran and the United States since Trump pulled out of an Obama-era nuclear deal, and they spiked shortly before the airstrike. The strikes that killed Soleimani were carried out after the death of a U.S. contractor in a rocket attack against a military base in Kirkuk, Iraq, that the United States blamed on Kataib Hezbollah, an Iran-backed militia.

**What happens next:** Iran responded to Soleimani’s death by launching missile strikes at two bases hosting U.S. forces in Iraq. No casualties were reported. In an address to the nation, Trump announced that new sanctions will be imposed on Tehran.

**Ask a question:** What do you want to know about the strike and its aftermath? Submit a question or read previous Q&As with Post reporters.
Mr. PHILLIPS. Thank you, sir.

As has been often stated in this hearing, it has been almost 20 years since Congress authorized the use of military force, and in those years it is clear the threat landscape has changed considerably. We are no longer at war with Saddam Hussein and the Iraqi government, which is why I wholeheartedly support repealing the 2002 AUMF, and the 2001 AUMF applies to Al Qaeda and its affiliates, which includes ISIS, of course, even though ISIS did not exist in 2001. Thus, I believe that the 2001 AUMF must be repealed and replaced with a new authority that accommodates our current security environment and addresses the specific—and I repeat, specific threats that we face today.

In my estimation, multi-decade authorizations with little to no oversight from this Congress is as dangerous as it is unacceptable. And as we know, existing AUMFs neither include sunset provisions nor articulate a process for mandatory reconsiderations.

So Mr. Goldsmith, my first question is to you. You mention the need for a sunset provision in future authorizations. My question is: do you believe such reconsiderations should be administered through mandatory reconsideration by way of expedited floor legislation or reauthorization termination or limitation, or should it be through a regular sunset provision that requires new affirmative authorizations, which of course, could create potential gaps in authorities at potentially crucial times?

Mr. GOLDSMITH. I take the view, sir, that it should be a required reauthorization, that the authorization lapse after a particular period of time. I do not believe that that poses the threat it is often made out to be, for many reasons.

One, Congress frequently is engaged in ongoing appropriations for various aspects of military conflicts. Those things come very close to the line before they are reauthorized. There is no signal sent about those. Those are much more consequential for stopping the use of force than a new authorization. Those do not pose any serious concerns, it seems. That is the first point.

And the second point, I do not believe Congress would fail to reauthorize, absent the President’s utter inability to justify what is going on, in which case it should not reauthorize. But, in the case that happened, the President does have significant Article II authorities. Now it is much better, significantly better, for him to rely on the AUMF and not Article II. But I think the threat of authorities lapsing is extremely exaggerated.

Mr. PHILLIPS. And, Mr. Goldsmith, in reference to the actual length of a sunset provision, you may have mentioned it earlier, but what do you believe is an appropriate standard length of time?

Mr. GOLDSMITH. So, Bob Bauer and I propose two or 3 years.

Mr. PHILLIPS. Yes.

Mr. GOLDSMITH. Senators Kaine and Flake—Senator Kaine, in 2018, proposed one 5-year and one 4-year. I think anything in that range; I mean I do not feel strongly about two, three, or four. I just think there needs to be a regular authorization where Congress is, more or less, always engaged in these issues. That is up to Congress on what the actual date is.

Mr. PHILLIPS. All right. Thank you, sir.
The next question is about oversight. Section 3 of the War Powers Resolution States that, quote, “The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities. . . .” Yet Presidents, clearly, routinely fail to comply with this requirement, even with prior consultation, when it was possible. And furthermore, I should say, too, reporting requirements often require only that limited information be given to Congress.

Do you believe the American people are best served by the President consulting Congress, when possible, before using military force? And if yes, how do you think Congress should respond to these violations, and what reforms should be considered to help ensure Presidents comply in the future?

Mr. Goldsmith. So, yes, I believe it is vitally important. I believe that Presidents have interpreted away in many circumstances the consultation requirement. I think the consultation requirement should use language that is stricter, but the problem is that my old office in the Office of Legal Counsel has ruled that some of these requirements in this core military area are unconstitutional.

But the last answer to your question is, Congress has extraordinary tools at its disposal to fight back against the executive branch, if it is willing to use them. It has not been willing to use them. From the appropriations context to the appointments context, to all sorts of other things that I know, when I worked in DOD, there is incessant conversation between DOD and the House and Senate Armed Services and Foreign Relations/Foreign Affairs Committee. So, you have many pressure points to bring to bear, if you want to punish the President for not complying with the law, if you can gather the will to do so.

Mr. Phillips. All right. Thank you, sir.

If I might just close, Mr. Chairman, the article I referenced, the opinion piece, was coauthored by Representatives Perry and Spanberger, of course, who serve as colleagues on this committee. The point of that piece was exactly the point of this hearing: that Members of Congress differ in political ideologies and priorities, but we cannot neglect our mandated responsibility in the Constitution to declare war, and I hope we can continue to do so on a bipartisan basis.

With that, sir, I yield back.

Chairman Meeks. The gentleman yields back.

I now recognize Representative Peter Meijer of Michigan for 5 minutes.

Mr. Meijer. Thank you, Mr. Chairman, Ranking Member, and our guests who are here today. And I just want to second what many of my colleagues have said about being appreciative for this opportunity to review the war powers and how vital this is in terms of Congress’ Article I responsibilities.

I served in Iraq with the Army. I spent time in Afghanistan in the humanitarian aid community. So, this is something that is also very personal.

Mr. Goldsmith, I just want to quickly clarify something you said earlier. You mentioned that former President Trump had invoked the 2002 AUMF with regards to Qasem Soleimani and his killing.
To clarify, he referenced that as a secondary justification, but invoked the Article II self-defense provision, is that accurate?

Mr. GOLDSMITH. Yes, I said that several times. I agree.

Mr. MEIJER. Yes. OK. And I just wanted to also ask the group, are you aware of any military action taken after 2011 which was predicated on or solely predicated on the 2002 AUMF?

Ms. HATHAWAY. No. When the President has cited it, both parties, it has been cited as sort of an add-on authority. There hasn’t been an explicit public implication of the 2002 AUMF as the exclusive authority for any operation.

Mr. MEIJER. So, after the Iraq withdrawal, all military operations could have—that had secondarily referenced it could have taken place without the 2002 AUMF on the books?

Ms. HATHAWAY. As far as is publicly available in terms of legal justifications that are made public, yes, absolutely.

Mr. MEIJER. And then, I want to set aside the 2001 AUMF, but go back to the other two AUMFs besides the 2001 and 2002 that are on the books. Is anybody aware, I would say after the death of Saddam Hussein, of any military operations that have been predicated on the 1991 Gulf War AUMF?

Mr. GOLDSMITH. No.

Ms. HATHAWAY. No.

Mr. MEIJER. And this is probably a little bit easier of a no. The 1957 Authorization for Use of Military Force during the Eisenhower Administration, after 1959, any military action that was taken predicated on that?

Ms. HATHAWAY. No, definitely not.

Mr. GOLDSMITH. No. And you do not need to stop there; they keep going.

Mr. MEIJER. So, I guess I’m trying to build out the fact that, if we repealed the 2002, the 1991, and the 1957, it would have had no tangible impact in any of our—you know, even specific to the 2002—any of our kind of modern challenges that we are facing today.

But I want to also kind of drive at something that my colleague Ms. Bass said about the Title 10 versus Title 50 distinction. If we lived in a world where we didn’t have the post-9/11 AUMF to begin with, wouldn’t an operation like Neptune Spear to kill Osama bin Laden, could that have been authorized under Title 50 authorities, if there was a Presidential finding?

Ms. HATHAWAY. Yes. In fact, that was a CIA operation. It was done under CIA authorities, even though it was DOD assets that were seconded to the CIA.

Mr. MEIJER. The sheep-dipping, kind of gray zone in that area. So, I think a lot of our concerns—and again, I share the concerns of many of my colleagues around the 2001 AUMF, and think we should be very intentional in how we look at reforming and moving past on that specific issue—but the other AUMFs on the books, do you think there is any reasonable concern that between the post-9/11 AUMF and the ability to invoke or to create a Presidential finding, and invoke kind of Title 50 authorities, that we would be hamstrung in adapting to threats that surpass Al Qaeda and associated forces?

Ms. HATHAWAY. In my view—go ahead, Jack.
Mr. GOLDSMITH. Go ahead. Go ahead, Oona.

Ms. HATHAWAY. So, in my view, no, and I think that it would be wise to get these sort of lingering authorities off the books, just so they do not make mischief. They do not provide any legitimate authority, even though they are sometimes, at least the 2002 is sometimes inappropriately relied on.

Mr. GOLDSMITH. I agree.

Mr. MEIJER. That was easy. Well, I appreciate the time, but I just want to, again, mention that I think this is well past time for us to be addressing these concerns, and to be not only looking forward at what Congress’ role is under its Article I authorities, but also being very mindful of what is lingering out there, perform some acts of constitutional hygiene, so that we are both approaching where our responsibilities are to meet the evolving threats, not only of today, but of tomorrow, but ensuring it is done in a constitutional manner.

And thank you, Mr. Chairman. I yield back.

Chairman MEEKS. The gentleman yields back.

I now recognize Representative Ilhan Omar of Minnesota for 5 minutes.

Ms. OMAR. Thank you, Chairman.

I wanted to start with Professor Goldsmith. In your New York Times op-ed yesterday with Samuel Moyn, you included a quote from President Obama I wanted to ask you about. President Obama said that a war fought—and I quote—“through drones or special forces could prove self-defeating and altering our country in troubling ways.”

And The Intercept reported over the weekend that, in 2020, Special Ops were deployed to 154 countries in the world. That is nearly 80 percent of the world where we have deployed Special Ops last year.

Can you elaborate on what that assertion from President Obama was, why it would be self-defeating and how it could alter our country?

Mr. GOLDSMITH. So, that statement was made in the conditional. The point of the argument was that if that was the case, if in fact the war on terrorism has become self-defeating, if it produces more costs than benefits, then Congress should seriously consider pushing back against the President even more, the global footprint, including Special Operations Forces, the President’s legal authorities, and the like.

I do not know whether it is true. I think that is what Congress needs to figure out. There are a whole range of views in our country about that, and a lot of it turns on information I do not have. It is a plausible argument.

Ms. OMAR. Yes, appreciate that.

Professor Hathaway, I wanted to expand the conversation about our military engagement to include our partnership with other militaries and militias. Congress has put a number of laws on the books to ensure that we are not providing support to war criminals and security forces that commit human rights atrocities. But there seems to be a major loophole in that included with the 127e program. How could we more effectively block U.S. support, including
the Department of Defense and State, as well as the CIA, from going to forces that commit atrocities?

Ms. HATHAWAY. I think this is a very important point that you raise. So, increasing

[inaudible] in which the U.S. Government engages in force around the world, is through these partnerships. Some of them are just merely assisting and providing training and the like to foreign military forces, but some of them we are much more deeply embedded, and in fact sometimes engaging in combat operations alongside partner forces. And we haven’t always been as careful as we can and should be about ensuring that those operations are consistent with all of our obligations under the Geneva Convention, as well as the obligations of our partners under those laws as well.

And I do think—and this is, obviously, a somewhat separate conversation—but I think you are right to raise it because, as we are engaging in much more partnered operations, we need to be thinking about what obligations we have for the actions our partners undertake. And if our partners, for instance, engage in international humanitarian law violations, we might want to be much more attentive to trying to ensure that that will not be the case and take action after the fact, if we learn of some violation, to try and put an end to it.

Ms. OMAR. I appreciate that.

And are there any other witnesses that would like to chime in on that question?

Mr. GOLDSMITH. There are no others.

Ms. OMAR. Well, I appreciate you all being here, and this is a really important conversation. Chairman, I think it sort of underscores that there is [inaudible] on the part of Congress to exercise its powers fully to create guardrails in this regard. And I do appreciate us taking a deeper look and, hopefully, figuring out how to create further guardrails in regards to this.

Thank you. I yield back.

Chairman MEEKS. Thank you. The gentlelady yields back.

I now recognize Representative Young Kim of California, the vice ranking member of the Subcommittee on Asia, the Pacific, Central Asia, and Nonproliferation, for 5 minutes.

Mrs. KIM OF CALIFORNIA. Thank you, Chairman Meeks and Ranking Member McCaul.

And I want to thank all of our witnesses for engaging with us today in this very timely policy and legalistic [inaudible].

As you know, the 2011 also revealed Congress’ lack of resolve in enforcing the War Powers Resolution, even after President Obama’s air campaign had blown past the 60-day limitation on unauthorized hostilities. On that single day, on June 24, 2011, the House considered two bills: one to authorize the Libya intervention and one to prohibit the use of funds for the Libya intervention. Both were voted down. Even though many Members voted consistently, taken as a whole, the House asserted its right to sit firmly on the fence.
So, is there another way to totally require Congress to take a position, or does it ultimately depend on how deeply the electorate feels about a particular military engagement?

Mr. GOLDSMITH. Well, there are some ways that you could alleviate that problem. One of the problems there was that the executive branch had interpreted a phrase in the War Powers Resolution, “hostilities,” to allow it to skirt through the 60-day limit, even for an administration that thought the limit was legally binding. You could reform the War Powers Resolution to have a much tighter trigger. I would prefer the use of armed conflict, which clearly that was, the Libya invasion, and that would have made clear that the level of force had to stop after 60 days. That is the first thing.

The second thing is there are mechanisms where you can narrow the President’s authorities and tie them, anything beyond those authorities, to an appropriation restriction. That would have a serious impact on the executive.

But, third, at the end of the day—and this is your real point—it is really a question about whether Congress is going to, as it has done on a few occasions, but not very often, to stand up to the President, and really stand up and take a stand. The meaning of those two votes is that Congress doesn’t like to take a position on war powers

[inaudible]. And until, in my judgment, with respect to the Congress, until you overcome that fundamental problem—and I do not know how you do it—we are not going to have progress. Congress, as an institution, needs to assert its institutional prerogatives.

Mrs. KIM OF CALIFORNIA. Well, thank you very much.

Is there another witness who wants to chime in on that?

Ms. HATHAWAY. Yes, I am happy to say a few words. I think the 2011 intervention in Libya sort of is an illustration of all the problems that we see with the War Powers Resolution. So, as Professor Goldsmith rightly said, the way in which the administration got around the 60-day limit is they interpreted the operation as not hostilities, and therefore, not subject to that 60-day limit, which, frankly, most people think is a pretty unrealistic interpretation of the term “hostilities.” But it was sort of interpreted in this very sort of flexible way to allow the President to continue to operate past 60 days.

And then, add to that the fact that the reason Congress had to vote to reject or to withdraw funding was that the President already had all the money he needed. Because there are such big appropriations that the President didn’t even have to come and ask for additional money; he had all the money he needed. So, that is different, for instance, from Kosovo, where even when the Kosovo operation happened, then the budgets weren’t quite as big. And so, the President actually had to come and ask for money to engage in the Kosovo operation, which Congress gave it. In this case, Congress was put in the box of having to reject it, and even if it had successfully voted to pass a joint resolution to withdraw funding, that would have almost certainly been vetoed by the President, and then you would have had to again overcome the veto, which would have been nearly impossible.
So, that is exactly what the problem is. Congress is in the position of not making decisions about using force, but whether to prevent it.

Mrs. KIM OF CALIFORNIA. Ms. Hathaway, thank you so much for that. I would like to continue the questioning with you.

I would like to ask for your view on the use of a preemptive AUMF that provides the President with war powers in advance of an expected conflict or as a means of deterrence. For example, one bill we introduced this Congress, the Taiwan Invasion Prevention Act, authorizes a preemptive AUMF for the President for a 5-year period in order to defend Taiwan in the event of an armed attack on its sovereign territory by China’s PLA. In your view, is the process of preparing legislatively for future conflicts and drafting AUMF’s useful, either practically as a means for legislative and strategical prudence, or as a means of deterrence?

Chairman MEEKS. Very short——

Ms. HATHAWAY. Very quickly——

Chairman MEEKS. The gentlelady’s time has expired.

Ms. HATHAWAY. Yes.

Chairman MEEKS. But I will allow her to answer as long as it is briefly.

Ms. HATHAWAY. Thank you.

Yes, I think that that is entirely constitutionally appropriate. The question really is a policy one, is whether Congress wants to give the President that authority. But if the answer is yes, then it is absolutely entirely appropriate and constitutionally permitted.

Chairman MEEKS. Thank you. The gentlelady’s time has expired.

Mrs. KIM OF CALIFORNIA. I yield back.

Chairman MEEKS. I now recognize Representative Colin Allred of Texas for 5 minutes.

Mr. ALLRED. Thank you, Mr. Chairman.

And I want to thank our witnesses. I am sorry that Professor Bauer had to leave us. He is a former colleague of mine at my law firm, and I would have loved to question him as well. But many of my questions have already been asked.

So, I do want to focus in, Professor Goldsmith, on you and Professor Bauer’s discussion of measures related to nuclear forces and nuclear deployment, and how you think any consideration of the AUMF and of the War Powers Resolution should be used to encapsulate nuclear, as well as other technologies that were not a part of the original War Powers Resolution. And I am thinking here specifically of cyber warfare, which I think we are all recognizing has the potential to lead very quickly to other types of warfare, and that is probably the one that is most actively being engaged in right now with other great powers.

Mr. GOLDSMITH. Yes, sir. With respect to cyber, Congress in the last four or 5 years has actually done a decent job—I cited this in, I think, the first footnote of my testimony—a decent job of engaging with the executive branch, authorizing forces, establishing reporting requirements, placing some modest limits. I do not know why that has happened, but maybe it is a consensus; maybe it is because it gets buried in the National Defense Authorization Act. But that process seems to be working better than some other ones in the war powers context.
The nuclear issue is a very important issue. I view it as very hard and somewhat separate from this because these issues we have been talking about today are hard enough. Nuclear weapons are very hard because, in a nutshell, we have given the President, basically, carte blanche authority to use nuclear weapons, the most destructive weapons by far, without any limitation. And we kind of did that because the Presidents that held that responsibility seemed reasonable. President Trump questioned that for some people, especially with his threats to North Korea. And I think it is time to look at that again. We have a proposal that would basically tie the President’s authority to use nuclear weapons exactly to the defense—to the nuclear deterrence policy. We explained in our book why we think that is the right approach.

But my general answer to your question is that I believe it is hard enough, the things we have been talking about today; this is a separate kettle of fish to me, anyway.

Mr. Allred. I agree. No, I agree, it is separate, and it is an important discussion.

Professor Hathaway, do you have anything to add on cyber?

Ms. Hathaway. Yes, just on the cyber, I mean, I agree with what Professor Goldsmith said, that Congress has been unusually active. And there were a number of gaps that existed in terms of the authority of Congress to oversee cyber operations, and it has filled a lot of those gaps.

The one thing I will say, though, is that that gap-filling, because it happened through the NDAA, gave all the reporting to the Armed Services Committees. And so, you all are not getting any reporting on cyber operations. And I do think that that can be a problem because there may be instances where you are called on to make a decision about an Authorization for Use of Military Force; for instance, against Iran. And you may not know what either our capabilities or activities are when it comes to the cyber field because you will not have been briefed on those, and you are not cleared into those compartments.

So, I think that there is actually a remaining problem just in terms of communication across the agencies. And I think HPAC and SFRC, in particular, tend to be excluded from a lot of the briefings that they ought to be getting, and that is particularly true in the context of cyber.

Mr. Allred. You must have been reading my mind. I have been thinking for some time, Mr. Chairman, that we are going to have to insert ourselves through the NDAA, or any other process, into some of these considerations.

I just want to finish in the minute that I have remaining to ask you both to assess what lessons you took from the bipartisan, but ultimately unsuccessful, votes to limit the President’s ability to go to war with Iran in the last Congress.

Mr. Goldsmith. I viewed it as very encouraging because Congress voted to—I believe it was under the War Powers Resolution process—to push back against the President, but it also reveals the problems with the current arrangement, which is, basically, that you have to overcome a veto.

Mr. Allred. I agree.

Professor Hathaway.
Ms. HATHAWAY. Yes, I agree with that completely, and I think the same thing is true, for instance, of similar votes by Congress to withdraw authority for support for the Saudi-led coalition operations in Yemen. The fact that Congress has taken these votes is a really great sign. It shows that the muscle memory has not completely fallen away. But it does illustrate the need for reform because those were vetoed, and then you are in the position of having to overcome a veto which is, again, nearly impossible.

Mr. ALLRED. The intention is there, and I think it is bipartisan. And I think you will see a Democratic Congress looking to limit a Democratic President right now. And so, I hope that folks recognize that as well.

Mr. Chairman, thank you for the time. I will yield back.

Chairman MECKS. The gentleman's time has expired.

Mr. MALINOWSKI. Thank you so much, Mr. Chairman. Thanks. Thanks to the witnesses.

I am very much in line with most of my colleagues in believing that Congress needs to assert itself here, that the 2002 authorization is no longer needed, should be repealed, along with all of them, going back to the 1950's, as we heard from our friend from Michigan, and that the 2001 authorization should be updated.

I do have some questions, though, because I do think, just from my experience, not just as a Member of Congress, but as an executive branch official, that this is an incredibly complicated set of issues.

I wanted to ask Ms. Hathaway to expound a little bit on this question of what engagement in hostilities really does mean. And just to throw out some real-world examples, I think an obvious one where, by any common-sense definition, we were engaged in hostilities was Libya. I am sure you would agree with that, despite the Obama Administration's assertion to the contrary.

Ms. HATHAWAY. Yes, I would. And if you look at what the understanding was of Congress at the time it enacted the War Powers Resolution, it understood itself to be putting in place a threshold that was lower than an armed conflict threshold. So, it chose the term "hostilities" because it wanted to be notified earlier than when we were involved in an armed conflict. But, unfortunately, while that appears in one-half of the [inaudible]—and so, we can look to that and see that this is what gives us insight into what Congress thought it was doing—it never put that actually in the text.

So, if we understand the original intent of Congress, it intended for that threshold to be pretty low, so that it would play a role. But unfortunately, successive Presidents have interpreted it much more broadly, and Congress has not really been in an effective position to push back. So, Libya is a perfect example.

Mr. MALINOWSKI. But that is a relatively easy one. I think earlier in the hearing you kind of gave a rough definition along the lines of a situation where our troops would be engaged in the use of force or potentially subject to use of force. And I want to question you on that relatively vague second part.
I mean, wouldn’t our troops be potentially subject to the use of force in Korea, for example? Or let’s say we stay in Afghanistan and say we are not there for combat; we are there for train and equip. They could be attacked anytime by the Taliban or somebody else. Would you see those as situations that require authorization?

Ms. Hathaway. So, I think that an authorization ought to be required in instances where the President is sending troops to situations where they are likely to be subject to uses of lethal force against them or where they, themselves, are likely to use lethal force. This is a draft authorization that has been put together by a variety of former government officials, including folks affiliated with the Open Society Institute.

But I will say that I actually think that it is entirely appropriate for Congress, if it thinks this isn’t the right line to draw, to draw it in a different place.

Mr. Malinowski. Yes.

Ms. Hathaway. But I think what is most important is for it to draw a line—

Mr. Malinowski. Right.

Ms. Hathaway [continuing]. And to be extremely clear about what that line is. And right now, we do not have that.

Mr. Malinowski. And I totally agree with you, and here is where I get skeptical, though. I think the problem is much less executive overreach and much more congressional abdication. I remember, 2013, lobbying Members of Congress in support of the Obama Administration’s request to authorize use of force against Bashar Assad in Syria, the famous red-line incident. And I had some just stunningly interesting exchanges with Members of Congress who would say to me things like, “Tom, maybe we should do this, but if the President really wants to do it, why is he asking us?” And some of those same Members of Congress would be on the floor saying, “Congress must be always consulted,” et cetera, et cetera. And I worry that a fundamental problem here is that we do not actually want the power that we are asking for; that we do not want to have to say yes; we do not want to have to say no, because we are afraid of bearing that burden, either way.

And I have only got 15 seconds left. I think maybe one solution to that is a sunset provision on these things because then we have to come back and say yes or no. But that doesn’t, for me, answer the question of what happens in these complicated humanitarian contingencies where there may be 5 days to decide how do we make sure Congress actually steps up to this responsibility. If you have any thoughts, any witness?

My time is up. So, I would yield back.

Chairman Meeks. The gentleman’s time has expired.

I see Representative August Pfluger of Texas. You are recognized for 5 minutes, if you would like to ask questions.

Mr. Pfluger. Mr. Chairman, thank you very much on this important topic.

And my apologies if some of these questions have been asked. But I do appreciate the discussion, especially being a 20-year veteran still serving in the Reserves, and near and dear to my heart, a lot of these topics.
I will open it up to Mr. Goldsmith. I think what would be my biggest concern at this point in time with just repealing is the threat, especially an immediate threat that needs to be responded to that may not cross that threshold. What are your thoughts on the risk/reward? I think what I am trying to get at is the danger of having just a repeal without reform is something that is on the forefront of my mind, and I would like to hear your thoughts on that subject as well.

Mr. Goldsmith. Sir, which statutes are you referring to to repeal?

Mr. Pfluger. Well, I think when we look at the authorized use of military force, that along with War Powers Resolution.

Mr. Goldsmith. OK. Thank you.

So, the 2001 AUMF, the one from 9/11 that is at the foundation of our global war, I do not think that that should be repealed without being replaced. There are some people in Congress proposing that, but I haven’t heard that suggested today.

The question about repeal without a replacement goes to the 2002 AUMF, the one against Iraq 18 years ago, 19 years ago. And with regard to that one, I think absolutely nothing [inaudible]. I think that statutory authorization has been stripped out of all, stretched and contorted in a way that does nothing more than provide the tiny fig leaf of cover for what is, in effect, an Article II action, and an Article II action that I do not think will be remotely affected if the 2002 statute is repealed. So, I am not in favor of repealing the 2001 statute. I am in favor of repealing the 2002 because I think it is meaningless and it shouldn’t be just lying around as a fig leaf for the President.

Mr. Pfluger. I appreciate the response on that.

And, Ms. Hathaway, I will hand it to you. I see you shaking your head in what looks to be like agreement, but please go ahead.

Ms. Hathaway. Yes, I agree entirely. And I think the way that Professor Goldsmith characterized it is exactly right, which is it really doesn’t provide any legitimate authority. Nonetheless, when Presidents have sort of felt uncertain about their legal authorities, they sort of grab for whatever they can, and they grab for the 2002 AUMF to sort of paper over what they see as sort of weaknesses in the rest of the legal argument. And that is not good for Congress. That is not good for the United States.

And so, I think what repealing the 2002 AUMF does is it sort of takes that off the table. It takes that inappropriate use of an authority off the table and it clears the decks, particularly if you also withdraw the 1991 AUMF and the 1957 AUMF, I think that sort of clears the decks. And then you can think carefully about the one authorization that still is actually doing work, which is the 2001 AUMF, and what do you want that to look like going forward?

Mr. Pfluger. Very good.

Mr. Chairman, with that—I appreciate the answer on that part of the subject—I am going to yield back because I do feel like most of the questions have probably been discussed and asked in this hearing. So, thank you for the time.

Chairman Meeks. Thank you. The gentleman yields back his time.
I now recognize Representative Andy Kim of New Jersey for 5 minutes. Mr. Kim? Unmute, if you are still there.

Not hearing from Mr. Kim, I will move to Representative—Mr. Kim? I now recognize Representative Sara Jacobs of California, the vice chair of the Subcommittee on International Development, International Organizations and Global Corporate Social Impact, for 5 minutes.

Ms. Jacobs. Thank you so much, Mr. Chair.

And thank you to our two panelists for hanging in there until those of us new freshmen get a chance to ask questions. I know it has been a long hearing already.

And I also want to echo what others have said about the importance of having this hearing. I was in middle school when the two AUMFs in question were passed. And so, I think clearly a lot has changed since then and we should make sure they are reflecting that.

I wanted to ask a question that some of my colleagues have touched on, but I feel like we haven’t really gotten to the heart of yet, and that is the Title 50 operations. And I was wondering if both of you could talk about whether or not you believe a new, amended war powers framework should include Title 50 oversight and approval, particularly of the military-style operations carried out under Title 50, not all collection, and how we can reform the Title 50 processes so that Congress acts as more than a passive receiver of information regarding covert offensive action.

Ms. Hathaway. I will just speak very briefly. I mean, the question you raise is a really big one and a really important one. So, we have been focusing primarily on the War Powers Resolution and the AUMFs and that sort of one set of authorities for authorizing U.S. military operations and lethal force. There is, separately, Title 50, which allows for authorization of covert operations, and those are briefed to the intelligence agencies and, generally, not disclosed to the public. In fact, the whole idea of a covert operation is it is not intended to ever be disclosed publicly.

And increasingly, there have been lethal operations undertaken under Title 50 authorities, including using drones, and those drones are actually the exact same drones in many cases and exact same operators who are engaging in the Title 10 authorities. You just are, basically, switching who is giving the orders. It is the exact same operators; it is just a different chain of command that is attached to it.

And so, I do think it is something to be aware of. The Obama Administration had tried to shift almost all of the Title 50 operations of that sort over to Title 10, as a way of trying to address that problem. The Trump Administration kind of pushed it back. And so, I do think that you are right to ask that question. And if you are going to take that kind of comprehensive view, which I hope that you do, thinking about foreclosing the possibility that what a future administration might do is sort of shift more and more into the Title 50 side, and sort of heading that off I think is very wise.

Ms. Jacobs. Thank you. Professor Goldsmith, do you have anything to add on that?
Mr. GOLDSMITH. Let me just say I agree with what Professor Hathaway said. I would say that, as best as outside observers can tell, these categories seem to be collapsing, at least in some respects. The authorities for cyber give what is defined as a covert operation, at least uses the definition of covert operation, to Cyber Command and some of its authorized operations.

I do not know the extent to which that is—I just do not know, the extent to which that is an Armed Services-led gambit, and it is something the intelligence committees are not happy about, and the Foreign Relations and Foreign Affairs Committees are not happy about. Ideally these things would be coordinated, but what ends up happening, as you know, is it ends up being a food fight. And it is a food fight often between the DOD and the CIA on the one hand, and between various committees of Congress on another. And it often basically shuts down progress.

So, I am not saying that you shouldn't face up to it. I am just saying it is a deep and old problem, and it does not have an easy solution.

Ms. JACOBS. Well, I appreciate that. I am on both Armed Services and Foreign Affairs. So, maybe I will be able to help with the food fight problem.

But, to my second question, and maybe you can tell I am thinking about all the loopholes the executive branch might use, even if we do have a new War Powers Resolution. I am wondering, aside from the power of the purse that I think you both discussed, are there any other ways that Congress could circumscribe the vast interpretation of Article II powers that the executive branch has relied on for a whole host of operations?

Ms. HATHAWAY. I will just point out one issue in response to that, which is that Congress really has ceded the interpretative authority almost entirely to the executive branch and has allowed the executive branch, a combination of White House Counsel's Office and the Office of the Legal Counsel in DOJ, to really be the ones who get to decide how to interpret these authorities. And Congress really hasn't had a way of pressing back against that.

And I have another paper where I make an argument, for instance, that we ought to have a congressional OLC, so a congressional Office of Legal Counsel, that would have the authority to render its own opinions about the scope of existing authority under the War Powers Resolution. There is no reason that that really ought to be the President's lawyers alone who are interpreting the scope of that authority. You could just as easily have congressional lawyers who are interpreting that in a way that is cognizant of the institutional concerns and interests of Congress.

So, I think just more thinking systemically about how Congress can reclaim some of the ground that it has ceded, and that would be one possible way of doing that.

Ms. JACOBS. Thank you.

Chairman MEEKS. The gentlelady's time has expired.

I now recognize Representative Kathy Manning of North Carolina, the vice chair of the Subcommittee on the Middle East, North Africa and Global Terrorism, for 5 minutes.

Ms. MANNING. Thank you, Mr. Chairman, for holding this very important hearing.
And thank you to the witnesses for your tenacity and your willingness to stay this late and answer everybody's questions.

Professor Goldsmith, you stated in response to Representative Titus's question that the War Powers Resolution has been a total failure in achieving its goal. If you were able to craft a solution from scratch, in light of the changes in the world, in Congress, in the presidency, and the complexities of the globe today, what would be the right way to effectively balance these powers between Congress and the President, to allow us to exert our appropriate role in the world while fostering transparency to the American people, careful consideration of all military actions, but still protect our country?

Mr. Goldsmith. So, to protect the country in the end is a very important point. There many things to do. If we are assuming away political hurdles, as I think your question asks, I think there are two or three steps. One, I think Congress should—which would be hard to do—it should define the circumstances in which the President can use force. It should authorize those circumstances, and it should limit it to self-defense and self-defense-related actions, which is at the core and maybe the only justification for Presidential power. And it should define it clearly.

It should then tie uses of force—and then, it should tie restrictions for anything beyond that, and for the use of those forces authorized after a certain period of time without congressional authorization, to a spending restriction. I think it should also tighten up the automatic kick-in for the termination of the President's authorized authorities to a narrower conception of hostilities. I would favor something like armed conflict. That is not a perfect definition. The advantage of that is it has a pretty well-established meaning within the Justice Department.

But those are the main things you can do within a war powers context. That is going to take a huge lift on the part of Congress. And there would be fierce resistance by the executive branch. So, I do not mean to suggest that is easy to do, but those are some of the things that I think should be done.

Ms. Manning. So, let me ask about the other part of that, because that would require a really strong spine on behalf of Congress. And as you have referenced a little bit today—well, we have talked about Congress' abdication of power, both an unwillingness of Congress to push back against a President who fails to consult with the Congress, who fails to report to Congress, and as we talked about just a little bit earlier, Congress' unwillingness to take the opportunity proactively to assert their power.

I think Representative Allred cited a few glimmers of hope. But what do you think it would take for Congress in today's world to resume its appropriate constitutional role?

Mr. Goldsmith. I do not have a great answer to that; I am sorry. I fear that the answer is that absent some cataclysmic mistake by the President exercising his unilateral force, like Vietnam, even though Vietnam was authorized, something that is as controversial as that, I fear that Congress will not get its act together to do what is necessary to do.

And I am especially worried because in the last 10 or 12 years we have shifted the vast majority of warfare to a light footprint warfare, which is not on the front pages, American casualties that
are at a minimum. As Senator Kaine says, it is like it is a deal between Congress and the President to just keep this off the front pages and not have a debate about it. If that is the scope and shape of the war, it is going to be very hard for Congress to muster, especially in a world of serious and legitimate, dispersed, asymmetrical threats. So, I am not optimistic about major war powers reform, as important as I think it is.

Ms. Manning. Does the fact that our military is voluntary have any impact on this?

Mr. Goldsmith. I do believe it does. I have written many times before that the combination of an all-voluntary military, and there is no draft—so, we do not see the draft-related protests like we saw in Vietnam—it is consent to serve in the military, more or less consent to serve in the military, combined with using our military in a way that is not on the front pages. It is like a one-two punch to kind of disassociate war from our democracy.

Ms. Manning. Thank you.

Professor Hathaway, anything to add in 25 seconds?

Ms. Hathaway. Well, I will just say that I am a little bit more optimistic, in part because of this hearing and in part because President Biden has expressed a willingness to be open to war powers reform. You do not always have Presidents who are willing to do that, in which case Congress is in a position of having to act over the objection of the President, which again is nearly impossible. So, I do hope that Congress will seize this opportunity of a President who is friendly to this and a sense that we really have gotten to the point, two decades after the 9/11 attacks, that Congress does need to reassess its authority and try to play its constitutional role yet again.

Ms. Manning. Thank you both, and I yield back.

Chairman Meeks. The gentlelady's time has expired.

I now recognize Representative Abigail Spanberger of Virginia, the vice chair of the Subcommittee on Europe, Energy, the Environment and Cyber, for 5 minutes.

Ms. Spanberger. Thank you very much, Mr. Chairman, and thank you for organizing this incredibly important hearing, particularly so early in this new Congress.

And to our witnesses, thank you so much for being here, and thank you for staying into this lengthy committee hearing.

I do understand the serious national security threats, given my background in the intelligence community, but I think that the crux of this conversation that we have had here today is not about whether we take threats seriously; it is really about whether we take the Constitution and the will of our constituents seriously as we look to how we address those threats.

As a little bit of the followup to the conversation and the question of Congresswoman Manning, I would argue that, if Members of Congress do not want the responsibility of debating and voting on decisions of war and peace, the responsibility to make grave and tough decisions that affect the lives of servicemembers and their families, and many other national security professionals, then perhaps they should pursue a different profession.

But I do share some bit of hopefulness that there are Members of Congress across the ideological spectrum, and from across the
country, who are really trying to reassert congressional authorities, and I look forward to our continued efforts to do so in Congress. This hearing I think has been vital to our understanding and to the discussion of the challenges that we are facing and how we can move forward.

So, my first question relates to the 2002 AUMF, and I open it up to either of you. I am hopeful that there is bipartisan momentum to repeal the 2002 AUMF and potentially other AUMFs that are no longer active or needed. And so, I guess I would start with you, Professor Hathaway. I know that the 2002 AUMF has already been discussed relatively at length today. But to make sure that we are clear as we close out the hearing, could you further explain why leaving this inactive or outdated AUMF, this or others, on the books sort of just in case they would be convenient at some other point in time, why that might be a challenge or something that you would support or not support? Could you comment on that?

Ms. Hathaway. Yes. I think the difficulty of leaving or the problem of leaving these defunct AUMFs on the table is that they create a lot of temptation for a President to sort of reach for them at times when they really are inappropriate to be reached for. And so, they have sort of a weak authority, and they sort of think, well, maybe if I take my weak authority and I add this 2002 AUMF to it, it somehow becomes stronger, even though a legitimate reading of the 2002 AUMF is that it doesn't actually provide any additional legitimate authority for that use of force.

So, I think it creates unnecessary temptations. It is just best to kind of clear those decks, to kind of get those out of there—there is no serious argument that the AUMFs were meant to be used at this point for the purposes that they have been cited for in the last couple of years—and move on with a clear repeal and replace of the 2001 AUMF after that.

Ms. Spanberger. And, sir, would you want to add anything to that?

Mr. Goldsmith. No, I agree with that.

Ms. Spanberger. Thank you very much.

And so, then, when we are looking at, in addition to the challenges of outdated or the vague nature of the laws that exist on the books, I think there is an overarching challenge of congressional capacity to carry out oversight, which I think could be one of the real contributing factors here. The President has expansive legal resources, and I know, Professor Hathaway, I think you were speaking about that just a bit ago. So, do you have additional recommendations about how we could better enable congressional oversight in our legislative efforts as a way of perhaps contending with this argument that there is value in keeping older AUMFs on the shelf just in case?

Ms. Hathaway. Well, yes. I mean, I think that part of what would be appropriate is for Congress to ask for a briefing from the executive branch about what operations it understands it to require. I suspect that what you are going to get from that is that the Administration is not relying on the 2002 AUMF for any ongoing operations. It didn’t cite it for the operation in Syria against the Iran-backed militias. And so, I think that that might give some comfort.
But I think, also, we need to be thinking about sort of regularized reporting mechanisms and ensuring that Congress is regularly kept updated, all the appropriate committees are kept regularly updated on the operations that are being undertaken using the authorities that have been granted by Congress.

And so, relative to [inaudible] attention to careful, thoughtful reporting, and ideally, reporting that is unclassified, so that Members are able to discuss it in the open, having hearings like this one about the claims that are being made, so that all the staff members can weigh in and be aware of the decisions made. Maybe there would be a classified appendix, but the vast majority of the reporting I think ought to be done in an unclassified way, so that the American public knows what is being done in their name.

Ms. Spanberger. And so that we can have those conversations with the people we represent. Certainly, I come from a classified background, but I see significant value in what you are discussing.

With that, I am over time, and I yield back, Mr. Chairman.

Thank you again to our witnesses.

Chairman Meeks. Thank you.

I now recognize Representative Juan Vargas, the vice chair of the Subcommittee on the Western Hemisphere, Civilian Security, Migration and International Economic Policy, for 5 minutes.

Mr. Vargas. Thank you very much, Mr. Chairman. I thank the witnesses.

In particular, Mr. Chairman, I want to thank you. Yesterday's hearing with the World Food Programme and David Beasley I think is one of the most important things we are going to do, and now to have this very important hearing. Again, thank you for your leadership so early on in your chairmanship. I really do appreciate it; I think we all do.

I do think that we, as Congress, we are shirking our responsibility when it comes to the Constitution and, in particular, the issue of the Authorization for the Use of Military Force. I think that Mr. Connolly was correct, the responsibility to declare war, hostility, or armed conflict, however you want to describe it, really lies at the feet of Congress. And I do think that the President, then, under Article II, has the responsibility to prosecute those actions.

But we have abandoned, or as my colleague Tom Malinowski said, we have abdicated our responsibility I think for two reasons. One, we do not want the responsibility. I think we are very, very comfortable having the President take the responsibility. I think, for all the reasons that we have mentioned—again, who goes to war, who doesn't, you know, and the type of wars we are fighting—I think we are very comfortable giving it over to the President. That is one.

And second, I think, interestingly, it is something that our colleague Mr. Kinzinger said, and that is that we have been somewhat successful, too, in the sense that we haven't had a terrorist attack in our country, really, an external one, since

[inaudible]. Most of the terrorist attacks that we have had have been internal ones. We have had national ones, but not an international one, since that. We haven't had a Vietnam War. We
haven’t had that type of situation. So, we have abdicated our responsibility.

I think it is terrible. I do think, as my colleague Congresswoman Spanberger said, we should then get another job if we do not want to do our own job. And I think it is our job. But do not you think those are two of the reasons? I mean, it seems to me that we are comfortable having the President take these responsibilities. And second, we have been somewhat successful.

Professor Hathaway.

Ms. HATHAWAY. Yes, I think that you put your finger on one of the real problems with bringing about reform, is that many Members have felt that it is easier not to have to take those votes. And I think part of it is, too, that in many cases they sort of trusted that the President would sort of do what was best.

I do think, as Professor Goldsmith mentioned, that some presidencies sort of shook that confidence for some people, and there was a sort of sense that maybe we cannot always rely on the President to make rational decisions when it comes to the use of our military force. And that may be part of what is driving a renewed interest in thinking about war powers reform.

But I think you put your finger on it. I do think that is part of the reason there hasn’t been a move in this direction. And I actually think it is part of the reason that there should be, because Congress should show that political courage to take on its constitutional role, even when it might be convenient not to do so.

Mr. VARGAS. Professor Goldsmith?

Mr. GOLDSMITH. I would just add that I agree with your two reasons. But Congress engaging doesn’t require in any way the jeopardization of the success. Congress has gone along with the President, as you say, half-handedly. They have been quietly cheering him on from the sidelines. They have been appropriating for every element of the war on terrorism.

I wouldn’t say that every step the President has taken in the last 20 years has been successful, but on the whole, I agree with you that the counterterrorism operations have been remarkably successful. But that is not a reason—I mean, I do not think you were implying this—but that is not a reason for Congress not to engage. That is a reason for Congress to engage, as Professor Hathaway said.

And you do not have to jeopardize that success by engaging if you agree with the arc of the war that the President has been doing. But you do to legitimate it, for the troops, for the American people. And I can tell you from working in the executive branch that congressional scrutiny has a great disciplining effect. So, I agree with your diagnosis, but I do not think Congress getting involved in any way jeopardizes success.

Mr. VARGAS. Thank you.

Now I do want to challenge, Professor Goldsmith, one thing that you did say. You said that we have given the President carte blanche with regard to nuclear weapons because the President seemed responsible, until President Trump maybe with North Korea. I have to say that one of the things that is interesting, if you flip that around and you talk to our adversaries—I remember in 1993 going to Russia—they felt that it was an irresponsible
President, potentially Reagan or someone, that would launch nuclear weapons. That is why they were afraid. It is interesting how they looked at it very differently. They thought we were quite irresponsible, not responsible, and that was a deterrent. Anyway, I throw that out there for——

Mr. Goldsmith. So, with regard to President Trump, that is the mad man theory of deterrence.

Mr. Vargas. Yes.

Mr. Goldsmith. And many people adhere to that. But it is also extremely dangerous when you are talking about pressing your big button.

Chairman Meeks. The gentleman’s time has expired.

Mr. Vargas. Thank you very much. I yield back.

Chairman Meeks. I now recognize the gentleman from California—from Illinois, excuse me—Mr. Brad Schneider, for 5 minutes.

Mr. Schneider. Thank you, Mr. Chairman. And as others have, thank you for calling this hearing. It is a critically important issue. I want to thank our witnesses for staying through the entire hearing. I think if I had the privilege of summarizing 3 hours-plus into 5 minutes, which I will not even try to do, but if I were to put an overarching theme on what we talked about today, it seems to be that we should repeal the 1991 and 2002 AUMFs, reform the 2001 AUMF, and reform the War Powers Resolution. That is basically what you guys have said, correct?

Ms. Hathaway. That is right.

Mr. Goldsmith. That is correct.

Mr. Schneider. All right. And I guess the other pieces I have heard, I have heard that, again, to oversimplify it, to agree it is complicated. It is complicated because the context, the dynamics are changing. The who, what, where, and how of conflict is not just different from what it was at our founding, or even at the time of the War Powers Resolution, but it is constantly evolving and changing as the threat changes. And it is a heavy lift.

The other theme I have heard over the day—I think, Mr. Goldsmith, you said it—assuming away political hurdles, we have heard variations on that statement over and over again. So, my question is, if politics is the art of the possible, and we do not get to assume away those political hurdles, what do you think is both the most important and the most possible thing that Congress can do to address the reform of the AUMFs and the war powers?

Mr. Goldsmith. Is that directed to me, sir?

Mr. Schneider. Well, we will start there, sure.

Mr. Goldsmith. Yes. So, I think that easily within the realm of the possible is abrogating the old and unusable AUMFs and reforming the 2001 AUMF. Frankly, I think, based on this conversation today and other conversations, that there is a lot more consensus than there used to be, even during the Obama Administration. I think there is a broader recognition about what the AUMF looks like. We have had very little disagreement expressed today from anyone on either side of this conversation. And President Biden has always been a war powers constitutionalist. He says he is behind this. I believe him. And so, I think that the 2001 AUMF
reform, accompanied by abrogating the others, is the lowest-hanging fruit that is achievable.

Mr. SCHNEIDER. Professor Hathaway?

Ms. HATHAWAY. I would agree with that. I think that that is essential. I would pair that with some efforts at reforming the War Powers Resolution. There are two elements that I think have been a source of some consensus that I think would make a big difference, even if you cannot do anything else. Those are define “hostilities”—the fact that “hostilities” is not defined in the War Powers Resolution is, I think, its biggest Achilles’ heel—and then, second, thinking about a way of including an automatic funding cutoff. That is maybe harder, but there are ways of designing it, so it doesn’t happen immediately, of phasing it in, of various other kind of mechanisms for including an automatic cutoff that Congress doesn’t have to separately vote on, that I think could make a real difference.

But, even if all that you did was define “hostilities,” that would be a very big step in the right direction. There are lots of other reforms that we have talked about, that is in our written testimony, that is in the testimony of the panelists at the Rules Committee this morning. I think those are all really valuable reforms as well. But I think if we take the pieces of it—we do not have to necessarily take all of it on; I would love to see us take all of it on, but even if you think that is politically not feasible—these are severable reforms that you could take on, even if you feel like the entirety of it is not within reach.

Mr. SCHNEIDER. Yes, let me expand a little bit because we have talked earlier about a definition of “war,” a definition of “hostilities,” “associated forces.” How narrowly do those, in your mind, have to be defined to be effective? And what is the path of trying to get to those clear definitions?

Ms. HATHAWAY. So, my view is it is not necessarily essential that it be super narrow, but that it be very clear. And I think one of the problems with using the term “hostilities” is that it is not a term that is used anywhere else. So, not only was it not defined, but it is not a term that is drawn from anything else. And so, there is nothing to use as a kind of external check on executive branch interpretations. What is essential is that Congress be very clear about how it is going to define whatever term it uses. I think, for “hostilities,” tying it to lethal force is one option. Another I think that Jack articulated is applying it, tying it to armed conflict. I think that is also, effectively, a very similar definition. But whatever you do, to be really clear about what the definition is, so that it is not open to this kind of process of interpretation that the executive branch lawyers are accustomed to engaging in.

Mr. SCHNEIDER. Great. Thank you.

My time has expired. I yield back.

Chairman MEEKS. Thank you, Mr. Schneider.

And let me, in closing, just say thank you to our witnesses, Ms. Hathaway and Mr. Goldsmith and Mr. Bauer, who were here. I just want to thank you. Your testimony and your advice has been extraordinary. The time that you have taken to answer each and every member’s questions is deeply, deeply appreciated by me and this committee.
You know, making decisions on the matter of war is one of the most serious and solemn responsibilities that the Constitution entrusted to Congress. And I know for me—and I have been in Congress for 22 years now; I was one that was still here back in 2001, when we had the AUMF that we voted on in 2002—but the decision to send a young woman or man into war is the hardest, was the hardest for me of any vote that I have ever had.

But it is a responsibility that we have, and for far too long I believe Congress has relinquished that responsibility to the executive branch. And as I said in my opening remarks, the time to reverse that trend I believe is now, for some of the reasons that were just indicated by both Mr. Goldsmith and Ms. Hathaway. It seems, just from this hearing, Democrats and Republicans are saying some of the same things. And all of our witnesses today seem to be in accord, and that President Biden is willing to work with us to try to make sure that we get to a different standard. So, the stars just may be lining up for us to do the right thing.

Now, later this week, the committee will take its first related legislative action of the 117th Congress by considering the repeal of the 2002 Iraq War AUMF. And the insight that you have given us today is definitely going to serve to further guide this committee on our work to replace the 2001 AUMF and reform the War Powers Resolution. I am focused, as chair, to make sure that we work in a collective way and to get as many people to the table as possible. I am sure that we could be calling you back just to guide us and to get some of your thoughts as we move this Congress to try to do just that.

So let me, once again, thank you for your participation today, and thank all of the members, and Mr. Ranking Member McCaul for his cooperation in working together on this hearing, which I feel was absolutely extraordinary for that.

And with that, this hearing is now adjourned.

[Whereupon, at 4:31 p.m., the committee was adjourned.]
APPENDIX

FULL COMMITTEE HEARING NOTICE
COMMITTEE ON FOREIGN AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515-6128

Gregory W. Meeks (D-NY), Chair

March 23, 2021

TO:    MEMBERS OF THE COMMITTEE ON FOREIGN AFFAIRS

You are respectfully requested to attend an OPEN hearing of the Committee on Foreign Affairs, to be held virtually via Cisco WebEx. The meeting is available via live webcast on the Committee website at https://foreignaffairs.house.gov/.

DATE:   Tuesday, March 23, 2021

TIME:   1:00 p.m., EDT

SUBJECT:    Reclaiming Congressional War Powers

WITNESS:   Ms. Oona A. Hathaway
Professor of Law
Yale Law School
(Former Special Counsel to the General Counsel, U.S. Department of Defense)

Mr. Bob Bauer
Professor of Practice and Distinguished Scholar in Residence
New York University School of Law
(Former White House Counsel)

The Honorable Jack Goldsmith
Lecturer in Law
Harvard Law School
(Former Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice)

By Direction of the Chair
COMMITTEE ON FOREIGN AFFAIRS
MINUTES OF FULL COMMITTEE HEARING

Day  Tuesday  Date  03/23/2021  Room  Cisco WebEx

Starting Time  1:15 p.m.  Ending Time  4:30 p.m.

Recesses  (  to  )  (  to  )  (  to  )  (  to  )  (  to  )  (  to  )

Presiding Member(s)
Chairman Gregory W. Meeks

Check all of the following that apply:
Open Session  ✓  Electronically Recorded (taped)  ✓
Executive (closed) Session  ✓  Stenographic Record  ✓
Televised  ✓

TITLE OF HEARING:
Reclaiming Congressional War Powers

COMMITTEE MEMBERS PRESENT:
See attached

NON-COMMITTEE MEMBERS PRESENT:
Rep. Elissa Slotkin

HEARING WITNESSES: Same as meeting notice attached? Yes  ✓  No
(if "no", please list below and include title, agency, department, or organization.)

STATEMENTS FOR THE RECORD: (List any statements submitted for the record.)
SFR - Connolly
IFR - Phillips
QFR - Chabot

TIME SCHEDULED TO RECONVENE  
or
TIME ADJOURNED  4:30 p.m.

[Signature]  Full Committee Hearing Coordinator
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STATEMENT FOR THE RECORD CONNOLLY

Statement for the Record from Representative Gerald E. Connolly
“Reclaiming Congressional War Powers”
House Foreign Affairs Committee
Tuesday, March 23, 2021

After five weeks in the Oval Office, on February 25, President Biden cited his constitutional authority as commander in chief and ordered airstrikes on Iran-backed militias in eastern Syria in retaliation for their recent attacks on American troops in Iraq. The airstrike added to the long list of U.S. military action from Afghanistan and Iraq to Syria and Yemen since September 18, 2001 when, just days after the 9/11 terrorist attacks, Congress passed a joint resolution authorizing the use of U.S. forces against those responsible for the attacks (P.L. 107-40). On October 16, 2002, Congress passed another joint resolution authorizing the use of U.S. forces in Iraq as part of the Iraq war (P.L. 107-245).

Unfortunately, these two laws have been stretched beyond recognition in the years since they passed, and it is high time for Congress to reassert its Article I responsibilities as mandated by the Constitution.

Article I, Section 8 of the United States Constitution states that “Congress shall have power...to declare war...and to raise and support armies” and other armed forces. While Article II, Section 2 designates “the President shall be Commander in Chief” of the nation’s armed forces. These constitutional duties have been in competition ever since the ratification of the Constitution. While Congress has officially declared war only five times, American presidents have initiated military operations without Congressional approval more than one hundred times. In the aftermath of the Vietnam War and the exploitation of the open-ended authorization contained in the Gulf of Tonkin Resolution, Congress sought to clearly define the procedures by which Congress and the President would participate in decisions to send U.S. Armed Forces into hostilities by passing the War Powers Resolution (P.L. 93-148). Every president since the enactment of the War Powers Resolution has taken the position that it is an unconstitutional infringement on the president’s authority as Commander in Chief.

While the 2001 and 2002 AUMFs were sufficient to authorize the wars in Afghanistan and Iraq, it stretches credulity to claim that these same resolutions extend authorization to the present-day fight against the Islamic State, which was only established in 2013. Both the Obama and Trump Administrations have cited the 2001 and 2002 AUMFs to justify military actions against the Islamic State. In 2020, then President Trump cited the 2002 AUMF to kill Iranian Major General Qassem Suleimani on Iraqi soil. This killing led to a major escalation in tensions and rhetoric between Washington and Tehran and galvanized public sympathy for and support behind the Iranian government. In 2017, Trump also used fifty-nine cruise missiles to attack a Syrian airfield in response to Assad’s chemical weapons attacks on civilians. While Assad’s action was barbaric and warranted an international response, a missile strike without proper Congressional authorization was reckless, put U.S. national security risk, and could not be accepted as a substitute for a coherent Syria policy.

In the Middle East and around the globe, the proliferation of terrorism undermines U.S. national security interests, threatens vulnerable populations and American lives, destabilizes partner and
allied countries, and contributes to instability. However, kneejerk kinetic military responses without an overarching strategy endanger American lives and diminish U.S. global leadership.Congress must make crystal clear to the Administration, our allies, our constituents, and our military families the circumstances and limitations under which we would authorize engagement by our men and women in uniform in hostilities overseas.

The still active 1991 Gulf War AUMF (P.L. 102-1), 2001 AUMF, and 2002 AUMF are obsolete and have been coopted for bad U.S. foreign policy decisions in the Middle East. That is why I proudly voted to repeal the 2001 and 2002 AUMFs nearly 20 years after opposing the Iraq war in the first place. Reviewing and replacing the 2001 AUMF with clearly defined mission and parameters, possibly to include a sunset clause, must be taken up urgently by this Congress. To that end I welcome President Biden’s commitment to work with Congress to replace existing AUMFs with “a narrow and specific framework that will ensure we can protect Americans from terrorist threats while ending the forever war.”

The contortion of AUMFs has raised fundamental questions about the future of fighting terror and how we accommodate necessary military action in an AUMF that would allow the U.S. to effectively prosecute terrorism without committing to war in perpetuity. Rather than resigning to the sidelines, Congress must act as a stakeholder and take greater ownership in U.S. military engagement and anti-terrorist activities overseas. An effective AUMF would need to address the purpose, scope of authorized force, targeted entities, geographic limitations, timeline, and reporting requirements.

The full assertion of Congress’ Article I duty is long overdue. I look forward to hearing from our witnesses how Congress and the Trump Administration can reassert our constitutional roles to protect U.S. national security from current terrorist threats.
RESPONSES TO QUESTIONS SUBMITTED FOR THE RECORD

Questions for the Record from Representative Steve Chabot
“Reclaiming Congressional War Powers”
House Foreign Affairs Committee
Tuesday, March 23, 2021

Question:

“I have a conceptual question. Americans tend to think that we are either at war or at peace. Unfortunately, the world is substantially more complicated with gray zone tactics, adversarial relationships, and nonstate actors blurring the traditional line between war and peace.

I want to address these three challenges in turn. First, I am the Ranking Member of the Asia-Pacific Subcommittee and I watch every day as the People’s Republic of China (PRC) conducts actions which are somewhere between war and peace. Their territorial aggression against their neighbors is the best example — whether it’s Japan and the Senkaku Islands, Taiwan, the South China Sea, or on the Indian border. Their cyberattacks against us and our partners are also greatly concerning.

It’s not just China. Russia’s annexation of Crimea fits this mold as does the Solar Winds attack. North Korea’s cyber-attacks and a whole range of provocative actions conducted by Iran also can fairly be described as gray zone campaigns.

Second, as Mr. Issa pointed out, we have long had an adversarial relationship with Iran that mirrors our relationship during the cold war, albeit on a smaller scale, with the Soviet Union. Our relationship with the PRC has been this way for some time as well, although only one side — Beijing — recognized it until recently. This state may fairly be characterized as a cold war or a hot peace. In such a situation, the hostile relationship may flare up at any point and in unforeseen circumstances.

Third, as Mr. Issa also pointed out, traditional models of war and peace do not fit the Global War on Terror. To elaborate on his question, with the exception of the ongoing operations in Afghanistan, the Global War on Terror is not a traditional war. Not only are most of our operations conducted by special operators and drones but they are not conducted against nation states, thereby blurring the line between war and law enforcement.

In each of these cases, our adversaries are deliberately operating in such a way that their actions do not trigger major war but nonetheless use sufficient force to achieve their political-military objectives. Indeed, in 2016, General Joseph Dunford, then-Chairman of the Joint Chiefs of Staff, said that “[Russia, China, and Iran] use economic coercion, political influence, unconventional warfare information ops, cyber ops to advance their interests and they do it in a way that they know we don’t have an effective response.”... “They, unlike us, are able to integrate the full range of capabilities their states possess to advance their interests.”...
traditional approach where we are either at peace or at war is insufficient to deal with that dynamic."¹

With this in mind, I have several questions with respect to how Congress should be conceptualizing about the nature of war in the 21st century:

1. How has the nature of war changed with the emergence of gray zone campaigns and terrorism?
2. How does the changing nature of war impact our traditional analysis of congressional war powers?
3. Ongoing adversarial relationships often require small-scale kinetic responses to establish deterrence or set an opponent back several steps. The strike that killed General Soleimani was such an operation. It was not intended to lead to major war, and was accompanied by messaging to Iran to that effect. Practically, the President cannot get an Authorization for Use of Military Force (AUMF) for such a decision in the great game that is our competition with Iran, precisely because it is designed to be a one-off, time-sensitive tactical decision. How should we adjust our understanding of war powers to address such instances?
4. It is clearly in our national interest to counter gray zone campaigns and terrorist groups. There are several means to counter them, ranging from information campaigns all the way up to kinetic force. Presumably, some means for countering them require congressional authorization while others do not. Where would you draw the line between means that require authorization and those that do not? Which means – or at what level of intensity – does the President need to seek authorization for, and why? Could you address specific examples including China’s territorial aggression, cyberattacks, and terrorism?°

**Answer:**

*Witnesses did not submit responses in time for printing.*