ARTICLE I: REFORMING THE WAR POWERS RESOLUTION FOR THE 21ST CENTURY

HEARING

BEFORE THE

COMMITTEE ON RULES
HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTEENTH CONGRESS

FIRST SESSION

TUESDAY, MARCH 23, 2021

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ARTICLE I: REFORMING THE WAR POWERS RESOLUTION FOR THE 21ST CENTURY [ORIGINAL JURISDICTION HEARING]

TUESDAY, MARCH 23, 2021

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RULES,
Washington, DC.

The committee met, pursuant to call, at 11:03 a.m., via Webex, Hon. James P. McGovern [chairman of the committee] presiding.

Present: Representatives McGovern, Torres, Perlmutter, Raskin, Scanlon, Morelle, DeSaulnier, Ross, Cole, Burgess, Reschenthaler, and Fischbach.

The CHAIRMAN. The Rules Committee will come to order.

I think we may have finally, finally caught lightning in a bottle. For many years a coalition on Capitol Hill, Democrats and Republicans, House and Senate, have been pushing not only to end endless wars, but to re-examine the broad executive powers that get us into global conflicts in the first place.

Despite the bipartisan support for change, it has sometimes felt like a lonely battle, because no President in all my time here has been open to even considering reining in their own power.

I am an optimistic guy, but even I was starting to worry that we might not get this done anytime soon.

But on January 20, we inaugurated a President who spent decades grappling with the limitations of the War Powers Resolution and looking for a way to change it. Earlier this month, the White House reiterated its support for reining in executive war power.

That really was the missing piece, the political will from the White House. Now we have a real chance to not only look at existing AUMFs, which I hope that we do, but to also reform the War Powers Resolution itself.

This resolution passed when Richard Nixon was President nearly 50 years ago—over his veto, I might add. Everything has changed since then—when we fight, how we fight, and why we fight. We have a responsibility to make sure that this resolution changes, too, so it works in the modern age for a modern Congress and for a modern military.

But, quite frankly, it is more than that.

In 1964, President Lyndon Johnson said: It is damn easy to get into a war, but it is awful hard to extricate yourself if you get in. We know all too well the truth of that statement.

That is why we are here today. It can't be easier to get into a war than it is to get out of one. And it can't be that Congress and

the people that we represent are sidelined on the life-and-death question of when we go to war.

That is just not my view. That is what the Constitution tells us. The Framers put the power to declare war in the hands of Congress. The Framers knew firsthand the dangers of all that power being in the hands of one person. They knew what the cost of war, both in terms of the loss of life and the loss of funding and opportunity, meant for real people.

Now, we have strayed from that vision, there is no doubt about that, and the results have been devastating. Presidents increasingly go it alone and tell Congress the bare minimum about military actions. Presidents and their lawyers look to a 20-year-old authorization of force to justify their actions.

If we do nothing, we shouldn't be surprised by the outcome, which will be more, not less, executive control over consequential questions of when we go to war.

So Congress is going to act, first, here at the Rules Committee this morning and then at the House Foreign Affairs Committee under the leadership of Chairman Meeks later this afternoon.

Today we will hear from a variety of witnesses to better understand what reforms are necessary and what is possible under the House rules. Ranking Member Cole and I have assembled today's panel not to check the Republican or Democratic box.

Now, we know we are brilliant, but we didn't invite you here to tell us how smart we are—though, unless Mr. Cole objects, that is certainly okay. But, instead, the ranking member and I wanted a panel that could give us their best advice as we think through the important question before us.

Some of you worked for a Republican President, some of you worked for a Democratic President. But it is not your politics that is important to us. It is your experience. Because if we are going to chart a better path on how to wage war and achieve peace, we need your help and we need your candid advice.

So with that, I am now happy to turn over to my ranking member, Mr. Cole, for any remarks that he wishes to make.

Mr. COLE. Thank you very much, Mr. Chairman. Let me associate myself with your remarks, particularly about the unique opportunity I think we have in front of us.

And I will join you in giving the administration credit for that. They have opened the door. It is really up to us to walk through it.

Today's original jurisdiction hearing covers a critical issue facing Congress: the scope of power and authority concerning matters of war. Today's hearing follows on our hearing last year covering the unique powers entrusted to the legislative branch under Article 1 of the Constitution.

Frankly, there is no topic more important or serious than Congress' authority to declare when, where, and how our Nation chooses to go to war.

I first want to thank Chairman McGovern for arranging today's hearing. Though the chairman and I disagree on a number of things, defending the constitutional authority entrusted to Congress is not one of them.

Both of us are equally concerned about the erosion of congressional authority in matters of war in recent decades, particularly given the corresponding expansion of executive branch authority since the end of World War II. And both of us believe strongly that we must rein in this expansion and reassert congressional primacy.

In Article I, section 8 of the Constitution, Congress is granted specific powers in relation to war. Among these is the exclusive power to declare war, the power to raise and support armies and a navy, and to make rules for regulation of the Armed Forces.

There is an inherit tension between congressional authority to declare war and the President's power under Article II of the Constitution to be the Commander in Chief of the Armed Forces. But in the recent years the trend has been for the executive branch to seize authority at the expense of Congress.

In 1973, Congress passed the War Powers Resolution, which became law over President Nixon's veto. And I just want to pause and insert, it is important to remember it became law over the President's veto. That meant it was a bipartisan decision by Congress, because he wouldn't have been able to overcome that veto without both Republican and Democratic support.

And that was done at a time of war, when we were still deeply involved in Vietnam. It tells you how strongly our predecessors, I think, felt about trying to rein this problem in.

The War Powers Resolution states clearly that the President cannot commit the United States to an armed conflict without the consent of the U.S. Congress. In the event that the United States engages in hostilities with a foreign power, the War Powers Resolution requires congressional notification and forbids the use of armed force after 60 calendar days without an Authorization for the Use of Military Force.

In recent years, Presidents from both parties have committed American military forces to combat without consulting Congress.

In 1993, President Clinton committed American military forces to the U.N.-led intervention in Bosnia.

In 2011, President Obama committed American military forces to NATO-led intervention in Libya.

And American ground forces have been present in Syria during both the Obama and Trump administrations.

Each of these instances has represented a further expansion of independent executive practice to commit American Armed Forces and a further erosion of congressional authority.

Given this backdrop, it is appropriate for the Rules Committee to now examine the War Powers Resolution. It is clear to me that the existing War Powers framework is no longer sufficient to safeguard congressional authority.

I am hopeful that our hearing today will shed additional light on what reforms can and should be made to ensure that Congress will continue to fulfill its constitutional obligations and that executive action will be undertaken within the bounds of clear statutory authority.

Of course, such a hearing would not be complete without noting the five ongoing Authorizations for the Use of Military Force that are still active today.

The 2001 AUMF authorizing military force against nations, organizations, or persons responsible for the September 11 attacks, and the 1991 and 2002 AUMFs authorizing military force against Iraq, continue in force today and have not been repealed or replaced by updated authorities.

Both Chairman McGovern and I have expressed deep concern about this state of affairs, and he and I have both been supportive of efforts to update these authorities.

In the 20 years since the September 11 attacks, America continues to engage against terrorist forces and their backers. But neither the 2001 AUMF, broad as it is, nor the 2002 AUMF were ever intended to serve as a blank check, authorizing any and all use of military force wherever in the world the President determines it is necessary.

I am in full agreement with my colleagues who support reforming the 2001 AUMF, but I would also caution that we should not simply repeal these authorities without ensuring there is an appropriate replacement.

This is a bipartisan debate Congress should be having and indeed must have in the months to come. We owe it to the institution and the American people to ensure that Congress has held a thorough debate on committing American troops to combat in accordance with our constitutional responsibility.

With that, Mr. Chairman, I thank you again for calling today's hearing and thank our witnesses for being here today, sharing their important insights and expertise with us.

And I want to thank the staff on both sides of the dais for their hard work in putting this hearing together. I think it will be of enormous benefit to the Congress. Thank you for your leadership in that respect, Mr. Chairman.

I thank you and yield back.

The CHAIRMAN. I thank the ranking member for his excellent opening statement. And I, too, want to thank the staff on both the majority and minority side for all their work in helping us prepare this.

As some of you may recall, before the pandemic we began a series of hearings in the Rules Committee to look at how Congress has ceded or abdicated much of its constitutional responsibility in a whole range of areas to the executive branch. We held one hearing, but then the pandemic hit us and we went on to have to deal with other things.

But I appreciate the ranking member's statement, and I certainly share his views.

And now onto our witnesses. Let me introduce them.

Rebecca Ingber is a professor at Cardozo Law School and taught at Boston University Law School for 5 years before moving to Cardozo Law last year.

Prior to this, she served in the Office of the Legal Adviser at the Department of State.

She is a senior fellow at the Reiss Center on Law and Security at NYU. Her scholarship focuses on international and foreign affairs law, as well as Presidential power. She has worked on litigation before both the U.S. Supreme Court and the International Court of Justice.

John Bellinger works on global law and public policy practice at the Arnold & Porter firm. Prior to this, he has served as Legal Adviser to the State Department, Senior Associate Counsel to the President, and Legal Adviser to the National Security Council during the George W. Bush administration. He has extensive experience in U.S. foreign relations and in litigation in U.S. courts and before the international institutions.

Tess Bridgeman is co-editor-in-chief of Just Security. Before this, she served as Deputy Legal Adviser to the National Security Council and worked at the State Department in the Office of the Legal Adviser.

She is also a senior fellow and visiting scholar at the Reiss Center on Law and Security at NYU. In addition, she served as Special Assistant and Associate Counsel to the President under the Obama administration.

We are grateful for all three of you being here today. We look forward to being enlightened.

So let me begin by yielding to Prof. Ingber to begin.

STATEMENT OF REBECCA INGBER, PROFESSOR OF LAW, CARDOZO SCHOOL OF LAW; SENIOR FELLOW, REISS CENTER ON LAW AND SECURITY AT NYU SCHOOL OF LAW

Prof. INGBER. Thank you so much, Chairman McGovern, Ranking Member Cole, and members of the committee. I want to thank you for your leadership in convening this hearing.

We are here today, in part, because we can no longer answer a simple question: With whom are we at war?

When I say "we" cannot answer, I mean the American people, I mean Members of Congress, I even mean members of the U.S. executive branch who are prosecuting the many violent conflicts the United States is engaged in across the globe with groups most Americans have never heard of.

Despite Congress' constitutional power over the decision to take the country to war, the United States is at war today with groups and within countries that Congress has never determined the nation should be fighting.

This is not how these decisions are supposed to work. When the Framers granted to Congress and not the President the power to declare war, along with a host of other war-regulating powers, this wasn't a haphazard decision. They were not unaware that decisionmaking by a legislative body, a body that at the time required travel by horse in order to convene, would be a slower process than decisionmaking by the President.

But the Framers pointedly gave this power to Congress, specifically because they feared consolidating warmaking power in one individual and because they valued the benefits of placing the decision to go to war in a slower, more deliberative branch.

In doing so, they recognized a narrow and implicit exception for the President to repel sudden attacks in the event of a true attack on the nation when there would be no time to convene Congress to act.

Today this narrow carve-out for the President to act without Congress in exceptional circumstances has been distorted beyond recognition. Decades of Presidential administrations—and, more

pointedly, executive branch lawyers—have aggressively construed the President's powers to act unilaterally.

They have done so through expansive interpretations of the President's constitutional powers and through expansive interpretations of congressional statutes.

They have claimed that a whole range of military actions that look an awful lot like war, from drone strikes on nonstate actors to taking out another state's military capabilities, are not technically war of the kind that implicates Congress' constitutional powers.

They have interpreted the limits Congress enacted in the War Powers Resolution as an additional delegation of authority to the President. They have creatively interpreted the 2001 and 2002 AUMFs to extend to conflicts with actors that Congress could not have had in mind when it passed those statutes, in many instances to groups that did not even exist until years later.

And in some extreme cases, executive branch lawyers have claimed that the President can go beyond even the significant authorities Congress has granted him to use force against any perceived threat or even to effect regime change if the President perceives it to be in the national interest.

Now, I don't suggest that Presidents have done all of this in bad faith. In many cases they are simply acting in what has often been a power vacuum.

But it does not have to work this way, and I want to recognize the significant bipartisan efforts this committee and others have made to pushing ahead to reset the balance. And I want to suggest just a few overarching considerations as you move ahead.

First, it is critical to take a holistic approach to reform. The President's claims to power here are like a balloon. If we press on one side of the balloon, for example, if Congress were to simply repeal the AUMFs, this will apply pressure to the other side of the balloon, leaving the President to rely more significantly on sole constitutional authority.

So effectively reasserting Congress' role in decisions to go to war requires moving forward with both AUMF and general war powers reform together.

Second, these legislative solutions must have teeth. They should include concrete consequences, like a funding cutoff with a shorter clock.

Put the President and executive branch officials on notice from the outset that if they can't get congressional support for their actions, their funding has an expiration date. And clearly define the trigger for when that clock starts.

Old AUMFs should be repealed and any new authorization should be made only after the case for force is presented to you and analyzed and should include precise language regarding the targets of force, how and where that force can be used and when the authorization will sunset.

A new AUMF—and this is key—a new AUMF should not be a blank check for the President to use force forever and without ever having to return to Congress.

And, finally, Congress must be involved in decisions to deploy forces abroad and those decisions must take into account the risks

to those troops and the risks of creating new conflicts should those troops use force in response to threats to themselves or to partner forces.

These are all consequential war and peace decisions and we need to ensure that they are taken in a way that respects our democratic system with transparency, with deliberation, and with an opportunity for the people's representatives in Congress to weigh in just as our Constitution directs.

Now, some will argue that war powers reform would be dangerous, that it might hamstring the President's ability to defend the nation. But under the Constitution, the President will never lack authority to stop an actual attack on the nation.

Rest assured that the executive branch will continue to aggressively protect the President's prerogatives. So we need Congress to protect its institutional power and, along with it, the American people's voice in some of the most significant decisions that we make as a Nation.

Thank you again for inviting me to testify. I look forward to answering any questions the committee might have.

[The statement of Prof. Ingber follows:]

Testimony of Rebecca Ingber

Professor of Law, Cardozo School of Law

Prepared Testimony to the Committee on Rules

United States House of Representatives

March 23, 2021

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

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

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

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

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

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[1] U.S. Const., Art. I, § 8, Cl 12.

[2] U.S. Const., Art. I, § 8, Cl 13.

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

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

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

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

Over time the President's understanding of this authority expanded dramatically. The 1973 War Powers Resolution grew out of congressional frustration with increasing presidential unilateralism and lack of transparency, including active White House efforts in some instances to prevent Congress from learning the full scope of U.S. operations. In the aftermath of the Vietnam War, having tried unsuccessfully for years to rein in the President's prosecution of the war, and having watched the courts repeatedly view their attempts to do so as instead acquiescence to the President's policies, Congress passed the War Powers Resolution to attempt to reset the balance of power between it and the President.[7] The goal was "to fulfill the intent of the framers of the Constitution of the United States and [e]nsure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations."[8] The War Powers Resolution was also an admonishment to the courts, coming on the heels of several judicial decisions stretching to find congressional acquiescence to the President's war making: it explicitly tells them (and the President) not to interpret as an authorization to use force anything other than an actual authorization to use force.

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

Why do we need war powers reform today?

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

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[6] The Prize Cases, 67 U.S. (2 Black) 635 (1863).
[7] War Powers Resolution of 1973, 50 U.S.C. 1541–1548.
[8] 50 U.S.C. 1541(a).
[9] 50 U.S.C. 1547(d).
[10] 50 U.S.C. 1541(c).

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

The War Power Resolution's enforcement mechanisms are not effective

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

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

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

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

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

[13] 50 U.S.C. 1544(c).

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

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

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

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

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

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

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

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

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

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

[19] *Id.*

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

The second legal theory OLC has relied upon for the President's claim to use force unilaterally is an expansive conception of self-defense, derived in part from that original "repel sudden attacks" authority but in some modern examples bloated beyond recognition, untethered to a specific known threat or to an urgent need to act before Congress could convene. Two examples in particular bear highlighting. In 2001, after Congress had already authorized the use of force against al Qaeda and the Taliban, OLC asserted that the President could also use force, without authorization from Congress, not only to respond to the 9/11 attacks but to "prevent and deter future attacks" bearing no connection to 9/11.[20] And in a 2002 opinion, OLC concluded that the President had constitutional authority to attack Iraq, independent of the authorization Congress had already provided if he "were to determine that military action against Iraq would protect our national interests."[21] OLC's examples of such national interests include the belief that Iraq's weapons program "might endanger our national security," or "destabilize the region" or even simply "were it the President's judgment that a change of regime in Iraq would remove a threat to our national interests."[22] In neither of these cases was there an urgent need for the President to act before Congress could authorize force; to the contrary, in both of these cases Congress *had already acted.* That OLC issued each of these opinions in the aftermath of Congress meeting, deliberating, and passing statutory authorizations lays bare how far the self-defense argument moved from the need to "repel sudden attacks" before Congress is able to act. These represent a particularly extreme approach to the self-defense rationale that has not been to my knowledge reiterated in the years since, but it is important to be aware of the claims presidents have made in the past and could potentially make again if Congress does not reclaim its prerogative.

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

The executive branch has interpreted congressional delegations expansively

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

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

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

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

[22] *Id.*

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

The executive branch has extended this theory further with the concept of "successor" forces—groups that have past ties to al Qaeda but who may no longer share its mission, and even groups long disassociated from or in an open rift with al Qaeda—against whom the executive branch uses force under claimed congressional authority through the 2001 AUMF.[25] This has been the government's domestic legal theory for the ongoing conflict with ISIS, a group that did not exist in 2001.[26]

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

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

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

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

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

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

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

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

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

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

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

Considerations for Congress in resetting the balance

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

We need a holistic approach to war powers reform

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

Legislative solutions must have teeth

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

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[29] *Id.*, at 83.

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

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

[32] 50 U.S. CODE § 1550(A).

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

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

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

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

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

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

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

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

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

[35] Hamdi v. Rumsfeld, 542 U.S. 507, 520.

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

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

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

Conclusion

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

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

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

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

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

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

The CHAIRMAN. Thank you very, very much.
I now yield to the Honorable John Bellinger.

STATEMENT OF JOHN B. BELLINGER III, PARTNER, ARNOLD & PORTER; FORMER LEGAL ADVISER TO THE DEPARTMENT OF STATE AND THE NATIONAL SECURITY COUNCIL

Mr. BELLINGER. Mr. Chairman, Ranking Member Cole, and members of the committee, thank you for inviting me to testify today about the War Powers Resolution and congressional and Presidential war powers. I really want to applaud the committee's interest and passion about taking up this subject. I do feel that the moment is this year to try to get some war powers reform done.

By way of background, I served for nearly two decades as a national security lawyer under both Democratic and Republican Presidents, including as Senior Associate Counsel to President George Bush and Legal Adviser to the National Security Council in the first term of the Bush administration and then later as the Senate-confirmed Legal Adviser to the State Department in the second term, serving under Condoleezza Rice in both positions.

I was in the Situation Room during the 9/11 attacks, and I served in the White House during the Iraq war. I was involved in drafting and interpreting both the 2001 and 2002 Authorizations to Use Military Force and in preparing all of the reports submitted by President Bush to Congress under the War Powers Resolution between 2001 and 2009.

To start with my bottom line, the current laws governing Presidential war powers are outdated and should be revised. The War Powers Resolution of 1973 should be updated to reflect modern military and political realities.

Congress should repeal the 2002 AUMF relating to Iraq, and it should revise the 2001 AUMF against terrorist groups responsible for the 9/11 attacks to authorize the President to use force against terrorist groups that today threaten the United States.

Successive Presidents have adopted increasingly contorted interpretations of all three laws, and Congress has acquiesced in these interpretations, rather than vote on new authorizations. This is bad legal and constitutional practice.

So, to begin with, the War Powers Resolution, although Presidents have sometimes had difficulties complying with the 48-hour reporting requirement, they have struggled in particular with the resolution's requirement that the President terminate any use of U.S. Armed Forces within 60 days unless Congress has issued a specific authorization.

So, for example, President Obama continued the use of U.S. military force against Libya for more than 60 days in 2011 after concluding that U.S. military operations did not actually constitute hostilities within the meaning of the resolution. And he then continued the use of U.S. military force against ISIS in Iraq and Syria for more than 60 days in 2014, after concluding—in a legal stretch—that the use of force against ISIS had actually been authorized by Congress in the 2001 and 2002 AUMFs.

Now, in 2008, the National War Powers Commission, a bipartisan commission chaired by former Secretaries of State James Baker and Warren Christopher, and before which I testified at the

time, issued an excellent report that called the War Powers Resolution impractical and ineffective and not serving the rule of law. They recommended the resolution be repealed and replaced with the mandatory congressional executive consultation process.

I commend that report to you, and I strongly support the War Powers Consultation Act that the commission recommended.

Now, let me turn to the 2001 and 2002 AUMFs.

The 2001 AUMF continues to serve an important legal purpose, but as time has passed it has become increasingly outdated.

And I would note here that 10 years ago, in 2010, shortly after I left the Bush administration, I wrote an op-ed in The Washington Post saying that it was outdated then, and that was 10 years ago.

It does not provide clear legal authority to use force against terrorist groups that have been formed or expanded after the 9/11 attacks.

As a result, I have long advocated revising the 2001 AUMF to update it to address contemporary terrorist threats. I especially applaud Senator Tim Kaine on the Senate side for his efforts over so many years to forge a bipartisan consensus in the Senate to revise the 2001 AUMF.

An updated AUMF is legally important to give our military clear statutory authority to fight terrorist groups that threaten the United States today.

And it is constitutionally important to demonstrate that Congress has authorized the actions our military is taking, rather than simply acquiescing in increasingly strained executive branch interpretations of the 2001 AUMF enacted 20 years ago, before most Members of the 117th Congress were elected.

To be clear, by my count, only about 15 percent of the current Congress were serving when the 2001 AUMF was enacted.

Now, Members of Congress have understandable concerns about approving a broad new authorization and extending what many view as a forever war.

However, I am convinced that Congress can come together to agree on a new AUMF that provides the President and our military the clear legislative authorization—with appropriate limitations—that they need to defend the United States against persistent threats from modern terrorist groups.

With respect to the 2002 AUMF, the threat posed by Saddam Hussein's regime was the primary focus of the law—and I was in the White House at the time it was drafted—but it has continued to be cited by Presidents Bush, Obama, and Trump as authorization for a range of military activities in Iraq through 2020.

In 2014, for example, President Obama cited the 2002 AUMF, in addition to the 2001 AUMF, as authority for the use of force against ISIS and Iraq.

And even more controversially, as members know, President Trump cited the 2002 AUMF as authorization for the U.S. drone strike on January 2, 2020, that killed Iranian intelligence chief Qasem Soleimani while he was visiting Iraq.

In my view, both of these latter interpretations of the 2002 AUMF were strained and unnecessary. In contrast to the 2001 AUMF, which should be updated, the 2002 AUMF should simply be repealed.

In sum, I hope that Congress will repeal and update the 2001 AUMF, repeal the 2002 AUMF, and hold further hearings to consider potential revisions to the War Powers Resolution.

Thank you for inviting me, and I look forward to your questions.

[The statement of Mr. Bellinger follows:]

COUNCIL *on* FOREIGN RELATIONS

March 23, 2021

Reforming the War Powers Resolution for the 21st Century

Prepared statement by

John B. Bellinger III

Partner, Arnold & Porter and Adjunct Senior Fellow in International and National Security Law, Council on Foreign Relations

Before the

Committee on Rules

United States House of Representatives

1st Session, 117th Congress

Mr. Chairman, Ranking Member Cole, and members of the Committee, thank you for inviting me to testify today about the War Powers Resolution and congressional and presidential war powers. I appreciate the Committee's interest in this important subject.

To start with my bottom line, I believe that the current statutory authorities governing presidential war powers and authorizing the use of military force are outdated and should be revised. Specifically, the War Powers Resolution of 1973 should be updated to reflect modern military and political realities. In addition, Congress should repeal the 2002 Authorization to Use Military Force relating to Iraq and should revise the 2001 Authorization to Use Military Force against terrorist groups responsible for the 9-11 attacks to authorize the President to use force against terrorist groups that today threaten U.S. persons or U.S. interests. Successive Presidents have adopted increasingly contorted interpretations of all three laws, and Congress has acquiesced in these intepretations. This is bad legal and constitutional practice.

By way of background, I served for nearly two decades as a national security lawyer in both the executive and legislative branches under both Democratic and Republican Presidents. I served as Senior Associate Counsel to President George Bush and Legal Adviser to the National Security Council from 2001 to 2005 and later as the Legal Adviser to the Department of State from 2005 to 2009, reporting to Condoleezza Rice in both positions. I was in the White House Situation Room during the 9-11 attacks and served in the White House during the Iraq War. I was involved in drafting both the 2001 and 2002 AUMFs and in preparing all of the reports submitted by President Bush to Congress under the War Powers Resolution between 2001 and 2009. During this period, I engaged on an almost daily basis in discussions about domestic and international legal issues relating to the use of military force in Iraq, Afghanistan, and elsewhere. [1]

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[1] I previously served as Counsel for National Security Matters in the Criminal Division of the Department of Justice (1997-2001); Of Counsel, Select Committee on Intelligence, U.S. Senate (1996); General Counsel, Commission on the Roles and Capabilities of the U.S. Intelligence Community (1995-1996); and Special Assistant to Director of Central Intelligence William Webster (1988-1991).

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Domestic and International Law Governing the Use of Force

When a President and his national security advisers consider the use of military force in or against another country, they must comply with both domestic and international laws governing the use of force. As a matter of U.S. law, these laws include the U.S. Constitution and laws passed by Congress, including the War Powers Resolution of 1973. As a matter of international law, the rules include the U.N. Charter, treaties governing the use of military force, and certain principles of customary international law. I will focus today primarily on domestic legal authorities.

A. Constitutional Authority

Under Article II of the Constitution, the President has broad authority as Commander-in-Chief and Chief Executive to order the use of force by the U.S. military. His Article II powers include authority not only to order the use of military force to defend the United States and U.S. persons against actual or anticipated attacks but also to advance other important national interests.

Presidents of both parties have deployed U.S. forces and ordered the use of military force, without congressional authorization, on numerous other occasions.[2] For example, President George H.W. Bush ordered U.S. troops to Panama in 1989 to protect U.S. citizens and bring former President Noriega to justice. President Clinton ordered the deployment of U.S. forces to Haiti in 1994 and U.S. participation in NATO bombing campaigns in Bosnia and Kosovo in 1995 and 1999. President Obama ordered the U.S. military to participate in the bombing campaign of Libya in 2011.

The Department of Justice's Office of Legal Counsel has written numerous opinions, under both Republican and Democratic Presidents, determining that the President has the power to commit troops and take military actions to protect a broad array of national interests, even in the absence of a Congressional authorization, including for the purpose of protecting regional stability, engaging in peacekeeping missions, and upholding U.N. Security Council Resolutions. For example, the Office of Legal Counsel concluded that the President had the power, without congressional authorization, to deploy U.S. forces and use military force in Somalia in 1992, in Haiti in 1994, in Bosnia in 1995, in Iraq in 2002, and in Libya in 2011.[3]

Of course, in addition to the powers granted to the President in Article II, Article I of the Constitution gives to Congress the authority to "declare War."[4] But this authority has never been interpreted – by either Congress or the Executive – to require congressional authorization for every military action, no matter how small, that the President may initiate. Indeed, the War Powers Resolution itself, implicitly recognizes that a President may order the U.S. military into hostilities without congressional

[2] See Barbara Salazar Torreon, Cong. Research Service, Instances of Use of United States Armed Forces Abroad, 1798-2017 (October 12, 2017).

[3] See, e.g., Authority to Use United States Military Forces in Somalia, 16 Op. O.L.C. 6 (1992); Deployment of United States Armed Forces into Haiti, 18 Op. O.L. C. 173 (1994); Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327 (1995); Authority of the President Under Domestic and International Law to Use Military Force Against Iraq (October 23, 2002); Authority to Use Military Force in Libya (April 1, 2011)

[4] Congress has issued eleven declarations of war: Great Britain (1812); Mexico (1846); Spain (1898); Germany (1917); Austria-Hungary (1917); Japan (1941); Germany (1941); Italy (1941); Bulgaria (1942); Hungary (1942); Romania (1942). https://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/WarDeclarationsbyCongress.htm

authorization, provided that he notifies Congress within 48 hours and ceases the use of force after sixty days unless he receives congressional authorization.

In several opinions, the Office of Legal Counsel has acknowledged that the "declare War" clause may impose a potential restriction on the President's Article I powers to commit the U.S. military into a situation that rises to the level of a "war."[5] This possible limitation appears only to have been recognized by OLC under Democratic Administrations; war powers opinions written by OLC during Republican Administrations do not appear to have recognized that the "declare war" clause places any restriction on the President's Article II powers. And even during Democratic Administrations, OLC has stated that whether a particular planned engagement constitutes a "war" for constitutional purposes "requires a fact-specific assessment of the "anticipated nature, scope, and duration" of the planned military operations" and that "This standard generally will be satisfied only by prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period." OLC determined that this standard was not met with respect to President Clinton's use of the U.S. military in Haiti in 1994 and in Bosnia in 1995 or President Obama's use of the U.S. military in Libya in 2011.

Although OLC has yet to identify a specific situation where the "declare war" clause would limit the President's independent authority to order the use of military force and require congressional authorization, this does not mean that such circumstances will never exist. If a President wished to order the U.S. military to launch a prolonged or substantial military engagement that is not in response to an attack or clearly imminent attack and that would expose the U.S. military, U.S. civilians, or U.S. allies to significant risk of harm over a substantial period, there is a strong argument that the President may be required to seek congressional approval. It would certainly be prudent for him to do so.

B. Congressional Authorization

Although the President has broad constitutional authority to order the use of force without congressional authorization, Presidents of both parties have generally preferred to seek congressional authorization, if it is possible to secure, for any prolonged or substantial use of force.

For example, President George H.W. Bush sought and secured a congressional authorization for the use of force against in Iraq in 1991. President George W. Bush sought and secured congressional authorization for the use of force against terrorist groups in 2001 ("2001 AUMF") and against Iraq in 2002 ("2002 AUMF"). President Obama sought congressional authorizations to use force in Libya in 2011 and against ISIS in 2014 but Congress did not agree; as a result, President Obama relied solely on his constitutional authority for military operations in Libya and on the 2001 and 2002 AUMFs for operations against ISIS.

1. The 2001 AUMF

The 2001 AUMF, passed by Congress on September 14, 2001 only days after the 9-11 attacks and signed by President Bush on September 18, 2001, authorizes the President to "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, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

[5] Deployment of United States Armed Forces into Haiti, 18 Op. O.L. C. 173 (1994); Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327 (1995); Authority to Use Military Force in Libya (April 1, 2011).

On the one hand, the 2001 AUMF is very broad. It authorizes "all necessary force" without restriction as to type of force or geography. It also has no termination date. But it has one important limitation: it authorizes force only against nations, organizations, and persons who planned, authorized, committed, or aided the 9-11 attacks (or harbored such organizations or persons). In other words, the 2001 AUMF requires some nexus to the 9-11 terrorist attacks.

For the last twenty years, Presidents Bush, Obama, and Trump have relied on the 2001 AUMF as statutory authority for a very broad range of U.S. counterterrorism operations against persons and terrorist groups in at least seven countries, including the invasion of and continued military operations in Afghanistan; more than 500 drone strikes in Afghanistan, Pakistan, Yemen, Somalia, Syria, Iraq, and Libya; and detention of thousands of individuals in Afghanistan, Guantanamo Bay, and elsewhere.

The 2001 AUMF continues to serve an important legal purpose to authorize the President to use force against certain terrorist groups. But as time has passed, it has becoming increasingly outdated. It does not provide clear legal authority to use force against terrorist groups that have been formed or expanded after the 9-11 attacks. Executive branch lawyers have spent countless hours debating whether a potential targeted individual or group is associated or affiliated or co-belligerents with the organizations that committed the 9-11 attacks.

In 2014, after Congress was unable to agree on a new AUMF authorizing the use of force against the Islamic State, President Obama announced that the 2001 AUMF (as well as the 2002 AUMF relating to Iraq) provided congressional authorization for military operations against ISIS in Iraq and Syria, because ISIS was an offshoot of al Qaida. This interpretation of the 2001 AUMF was widely viewed and criticized as a legal stretch, because ISIS did not exist in 2001 and was not the group that committed the 9-11 attacks.[6] Nonetheless, relying on the 2001 and 2002 AUMFs allowed President Obama to claim that he was relying on congressional authorization to use force rather than solely on his own constitutional authorities, and it saved Congress from having to vote on a new authorization in an election year. In February 2015, while continuing to insist that existing congressional authorizations provided all the authority he needed to use military force against ISIS, President Obama submitted a draft congressional authorization to Congress that would specifically authorize the use of force against ISIS.[7] However, Congress never acted on the President's proposed authorization and instead acquiesced in his reliance on the 2001 AUMF (and 2002 AUMF) to conduct operations against ISIS for the remainder of his Presidency.

For more than 15 years, including while I was still in government and since leaving government, I have advocated revising the 2001 AUMF in order to update it to address terrorist threats that have emerged after 9-11 and to clarify the scope of the AUMF's authorization.[8] An updated AUMF is legally important to give our military clear statutory authority to fight terrorist groups that threaten the United States and

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[6] Bruce Ackerman, "Obama's Betrayal of the Constitution, New York Times, September 12, 2014, https://www.nytimes.com/2014/09/12/opinion/obamas-betrayal-of-the-constitution.html?_r=1; Ben Wittes, "Not Asking the Girl to Dance," Lawfare, September 10, 2014, https://www.lawfareblog.com/not-asking-girl-dance.

[7] Letter from the President -- Authorization for the Use of United States Armed Forces in connection with the Islamic State of Iraq and the Levant, February 11, 2015; https://obamawhitehouse.archives.gov/the-press-office/2015/02/11/letter-president-authorization-use-united-states-armed-forces-connection.

[8] Over a decade ago, in 2010, I wrote an op-ed in the Washington Post arguing that the 2001 AUMF should be updated: "*As U.S. forces continue to target terrorist leaders outside Afghanistan, it is increasingly unclear whether these terrorists, even if they are planning attacks against U.S. targets, are the same individuals, or even part of the same organization, behind the Sept. 11 attacks.*" John B. Bellinger III, "A Counterterrorism Law in Need of Updating," Washington Post, November 26, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/11/25/AR2010112503116.html.

constitutionally important to demonstrate that Congress has authorized and supports the actions our military is taking, rather than simply acquiescing in increasingly strained Executive branch interpretations of the 2001 AUMF enacted twenty years ago before most members of the 117th Congress were elected.

More recently, I have testified on several occasions before the House and Senate urging that the 2001 AUMF be repealed and updated. I especially applaud Senator Tim Kaine for his efforts over many years to try to forge a bipartisan consensus in the Senate to revise the 2001 AUMF. In May 2018, I testified before the Senate Foreign Relations Committee in support of S.J. Res 59, the Authorization to Use Military Force Act of 2018, drafted by Senators Kaine and Corker, which would have updated the 2001 AUMF.[9]

Members of Congress have understandable and valid concerns about approving a broad new authorization and extending what many view as a "Forever War." However, I am convinced that Congress can come together to agree on a new AUMF that provides the President and our military the clear legislative authorization, with appropriate limitations, they need to defend the United States against persistent threats from modern terrorist groups. It is important that Congress refresh the legislative authorization to use force against terrorist groups, rather than rely on a twenty-year-old authorization or encourage the President rely solely on his own Article II authority.

2. The 2002 AUMF

The 2002 AUMF, signed by President Bush on October 16, 2002, focused on Iraq and the failure of Saddam Hussein to comply with Iraq's obligations under a series of U.N. Security Council Resolutions. It authorized the President to "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.

Although the threat posed by Saddam Hussein's regime was the primary focus of the 2002 AUMF, it has continued to be cited by Presidents Bush, Obama, and Trump as congressional authorization for a range of military activities in Iraq through 2020. President Bush relied on the 2002 AUMF for the initial invasion of Iraq in 2003 and for subsequent military operations in Iraq through 2009. President Obama continued to rely on the 2002 AUMF during the armed conflict in Iraq throughout his Presidency. And, as noted above, in 2014, President Obama cited the 2002 AUMF (in addition to the 2001 AUMF) as authority for the use of force of against ISIS in Iraq. Even more controversially, President Trump cited the 2002 AUMF as congressional authorization for the U.S. drone strike on January 2, 2020 that killed Iranian intelligence chief Qassem Soleimani while he was visiting Iraq.[10] In my view, both of these latter interpretations of the 2002 AUMF were both strained and unnecessary. Although legal arguments can possibly be made that some continued U.S. military activities in Iraq are authorized by the 2002 AUMF, for the rare circumstances where the U.S. may need to use force in Iraq or Syria, it is preferable for the President to rely on his constitutional authorities. In contrast to the 2001 AUMF, which should be updated, the 2002 AUMF should be repealed.

C. War Powers Resolution

[9] https://www.foreign.senate.gov/imo/media/doc/051618_Bellinger_Testimony.pdf
[10] https://foreignaffairs.house.gov/_cache/files/4/3/4362ca46-3a7d-43e8-a3ec-be0245705722/6E1A0F30F9204E380A7AD0C84EC572EC.doc148.pdf

When authorizing the use of force or deployment of U.S. armed forces, Presidents must also take into account the War Powers Resolution of 1973. Section 4 of the War Powers Resolution requires the President to notify Congress within 48 hours after U.S. armed forces are introduced 1) into "hostilities" or where hostilities are imminent; 2) into the territory, airspace or waters of a foreign nation, while "equipped for combat"; 3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation. Section 5(b) of the Resolution requires the President to terminate any introduction or use of US armed forces into hostilities within 60 days unless Congress issues a specific authorization.[11] Presidents of both parties have concluded that some parts of the War Powers Resolution are unconstitutional, though all Presidents have tried to act "consistent with" the Resolution's provisions, including by submitting regular reports to Congress. As I noted above, between 2001 and 2009, I was involved in preparing of the war powers reports submitted to Congress by President Bush.

Although Presidents have sometimes had difficulties complying with the 48-hour reporting requirement, they have struggled in particular with the Resolution's 60-day termination requirement. President Obama continued the use of U.S. military force against Libya for more than 60 days in 2011 after concluding (contrary to the purported advice of the Justice Department and Defense Department) that U.S. military operations did not constitute "hostilities" within the meaning of the Resolution. He later continued the use of U.S. military force against ISIS in Iraq and Syria for more than 60 days in 2014 after concluding that the use of force against ISIS was authorized by Congress under the 2001 and 2002 AUMFs, even though al Qaida had distanced itself from ISIS.

On several occasions, members of Congress or of the public have sued the President for allegedly violating the War Powers Resolution by using force for longer than sixty days without specific congressional authorization. The courts have generally dismissed these suits, finding that the legislators or members of the public lack standing or that the suits raise non-justiciable political questions.[12]

I have previously recommended that Congress revise and update the War Powers Resolution to address contemporary conflicts and take into account increasing congressional reluctance to vote to authorize the use of force. This Committee may wish to review the valuable 2008 report of the National War Powers Commission, a bi-partisan commission chaired by former Secretaries of State James Baker and Warren Christopher, which called the War Powers Resolution "impractical and ineffective."[13] The Commission stated that no President has treated the Resolution as mandatory and that "this does not promote the rule of law." They recommended the Resolution be repealed and replaced with a mandatory consultation process. In 2014, Senators McCain and Kaine introduced the War Powers Consultation Act of 2014 to implement the Commission's recommendations.[14] Congressman Lee Hamilton, the former Chairman of the Foreign Affairs Committee and a member of the National War Powers Commission said: "The War Powers Consultation Act of 2014 offers a practical, fair and realistic approach to getting the President and the Congress to consult meaningfully and deliberate carefully before committing the country to war." Unfortunately, no hearings were held on the proposed legislation in the Senate, and companion legislation was never introduced in the House.

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[11] The 60-day termination provision applies only to the introduction of U.S. armed forces into hostilities or imminent hostilities.
[12] See, e.g., *Campbell v Clinton*, 52 F. Supp 2d 34 (DDC 1999)(dismissing suit against President Clinton relating to NATO bombing campaign in Serbia)(citing cases); *Smith v. Obama*, 217 F. Supp 3d 283 (DDC 2016)(dismissing suit against President Obama relating to operations against ISIS in Iraq and Syria) (appeal pending).
[13] http://web1.millercenter.org/reports/warpowers/report.pdf
[14] http://thehill.com/blogs/floor-action/senate/195704-senate-bill-amends-war-powers-act

I urge the House to hold hearings on recent presidential and congressional practices under the War Powers Resolution and ultimately to revise and update the Resolution to reflect modern military and political realities, including the President's need to respond quickly to contemporary threats and congressional reluctance to enact new authorizations.

International Law

It is important for Congress to understand that the AUMF only authorizes the use of force under U.S. domestic law. The United States must separately comply with international law rules governing the use of force. The U.N. Charter, a treaty to which the U.S. is a party, prohibits the use of force in or against another U.N. member state unless the state has consented, the U.N. Security Council has authorized the use of force, or the use of force is in self-defense in response to an armed attack or imminent armed attack. It is important that the United States observe international law rules governing the use of force not only because the U.S. has agreed to be bound by the U.N. Charter but because we want other countries like Russia and China to follow the same rules. As I explained in my Lloyd Cutler Rule of Law Lecture in November 2016:

> If the United States violates or skirts international law regarding use of force, it encourages other countries -- like Russia or China -- to do the same and makes it difficult for the United States to criticize them when they do so. If the United States ignores international law, it also makes our friends and allies who respect international law -- such as the UK, Canada, Australia, and the EU countries -- less likely to work with us. Unlike Russia and China, the United States has many friends and allies who share our values, including respect for the rule of law. But we lose our friends when we do not act consistent with law and our shared values.[15]

The Biden Administration's Use of Force in Syria

On February 25, President Biden ordered airstrikes against targets in eastern Syria, apparently his first use of military force as president. The president directed the strikes in response to rocket attacks against U.S. forces in Iraq, including an attack on February15 that injured a U.S. service member and killed a Filipino contractor. On February 27, the president reported the military action to Congress in his first report to Congress under the War Powers Act.[16] As the domestic law authority for the action, the president cited only his constitutional authority as commander in chief and chief executive. He did not seek to rely on either the 2001 Authorization to Use Military Force (AUMF)—against those responsible for the 9/11 attacks—or the 2002 AUMF—relating to Iraq. This is understandable as it would have been a legal stretch for him to have argued that Congress had authorized his action.

President Biden also stated that he was acting "pursuant to the United States' inherent right of self-defense as reflected in Article 51 of the United Nations Charter." He stated further that "The United States always stands ready to take necessary and proportionate action in self-defense, including when, as is the case here, the government of the state where the threat is located is unwilling or unable to prevent the use of its territory by non-state militia groups responsible for such attacks." Although the War

[15] John B. Bellinger III, "Law and the Use of Force: Challenges for the Next President," Sixth Annual Lloyd Cutler Rule of Law Lecture, http://lawfare.s3-us-west-2.amazonaws.com/staging/2016/Lloyd%20Cutler%20Lecture.pdf.

[16] https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/27/a-letter-to-the-speaker-of-the-house-and-president-pro-tempore-of-the-senate-consistent-with-the-war-powers-resolution/

Powers Resolution requires a President to report only the "the constitutional and legislative authority" for the use of U.S. Armed Forces, it was appropriate for President Biden to explain to Congress how his action complied with international law.

Conclusion

I appreciate the opportunity to appear before the Committee today. I hope that Congress will repeal and update 2001 AUMF, repeal the 2002 AUMF, and hold further hearings to consider potential revisions to the War Powers Resolution.

The CHAIRMAN. Thank you very much.
Dr. Bridgeman.

STATEMENT OF TESS BRIDGEMAN, CO-EDITOR-IN-CHIEF, JUST SECURITY; SENIOR FELLOW AND VISITING SCHOLAR, NYU LAW'S REISS CENTER ON LAW AND SECURITY

Dr. BRIDGEMAN. Thank you, Chairman McGovern, Ranking Member Cole, and members of the Rules Committee. I would like to reiterate the thanks expressed by my fellow witnesses for your leadership on this important set of issues. I do think now is the time to act.

All of us here today share a concern about the erosion of Congress' role in exercising its constitutional war powers.

I was deeply involved both at the White House and, prior to that, in the State Department in how the President exercises his war powers, both under the Constitution and under statutes provided by Congress delegating authority to take the nation to armed conflict.

The concern about the erosion of Congress' powers is not new, but it has gained increased urgency in an era marked by sprawling long-term conflicts that Congress has not explicitly weighed in on. I look forward to discussing with you today how to reverse this trend so that the people's representatives exercise their authority, and fulfill their duty, to decide when and how the United States uses armed force abroad.

In my written testimony I offered six concrete proposals for war powers reform, and I want to highlight those for you today because I hope they can form the basis for part of our discussion.

These reforms, in my view, are achievable, and they are mutually reinforcing.

They further goals that I believe we share: restoring Congress' role in deciding when and how to go to war, without taking away from the President the authority to use defensive force when necessary.

And this brings me to the first reform.

The War Powers Resolution should clearly delineate two circumstances when the President may use force without prior congressional authorization. They are very simple. First, to repel an imminent or sudden attack on the United States; and, second, to protect, evacuate, or rescue U.S. nationals in situations of peril.

But for other types of interventions, including the ones that Chairman McGovern and Ranking Member Cole brought to our attention, Congress should vote.

Second, the Resolution's key term "hostilities" must be defined. The Resolution's core requirement that the President must terminate unauthorized hostilities after 60 days has been rendered all but useless by the executive's exceedingly narrow definition of the term "hostilities."

To avoid continued end runs around the termination requirement, hostilities should be defined to include any lethal or potentially lethal use of force by or against U.S. forces, including when deployed by remote weapon systems, like drones or cyber weapons, and including in low-intensity or intermittent engagements, which have become the norm in recent conflicts.

Third, while defining hostilities will make the termination clock meaningful again, the 60-day time period is too long. It incentivizes the executive branch to start engagements that are not defensive in nature or to turn defensive strikes into escalatory conflicts before the clock runs out. But there is a simple solution: shorten the clock.

Fourth, enforcement. To add teeth back into the War Powers Resolution, it needs a clear, automatic funds cutoff. This would apply to any activity that is not consistent with the statute.

An enforcement mechanism should not require a vote to take effect, and it certainly should not require a supermajority of both Houses.

Think of it this way. The statutory requirement being enforced is merely preserving a power that Congress has already been delegated in the Constitution.

Fifth, as I documented in the War Powers Resolution Reporting Project at NYU Law's Reiss Center on Law and Security, which analyzes all of the unclassified 48-hour reports since the War Powers Resolution was enacted, Presidents generally aim to comply with the War Powers Resolution's reporting requirements, but they often provide boilerplate language to Congress.

Congress needs much more meaningful information to understand the reasons for an introduction and its full implications.

You can ask yourself: What would you need to know to take an informed vote on authorizing a use of force or letting an automatic funds cutoff kick in? That should guide us in terms of what the President is required to provide.

Sixth, and finally, I will agree with Professor Ingber and with John Bellinger that the 1991 and 2002 AUMFs are operationally unnecessary and leaving them on the books only makes them susceptible to abuse. But we should be clear that it is the 2001 AUMF that has been stretched beyond recognition by administrations of both parties and must be repealed.

If circumstances require a new force authorization, it must include explicit boundaries to avoid repeating the situation we find ourselves in today. I included specific guardrails in my written testimony that I would be happy to discuss with you in today's hearing.

In sum, the status quo in which the people no longer have a voice in matters of war and peace is untenable. The executive cannot be left to check itself any longer.

But this means Congress must have the courage to assert itself on these issues, and I believe it is starting to do so. Recent votes to end U.S. involvement in the disastrous conflict in Yemen and to avoid war with Iran show that this is possible.

But the result in each case, a presidential veto that was foreseeable and the continuation of the status quo, shows that Congress' tools are inadequate. The War Powers Resolution must be updated to ensure Congress is able to assert itself when it has the political will to do so.

I hope that the reforms we discuss today will put us on that path, and I look forward to answering your questions.

Thank you.

[The statement of Dr. Bridgeman follows:]

Testimony of Dr. Tess Bridgeman[1]

Prepared Testimony to the Committee on Rules

United States House of Representatives

March 23, 2021

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

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[8] Thomas Gibbons Neff, *How a 4-Hour Battle Between Russian Mercenaries and U.S. Commandos Unfolded in Syria*, N.Y. TIMES (May 24, 2018), https://www.nytimes.com/2018/05/24/world/middleeast/american-commandos-russian-mercenaries-syria.html.
[9] Rebecca Ingber, also testifying today, has discussed this dynamic in detail. *See* Rebecca Ingber, *Legally Sliding into War*, JUST SECURITY (Mar. 15, 2021), https://www.justsecurity.org/75306/legally-sliding-into-war/.
[10] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).
[11] *See* Rebecca Ingber, *Co-Belligerency*, 42 YALE J. INT'L L. (2017), at 74-79.

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

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

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

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

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

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

[14] *See* Mary B. DeRosa, *National Security Lawyering: The Best View of the Law as a Regulative Ideal*, 31 GEO. J. LEGAL ETHICS 277 (2018), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3156&context=facpub.

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

[16] Joseph R. Biden, Jr. & John B. Ritch III, *The War Power at a Constitutional Impasse: A "Joint Decision" Solution*, 77 GEO. L. J. 367 (1988), https://heinonline.org/HOL/LandingPage?handle=hein.journals/glj77&div=20&id=&page=.

War Powers Resolution Reporting Practice

I recently created the War Powers Resolution Reporting Project[17] at NYU Law School's Reiss Center on Law and Security (RCLS), which analyzes the war powers reporting practices of every President since the WPR was enacted, in the hopes that providing a comprehensive understanding of practice to date can help lay the groundwork for reform. The interactive graphics and searchable database highlight a number of phenomena I observed directly when serving in the Executive branch. For example, most Presidents aim to comply with the WPR's reporting provisions most of the time, including the timely submission of reports required within 48-hours of introducing forces into hostilities (or "situations where imminent involvement in hostilities is clearly indicated by the circumstances"), deploying combat-equipped forces abroad, or substantially enlarging such deployments.

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

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

To be sure, the President will always retain the authority to defend the United States against imminent attack and to rescue citizens in peril. Congress cannot, and should not have to, authorize in advance every emergency embassy evacuation, for example. But it matters that the authority of the branch the Constitution vested with the power to decide whether to go to or stay at war has diminished so greatly. Our servicemembers and their families deserve no less than an active and engaged Congress that authorizes their missions with purpose when doing so is wise and lawful, and that makes difficult decisions about when they should *not* be deployed into harm's way, even in some cases when the President believes force ought to be used. Our democracy requires public debate on these difficult choices, and that debate requires leadership by the representatives of the people. Without Congress stepping up to seize its Article I war powers, presidential deference to Congress' constitutional role will be the exceedingly rare exception[18] rather than the norm.

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

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

Proposed Reforms

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

1. Define the President's Authority

The WPR's "Purpose and Policy" section provides Congress' view that the President's constitutional powers to introduce U.S. forces into hostilities (or situations where imminent involvement in hostilities is clearly indicated by the circumstances) may be "exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."[20] This is consistent with the framers' intended allocation of powers in the Constitution, although it is radically different than the broad view of presidential power expressed by the Executive branch in recent decades.

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

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

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

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

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

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

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

2. Define "Hostilities"

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

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

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

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

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

[21] The 60-day period is extendable to 90 days in specific circumstances. *Id.* at § 5(b).
[22] H.R. Rep. No. 547, 93d Cong., 1st Sess. 7 (1973).

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

3. Shorten the Termination Clock

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

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

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

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

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

4. Enforcement: Automatic Funds Cut-Off

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

Following the Supreme Court's invalidation of the legislative veto in its 1983 decision *INS v. Chadha*,[25] the WPR's key enforcement mechanism – passage of a concurrent resolution through both houses to stop unauthorized military action by the President[26] – was essentially nullified. We are left with the intended balance of powers turned on its head: instead of a majority of Congress having the power to authorize the President to initiate the use of force, a *supermajority* is required to *stop* the President from doing so.

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

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

Congress should ensure that a funds cut-off is comprehensive and clear, as any ambiguity will undermine the purpose of the provision. One possible formulation[28] is as follows:

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

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[25] 462 U.S. 919, 954-55 (1983).
[26] War Powers Resolution, Pub. L. No. 93-148, § 5(c), 87 Stat. 555 (1973).
[27] 31 U.S.C. § 1341 (2019).
[28] *See* Tess Bridgeman and Stephen Pomper, *Good Governance Paper No. 14: War Powers Reform*, JUST SECURITY, Oct. 30, 2020, *available at* https://www.justsecurity.org/73160/good-governance-paper-no-14-war-powers-reform/.
[29] Jack Goldsmith and Bob Bauer have proposed the following formulation: "No funds made available under any provision of law may be obligated or expended for any use of force abroad inconsistent with the provisions of this act." BOB BAUER & JACK GOLDSMITH, AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY (2020).

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

5. Meaningful Reporting and Transparency

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

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

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

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

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

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

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

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

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

- the specific factual circumstances that necessitated the introduction, including any reasonably available information about the threats posed to the United States or its nationals that was relied upon in determining the introduction was necessary;
- the domestic and international legal basis[32] for the introduction;
- the specific country (or countries) and/or organized armed group(s) against which the use of force is occurring or is expected to occur based on the circumstances;
- the estimated risk to U.S. forces, other U.S. persons or property involved in the operations, and to civilians; and
- an assessment of the potential for escalation.

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

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

[31] Press Release, U.S. Dep't of Def., U.S. Conducts Defensive Precision Strike (Feb. 25, 2021), https://www.defense.gov/Newsroom/Releases/Release/Article/2516518/us-conducts-defensive-precision-strike/.
[32] The WPR Reporting Project found that "over half of the 48-hour reports provide enough information to identify an international legal basis for the reported activity, even though doing so is not required by the text of the War Powers Resolution." Most reports marking the introduction of U.S. armed forces into hostilities provide the international legal basis for the activity. *See* https://warpowers.lawandsecurity.org.

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

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

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

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

Conclusion

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

[33] Tess Bridgeman, *Now is the Time to Repeal the 2002 AUMF*, JUST SECURITY (Jul. 11, 2019), https://www.justsecurity.org/64885/now-is-the-time-to-repeal-the-2002-aumf/.
[34] Outdated AUMF Repeal Act of 2021, 117th Cong. § 1 (2021), https://gallagher.house.gov/sites/gallagher.house.gov/files/Outdated%20AUMF%20Repeal%20Act.pdf.
[35] Rep. Abigail Spanberger (@RepSpanberger), Twitter (Mar. 18, 2021, 6:29 PM), https://twitter.com/RepSpanberger/status/1372676594838421505?s=20.
[36] *Id.*
[37] Tess Bridgeman et al., *Principles for a 2021 Authorization for Use of Military Force*, JUST SECURITY (Mar. 5, 2021), https://www.justsecurity.org/74273/principles-for-a-2021-authorization-for-use-of-military-force/.
[38] Letter from Members of Congress to President Biden (Jan. 21, 2021), https://lee.house.gov/imo/media/doc/Biden%20AUMF%20letter%20FINAL%20(1).pdf

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

The CHAIRMAN. Thank you very much.

I want to thank all three of you for excellent testimony.

And before I get to my questions, I just saw my friend Mr. Perlmutter from Colorado come online. I think I speak for everybody on this committee when I say that all of us are in deep shock over the shootings in Boulder. And, obviously, our prayers are with the people of Colorado, the family members of the victims. A police officer was shot who had a young family.

It really—this is madness. And the subject of another hearing is we need to do more than just express our thoughts and prayers over these tragedies. But I just wanted to make sure that we acknowledge what happened.

In any event, again, I want to thank the witnesses for your testimony.

The Rules Committee is not always associated with bipartisanship and we don't always hold hands and sing kumbaya together, I mean. But at the risk of shocking everybody, I want to start by highlighting I think some of the things that we agree on.

I mean, each of our witnesses noted in oral or written testimony that you believe Congress should repeal the 2002 Authorization for the Use of Military Force. You all seem to agree that we should either repeal or repeal and replace the 2001 authorization of military force. And each of you said that you believe that the War Powers Resolution is not working and is in need of reform.

Is that right? Does everybody agree? All the witnesses agree on that?

I am seeing yes. Okay. All right.

Mr. Bellinger, just briefly, tell us, what is the Office of Legal Counsel? And what role does it play in the war powers discussion?

Mr. BELLINGER. So let me separate the couple of players that are involved here.

The Office of Legal Counsel is the part of the Justice Department which by statute issues opinions interpreting the law under delegated authority from the Attorney General. So they are essentially the President's lawyers for the interpretation of statutes, and they write opinions.

The White House lawyers—and I was a White House lawyer, so I was part of the White House Counsel's Office and the lawyer for the National Security Council before I moved to become General Counsel at the State Department.

At the White House we relied on the Office of Legal Counsel for those opinions, but they are not necessarily binding on the President. The President and the White House lawyers do look to the Office of Legal Counsel to write these opinions on war powers. But it is ultimately up to the President and to the counsel to the President to decide what legal positions they want to take.

The CHAIRMAN. Thank you.

So, Professor Ingber, you are a law professor. I am not a lawyer. So please make this as simple as possible for me. Save the tough stuff for Professor Raskin, who is a constitutional expert.

Can you tell me where the role of the Office of Legal Counsel can be found in the Constitution?

Prof. INGBER. There is no role for the Office of the Legal Counsel in the Constitution. The Constitution provides that the President will get advice from advisers, and these are Presidential advisers.

Sometimes OLC memoranda get discussed as if they are Supreme Court opinions. And I think it is important to keep in mind that that is not what they are. These are the President's lawyers.

Alumni from the Office of Legal Counsel and lawyers in that office will tell you that they seek to provide the best view of the law when they are giving legal advice to the President.

But they will also tell you—and I think Professor Goldsmith will tell the HFAC when they meet later today—that they are also doing so from the perspective of lawyers who have a client, and that client is the President, and their job is to protect Presidential power.

So the President has a set of lawyers who view it as their institutional prerogative to protect Presidential power. And there is no reason for the rest of the branches to view those lawyers' positions as if they are written down in the Constitution. You have your own institutional prerogative to interpret the law as well.

The CHAIRMAN. Yeah. And I apologize for the committee's kind of very simplistic questions, but I want to get them on the record.

Okay. So tell me where the Constitution gives lawyers advising the President the power to settle conflicts between the Congress and the President over questions like what constitutes a war and who should declare it.

Prof. INGBER. Right. You are not going to find that in the Constitution, and that might be just the answer you were looking for.

The CHAIRMAN. Yeah, it is, I mean, because I was getting a little confused, because we keep on hearing about the OLC opinions to establish legal precedent to engage military conflicts. If the OLC isn't supposed to determine what the law is and what the law means, then who is supposed to decide that?

Prof. INGBER. Well, each of the branches has a responsibility to make that decision for itself.

OLC is providing a really important function for the President. The President has to figure out where the President thinks those lines are and it is very useful to have lawyers who are thinking about those issues all the time, because the President needs to figure out when the President can act.

But the other branches have their own independent authority and also obligation to do so for themselves.

The way the Supreme Court has viewed these questions is they have looked to actions by both the branches as providing, you know, as precedent for determining where the proper formal allocation should be today.

And so when Congress has not acted or has acted in ways that we might see as ambiguous, the Supreme Court has often read that as acquiescence in the President's actions.

The President has OLC standing up there with a memo, and perhaps Congress might need to have something of its own to be able to more effectively push back.

The CHAIRMAN. Right. Yeah. Because one of the frustrations is that when people refer to the Supreme Court, the Supreme Court

usually says that these are political questions best decided by other branches.

Dr. Bridgeman, we agree that the War Powers Resolution isn't working well. Courts increasingly tell the President and Congress that these are political questions, so you all figure it out. And we have seen the President's lawyers kind of fill the vacuum. I mean, that is kind of what has happened.

The President inevitably faces the voters, as do Members of Congress, which at minimum is a chance for the people to show how they think their leaders are doing, doing their job.

What ways can the people weigh in with White House lawyers, I mean, who obviously are playing a big role in this big public policy question?

Dr. BRIDGEMAN. It is an important question, and I think you put your finger on the answer when you talk about the role of the people.

It is through Congress that the people are supposed to express their voice in the political process, first and foremost, and the House of Representatives is, of course, the closest to the people. This is something that I think is vitally important as we think about how to police the executive branch.

You mentioned political will, and that political will needs to come from this body and from understanding the desires and the needs of the people.

I think we have a country that is war weary. We have been at war for two decades now.

When you talk to servicemembers and their families and they talk about the multiple deployments that they have faced, the toll that that takes on their families, the toll that takes on military spouses and military children, when you think about the trillions of dollars that these wars have cost, and when you think about whether they, in fact, have made us appreciably safer over these last two decades, that is the people expressing their views to you as their representatives. And then it is up to Congress to engage.

Congress can do things like hold hearings. Congress can take votes pursuant to the War Powers Resolution, which happened in 2019 and 2020 successfully for the first time ever. But, fundamentally, as we have seen, those votes didn't change the status quo because the War Powers Resolution is broken.

And that is where you come in. Congress needs to provide a voice, but Congress also needs to ensure that it gives itself the tools to make that voice effective and meaningful.

I would just add one final point, which is that when Congress does so, when Congress legislates, that is what hems in the executive branch lawyers.

So going on record with hearings absolutely is a step in the right direction. Expressing the voice of the people is vitally important. But legislating and then ensuring that the executive branch will implement that legislation because it has meaningful enforcement mechanisms, that is how Congress best expresses the voice of the people in its debates with Article II.

The CHAIRMAN. Yeah. No, one of my frustrations has been that that Congress hasn't provided the proper oversight.

And you mentioned the war powers votes that we have had. I have been part of a group that has kind of forced some of those votes. But they are not a substitute for thorough hearings, a transparent process, more oversight, more discussion.

And it is too easy for people to find an excuse to table them or vote against them, even when they know that a particular policy is not going the way we want it to go.

But we talk about these AUMFs. I was around when these AUMFs were approved. And I don't think Congress 20 years ago could have anticipated what the reality in the world was going to be in 2021 or that an Authorization for the Use of Military Force in Afghanistan or Iraq could somehow be used for something totally out of the realm of those particular conflicts years later.

And we don't ever repeal these things, right? So, I mean, 40 years from now, 50 years from now, if we don't address these AUMFs, they could be invoked to justify some sort of military intervention somewhere else in the world.

So, look, I mean, I think, part of the hope here—and I think everybody on the panel is reinforcing this—is that we need to reform the War Powers Resolution.

I would like to, if I could, Professor Ingber, I would like to turn to an issue near and dear to the Rules Committee's heart, and that is process and procedure.

Professor Ingber, can you tell us briefly the history of the legislative veto, what it is, and what happened to it, as well as how the Congress in 1973 might have relied on it when constructing the War Powers Resolution?

Prof. INGBER. So the Supreme Court in a decision that was not about war powers at all, in the Chadha decision, decided that Congress could not legislate, could not make law without bicameralism and presentment, which is to say without two Houses of Congress voting on a resolution and then presenting it to the President for signature.

In order to make any law both houses of Congress have to agree on the text and the President has to sign or else Congress needs to override a potential veto with a two-thirds supermajority.

Prior to the Supreme Court's decision, Congress had at times included in legislation, like in the War Powers Resolution—and I can read you the language you had included the War Powers Resolution that provided that forces shall be removed by the President if Congress so directs by concurrent resolution, which would have been a resolution that would not have then needed the signature of Congress.

So a mere majority of Congress would have been able to speak its mind and force the President to remove forces from hostilities when Congress chose to do so.

But after Chadha that has put that provision under a bit of a constitutional cloud. There are many who believe that that that enforcement mechanism has been entirely gutted.

I don't think that is entirely the best way to read it. The fact is that the Constitution entrusts Congress and not the President with the authority to declare war.

And, therefore, if the President is already engaging in an undeclared war, if the President is already engaging in hostilities

without authorization from Congress, then the President may not have that authority to begin with.

And so to the extent courts want to look to Congress' actions as acquiescence, then a concurrent resolution should be the absolute opposite of acquiescence in those actions.

And so it is a totally plausible and I think the best reading to say that a concurrent resolution would be Congress putting its foot down and saying, no, we have not actually authorized the use of force here, we are being very clear about it, and the courts should not read this as an authorization to use force.

That said, I don't think you can rely on the courts having that reading. And history has shown that the courts are exceedingly reticent to interfere when there is any hint of ambiguity about the President's ability to use force and have even viewed lots of things, even at times a vote to eventually end the conflict, as acquiescence in the conflict until that point.

So my view is that you can't really rely on the courts. What you need to do is, use your own tools to create legislation that has real teeth.

The CHAIRMAN. So since the 1983 Chadha decision Congress has tried to figure out how to bounce back. On war powers, the Senate, led in part by then Senator Joe Biden, sought to address constitutional issues by requiring a joint resolution, while the House kept the original approach, which called for a concurrent resolution.

And for the people who are watching this at home, a concurrent resolution, which is often used to express the view of Congress, does not require the President's signature. The joint resolution, however, is more like a traditional bill.

And exact language must pass each house and must have the President's signature in order to take effect. Otherwise, Congress can override a veto with two-thirds majority of each house.

So to start a war, Congress needs a majority of each house and the President's signature. But Congress needs supermajorities of both houses to stop a war over a President's objection. There is something wrong with that.

So to each witness, is this a good process for questions of war and peace? Is this what you believe the Founders envisioned, the President can go in alone and only supermajorities in Congress can stop him?

This is for all three of you.

Mr. Bellinger.

Mr. BELLINGER. Well, I am reluctant to wade into either House or Senate processes. I will simply say that, particularly when it comes to modern war powers—and I think we really do, we have a living Constitution, but we do have to recognize that the power of Congress to declare war enshrined in the Constitution in the late 1700s has also got to reflect modern military realities where a President may need to act extremely quickly. We all know that.

And you all know better than I do both how difficult it can be to get both houses of Congress to convene, debate, agree on, and authorize a use of force.

So I will say that I think we do need to give the President a good deal of flexibility to use force in certain situations that are going to be short of a significant war, and at the same time we need to

have procedures that will allow both houses of Congress to act quite quickly.

I leave it to the two bodies, but it has always puzzled me why the bodies would have different procedures for voting on war powers.

But my bottom line is that I do think that both houses need to have procedures that will allow them—and, indeed, perhaps force them by self-discipline voted by yourselves—to act quickly on war powers measures.

The CHAIRMAN. Thank you.

Professor Ingber.

Prof. INGBER. So I absolutely agree that this is an untenable situation.

I am not sure I agree entirely with John Bellinger's suggestion of giving significant flexibility to the President to act before those questions reach Congress. I think that there is a risk there for potential escalation into the very kinds of wars that are then extremely difficult to rein in.

So I think there needs to be congressional engagement at the outset. You need to be in a situation where the President is forced to bring the case to you, bring the case not only for why force is necessary in these circumstances, but also for what the end game would look like.

I think that will have a useful effect on both executive branch decisionmaking and deliberation between the branches and transparency, and it will also give the American people an opportunity to understand what we are doing.

I think that is important and I think there are ways to do it. But I agree entirely with Mr. Bellinger that there needs to be expedited procedures for doing so. And one of the ways that I think you can bind yourself to the mast ex-ante would be to create, for example, automatic funding cutoffs until Congress affirmatively authorizes force.

You need to flip the status quo. The way the current scenario is, the status quo is the President will act unless or until Congress exercises sometimes politically infeasible power to rein the President in. And I think you need to flip that scenario so that the status quo is the President can't act unless and until Congress has the opportunity to weigh the evidence before it and authorize force.

The CHAIRMAN. Thank you.

Dr. Bridgeman.

Dr. BRIDGEMAN. I will answer your question in the negative: No, it is certainly not what the Constitution envisioned and it is certainly not tenable.

But I want to just emphasize here that the constitutional design matters. It was this way for a reason, and there are real consequences when it is flipped on its head. It essentially inappropriately shields executive branch deployments of the military from democratic accountability.

That is a real problem. If you need supermajorities of both houses to stop a war, there is not appropriate democratic accountability for uses of our military abroad.

So I think everything that Professor Ingber just said is exactly right. We need those priority procedures to enable Congress to act quickly.

I think that goes a long way towards ensuring that the President's flexibility being hemmed in by a reformed war powers statute doesn't have any detrimental consequences for our national security.

Those priority procedures need to ensure that there can be a vote, there can be debate, although it needs to be a limited time period, and that the process continues so long as there is a simple majority in both Chambers.

That needs to be enshrined and retained in an updated War Powers Resolution.

But we also need that backstop, we need that enforcement mechanism, both to incentivize the President not to get us involved in conflicts that can't be wound down or to get us involved in conflicts that are unnecessary before Congress has had a chance to weigh in; but also to ensure that Congress is brought into the process meaningfully well in advance, as Professor Ingber just said.

I want to emphasize here that the War Powers Resolution now has a consultation requirement. But it is treated as a road bump, nothing more. Consultation is often essentially a staff-level call.

Sometimes the President himself has been involved, as Obama was with Libya in 2011. That didn't do much to assuage the concerns of Members of Congress when what ended up happening in the end looked a lot like finding a loophole through the enforcement mechanism that the War Powers Resolution had put in place.

So consultation is important, but we need those back-end enforcement backstops for that consultation to actually be meaningful.

The CHAIRMAN. Thank you. I appreciate it.

Mr. BELLINGER. Could I come back in on this point?

The CHAIRMAN. Yes. Go ahead, Mr. Bellinger.

Mr. BELLINGER. And forgive me. I wouldn't normally do this in a normal hearing, but the staff tells me that you——

The CHAIRMAN. We are not normal. We are not normal in the Rules Committee.

Okay. Go ahead.

Mr. BELLINGER. You slap me right down, Mr. Chairman, if [inaudible].

I am told by the staff that you really like to try to get the witnesses to sort of focus on what are their disagreements. And I want to say here so you can see it right up front and it will help to frame the hearing, both Professors Bridgeman and Ingber and I are old colleagues, as you could tell. All three of us served in the Legal Adviser's Office at the State Department, an office of which we are all fond.

But let me focus this here. I think in theory what they both say about the way congressional processes and voting of war powers should work, that should be the perfect world. But I just do not think that we are going to see Congress voting on every relatively minor use of force by the President.

It has never worked that way in history under Republican or Democratic Presidents, and it is not going to change that way in

the future. And, in fact, even the Constitution itself says that the Congress' power is to declare war, not to nip the executive's power to use force where necessary.

So while, yes, if Congress would be willing to convene rapidly to authorize every use of force by the military, that is the way it ought to work.

But I think what has happened over time and what I think is really both the constitutional structure and the political reality is that Presidents of both parties—and I think my guess is that President Biden would say this.

I do not say this as somebody who served in a Republican White House, but certainly watching the way President Obama worked, is that Presidents need a good deal of flexibility to use military force for a variety of purposes. But there does reach a point where Congress' authorization is necessary to continue or to start a significant conflict.

And I hope we will come back to it. But this is exactly what the War Powers Resolution, that the National War Powers Commission recommended Congress consider.

Dr. BRIDGEMAN. Can I——

The CHAIRMAN. Thank you. Sure.

Dr. BRIDGEMAN. Just to clarify one point, because I think there might be more agreement than was apparent here.

I don't think anyone is suggesting that the President should have to come to Congress to repel a sudden attack, to rescue our nationals, to evacuate an embassy, to do a hostage rescue, for example. These are the types of things that we see Presidents doing quite often, unfortunately, in the modern world, and those are the things that would be preserved in these proposals.

I think it is the idea of giving the President flexibility for a variety of purposes where we may disagree.

So I think for humanitarian interventions, for stabilization missions, advise and assist missions, it is those kinds of things that should be in Congress' hands.

But I want to make sure we understand that there is common ground here with respect to preserving the President's ability to defend us against attack or to defend our nationals in peril.

The CHAIRMAN. Well, thank you.

Let me just close, then I will yield to the ranking member.

I have gotten the impression that various administrations, both Democratic and Republican administrations, have viewed Congress when it comes to the issues of war as a nuisance, as something to try to get around or to avoid. That is why I think consultation has become something that really isn't meaningful.

But they try to find ways around us, try to find ways to not have to come and have a debate on some of these very, very important issues of life and death.

We have had wars over the time I have been in Congress. People have died in those wars. There is a tremendous cost not only in terms of human life, but in terms of treasure, that goes along with these wars. And the notion that a branch of government can essentially be bypassed is really, really disturbing to me.

Now, so that is the fault on the executive.

There is a fault on the legislative branch, too. We have colleagues on both sides of the aisle who, quite frankly, would rather not deal with these issues, because they could be very politically sensitive issues. And sometimes people prefer to be on the sidelines. If things are going well, we will cheer you on. If things aren't going so well, they say, well, I would have done this differently.

There is a little bit of what I call moral cowardice over the years in the legislative branch of basically ceding our constitutional responsibilities to the executive branch.

It doesn't take a lot to say that Congress should reclaim power ceded to or taken by the President. It doesn't take a lot of courage to say that. The hard part is actually doing it. Right?

And the normal playbook around here says that when my team is in the White House, I won't complain. Well, my team is in the White House right now. I support President Biden. I think he is a good person. I believe that he and his team are trying to make the best choices for the American people.

And still I believe what I believed last year when the other team's guy was in the White House and every year before then, and that is the process for how we wage war and establish peace in this country is broken. It is badly broken.

And so let's not miss this opportunity to change course. Let's focus on where we agree, not just where we don't.

And, again, this is the first, I think, of several hearings on this topic. But I am hopeful that we will come up with a solution that we can bring to the floor and move it forward.

So with that, let me yield to Mr. Cole, the ranking member, for any questions he may have.

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

First of all, again, thank you for holding the hearing. Thank our witnesses. Great set of witnesses. Great discussion. Chairman, great set of questions by you.

And let me just add I couldn't agree more with you that we need to take this rare opportunity. I have been in Congress since January of 2003, and—but we have never had this kind of opening before. I would rather act and not get it quite right than do nothing at all and miss this really unique opportunity to reassert congressional authority.

And I think back over my time in Congress, and I would have opposed President Obama's decision on Libya. I thought it was a mistake at the time, you know, and I thought using NATO when no NATO country had been attacked was a real stretch. And I thought we sent a message to Iran and to North Korea: Don't give up your WMDs. This is what happens to you when you do.

It was a big mistake. On the other hand, I would have been very supportive of President Obama's decision on ISIS in 2013 and 2014. I think he did the right thing. And didn't have an opportunity to really express myself clearly on either occasion. None of us did.

And, you know, that needs to change. I agree very much with your remark, Mr. Chairman, and I am going to flip what Dr. Bridgeman said. She talked about insulating the executive. I think you are exactly right when you talk about insulating Congress. And I think a lot of our Members have wanted to avoid those kinds of

decisions because you are held accountable pretty, you know, pretty quickly.

Going to war in 2003, decision actually made in October of 2002, was pretty popular. It wasn't very popular by 2005 and 2006. And so, you know, I think forcing Congress to put its fingerprints on these kind of decisions is really something that we need to do. And, you know, that is the American people then have the ability to hold us accountable and, through us, hold the executive branch accountable.

Let me ask all three of you this question. It is a very unfair question, one that my staff didn't give me to ask, but you have all been in very sensitive executive branch positions when these kind of discussions were going on. And I know certainly President Obama did send a sort of reformed AUMF up for Congress to consider. It was pretty weak stuff and pretty far after the fact, frankly.

And I remember asking Secretary Mattis in a Defense Appropriations Subcommittee hearing in 2017, did he need a new AUMF? And he said: Yes, we absolutely do need a new AUMF. You know, and of course we never got that request formally from the administration.

So, inside your—the respective administrations you were with, how serious was the consideration ever given to say, "Hey, we have got an AUMF that we are stretching beyond belief; we need to go ask Congress to do something new"?

Anybody seriously put that question to a President, and how did different Presidents respond? Again, I am not asking you to violate any confidence or whatever. I am just curious if this is a debate on one end of Pennsylvania Avenue, is it ever a debate on the other end of Pennsylvania Avenue?

And let me start—I will start in the order we had. Dr. Ingber, let me go with you.

Prof. INGBER. So the way this came up for me historically was in the context of decisions about who could be detained at Guantanamo and the extent to which those individuals actually fell within the AUMF. This has been widely reported that there was a lot of interagency disagreement during those years over what individuals were covered by the AUMF and the extent to which those individuals should be covered by the AUMF.

And, interestingly, in particular in the way this arose in the early years of the Obama administration—and I should say I worked on these issues under both the Bush and the Obama administration, but they really came to a head under the Obama administration because of all of the litigation that was underway—and so the way these legal questions came to a head, you had the Obama administration come in, and, as a career civil servant, I was able to watch all of this sort of happen, this transition. And the individuals come in, and on the first few days in office, the Obama administration made these executive orders about closing Guantanamo and established a task force and this was going to be a reasoned process of decisionmaking about who could be detained and about what the AUMF meant, and who it covered, et cetera.

But the reality of what happened at that time is that all of that decisionmaking got channeled into a litigation-driven process because we were in the midst of active litigation over all the Guanta-

namo detainees, and so the decisions about how to interpret the AUMF during those early years of the Obama administration came about primarily through litigation where all the influences, all the institutional biases are to project a defensive view of executive branch power because you are in defensive litigation before a court. You are in a position where DOJ's litigators are running the process, and they are institutionally set up to defend the President's power to do whatever is before the court; in that case, defend any given individual.

And so all of the institutional biases in that moment are geared toward saying the President has the power to do X, Y, Z, and anything that is before the court in that moment. That is how a lot of decisions end up getting made, particularly when these decisions are made in the course of defensive litigation inside the executive branch.

I don't know that you can look at from the outside and think that every decision that the executive branch makes is the result of a reasoned, deliberative, forward-looking process—we want to have this authority going forward—rather than sometimes a backward-looking process; we are just defending decisions that have already been made.

Mr. COLE. Thank you.

Mr. Bellinger, was there ever any consideration in the Bush years of saying, "Hey, we got it wrong in 2001 or 2002; we need something different" or "we need to look at the War Powers Act," or were you sort of caught up always in, "We have made these decisions, and now we have to defend them"?

Mr. BELLINGER. Well, of course, this was 10 years ago rather than more recently, so we had 8 years of practice under the 2001 AUMF, and it had—by the end of the Bush administration, even then it was getting to be outdated.

I was in the Situation Room and spent hundreds and hundreds of hours, particularly in the second term, debating whether particular terrorist groups were either the same as, affiliated with, associated with, or somehow had ties with the people who had committed the 9/11 attacks.

So, in 2002, 2003, 2004, 2005, it was easier, but, as it got to be 2007 and 2008, it was getting harder. And I—well, literally, we would spend hours debating, well, is this group really the same as the group that Congress gave us the authority to use force on? And then, of course, it just got worse for the next 10 years.

The ISIS example that you gave, I think, is useful both legally and politically. I think Dr. Bridgeman may have been in the White House at the time. The Obama administration actually reached out to me, even though I was out, to see if I would support what they were doing.

I think their preference in 2014 would have been to get a new congressional authorization. Of course, any President would prefer to have authorization. But, as you well know, at the time the President asked, it was July, August of an election year, and I think—you know, I am reluctant to get into politics, but very difficult to pull 535 Members back in August of an election year to vote a new authorization to use military force.

So, ultimately, the Obama administration used the really pretty legally strained argument that ISIS was really the same group that Congress had authorized back in 2001. And that was a stretch, because, in fact, al-Qaida had essentially divorced itself from ISIS.

My sense, again—you all can tell me—was Congress didn't actually disagree as a policy matter with what President Obama wanted to do. Mr. Cole, I think you said you supported that. But it just would have been very difficult to drag Congress back for a vote to vote that new authorization.

So, yes, to answer your question, particularly as these laws have gotten further and further dated, there is a good deal of debate inside the executive branch. That is, I am sure, why Secretary Mattis said to you, "In theory, yes, I would love to have a new AUMF if you will give me the right AUMF."

Mr. COLE. Absolutely.

Dr. Bridgeman, same question.

Dr. BRIDGEMAN. I think it is a really important question, and I just want to give you two quick, concrete examples.

The first—and I was still at the State Department at this time—was when President Obama decided to come to Congress with respect to the possibility of striking Assad in Syria in response to chemical weapons use. And he said he had authority under Article II of the Constitution to take those strikes. I think that that is a stretch.

But he also said that, in the absence of a direct or imminent threat to our security, it is right to take this to Congress. He said that our democracy is stronger when the President acts with the support of Congress, and America acts more effectively abroad when we stand together.

I think that latter part of the statement is absolutely correct, but, in claiming that he had Article II authority before coming to Congress, I think he undermined his case. I think it implied that coming to Congress is discretionary. And I don't think that is the right way to think about it.

So I think it was absolutely right to come to Congress, but doing so with an "I am going to fall back on authority I already have in my back pocket" approach, it makes it harder, I think, to seriously be contemplating that Congress must act. And it kind of keeps the momentum, I think, in the executive branch's court. I think the counter-ISIL campaign is an even stronger example of that.

I agree with what Mr. Bellinger just laid out for you, but I would add to it that I think this other issue that I just flagged with respect to Syria was even more important with respect to the counter-ISIL campaign. Had the President come to Congress and said, "I don't have statutory authorization for this. The 2001 AUMF was meant to respond to the 9/11 attacks; this is not that group. It is not those countries. It is not that threat. It is a different situation. But let me tell you, Mosul has been overrun, atrocities are being committed, and Baghdad is going to fall unless you help us get there," I think Congress would have acted, and I think Congress needed to have that opportunity.

But the executive branch doesn't have that trust that Congress will act, and the executive branch sees Baghdad about to fall. So

that trust needs to be built back up, and it needs to be built back up by Congress being willing to take votes.

And Congress voted in the Yemen context in 2019. Congress voted in the Iran context in 2020. If Congress keeps that up and, most important, if Congress actually engages in war powers and AUMF reform that this hearing is addressing today, I think the executive branch will no longer have that crutch to say, "Well, I have this authority in my back pocket, so, when I am coming to you, it is not because I truly need you to act."

That is the dynamic that needs to change, and I think Congress taking these steps that we are talking about today is going to start changing that dynamic over time.

The CHAIRMAN. You have to unmute, Tom. You have to unmute.

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

Just to add some commentary from the other side of the legislative fence, I remember talking to President Obama during the Syrian red-line incident and making very much the same points you had, that he had laid down a red line without asking any of the rest of us.

And nobody supports the use of chemical weapons, but we didn't intervene in Iran when Saddam Hussein used chemical weapons in 1990 against the Kurds. You know, we just did not choose to do that. And there is a big difference between what we were looking at in ISIS a couple of years later and what we were looking at in Syria.

But the mere fact that it was an after-the-fact consultation with Congress, you know, "I am going to do this. I just want your fingerprints on it, but I can do it whether your fingerprints are on it," you know, just was not a very compelling argument, particularly when I suspect almost everybody's phones were ringing off the wall: Don't do this. We are already deeply involved in the Middle East. Why do we want to go into Syria, where we don't—we might have a humanitarian interests, but, frankly, I don't think we had very compelling strategic interests in that particular outcome.

But let me just quickly get to one other point. And I know there is a lot of interest in this. I don't want to take too much time. The chairman has been very generous, as always.

All of you put your finger, you know, one way or the other on the key point, which is congressional will. You know, at the end of the day, this doesn't matter. And the chairman suggested this, and he is absolutely right. It is very difficult when it is a President of your own party. And I have seen people flip, you know, in that regard. The chairman, to his credit, by the way, has been very consistent in his concern on this issue, whether there was a Democrat or a Republican in the White House.

I remember on one occasion talking to—when we were engaged in one of these efforts, actually together talking to Speaker Ryan, who called me and said, "You know, I see what you guys are doing, and I am really afraid that, if you continue down this path, we won't have the votes to sustain this particular military operation"—I won't get into all of them—which I supported, quite frankly.

And I said, "Well, if we don't have the votes, maybe we shouldn't do it," you know, even though I would have a different opinion than

probably my friend, Mr. McGovern, in that case would have had, the point is, if you don't have popular consensus and will behind it, it may be the wrong decision, but that is okay. That is how our system works. We don't get every decision right, but we take responsibility or are supposed to take responsibility for the decisions we make.

And, when we are committing men and women to war and committing the country to something that could go on a lot longer and become a lot more difficult, we ought to be willing to step up and do that and then go home and face the voters and make the case as best we can and leave the decision in their hands, where it ultimately belongs.

So what are the things, if any—and you touched on some of these, I think, when you talked about how you would reform the War Powers Act. You know, what are the things you would do to sort of buck up congressional will so that we don't insulate ourselves, so that we do require ourselves to assert the constitutional authority that we do indeed have and so often choose to ignore, particularly when it is politically inconvenient and you happen to have a member of your own party in the White House?

And, again, let me just start—I will start with you, Dr. Bridgeman, and then kind of work through, and that will be my last question, Mr. Chairman.

Dr. BRIDGEMAN. Thank you. It is an important question how to bolster that political will in Congress.

I do think one issue is muscle memory and the fact that you have started to take votes. You are starting to hold these hearings. Your staffs are getting acquainted with these issues in a much more detailed manner. The fact that we haven't visited these issues seriously in 20 years creates a knowledge deficit, and it creates a process deficit.

I think this is—we have seen this with, for example, treaty hearings in the SFRC. It is a Congress-wide issue, and it is not just related to war powers. If no one is around who has actually handled these issues before, it becomes much more difficult to do. So part of it is building up that institutional capacity, and I think this committee is a model for doing that already. I think other committees are starting to do the same.

In addition to building up that capacity, I think there needs to be a clear sounding board with constituents about the real issues. I think you may find you are exactly right that you may not agree on the ultimate decision in every single case. But I think we can look our servicemembers and their families in the eye if we say, "I am talking to you about whether we should be doing this. I am making these hard decisions about whether to send you into harm's way, and so I want to hear from you about that."

I think opening up those kinds of conversations with our constituents is not only what we should be doing for Democratic accountability—it is not only the morally right thing to do. I think it is the politically right thing to do. And it will help Members be able to say, "I have talked to these families. I have talked to these servicemembers that were deployed three times in Afghanistan and two times in Iraq, and I am listening." So I think that will help with the political will as well.

And then from a more legalistic and mechanical perspective, the most important thing is having that funds cutoff in place. There is nothing like a funds cutoff to focus the mind and to force a vote. And, if everyone has to vote, if it is a foregone conclusion that a vote must happen, then it is a matter of building up that political will to bolster yourself in the event that the President comes to you through these other mechanisms I am describing, but you know it is out there, and so you have to take these steps. You can't sit back and, you know, as Chairman McGovern said, you can't hide behind the President.

Those were some of the key things I would highlight. I am sure there are many others. But I would encourage those as initial steps.

Mr. COLE. Dr. Bridgeman, you can go next, and then I will go to you, Mr. Bellinger.

Prof. INGBER. So I agree with Dr. Bridgeman. I think there is a bit of a feedback loop here. If you don't have the——

Mr. COLE. Oh, Dr. Ingber. I am sorry.

Prof. INGBER. Oh, that is all right. That is fine.

I think there is a feedback loop. If you don't have the authority, then you are not expected to exercise responsibility over it, and your constituents don't necessarily hold you accountable to it, and so we need to somehow break that feedback loop so that the opposite is true, that your constituents are expecting this from you, and they are holding you to account for it.

And I think that Dr. Bridgeman is correct, that one way to do so would be for a funding cutoff, which would create that kind of required action.

And I think that this point about institutional expertise is correct. I have seen this happen in the executive branch. I have seen it happen in the courts, where there was an area—where they had not previously had expertise. I remember, just to bring back the Guantanamo cases again, when the court started taking up those cases, there was a sense that this was not their expertise, they didn't know what they were doing, and Congress should have given them rules and even, why do we have to do this?

And, yet, over the first few years, they built up extreme expertise in this area simply by doing it. And I have seen this inside the executive branch as well, and I have total confidence that this would happen in Congress as well.

Mr. COLE. Thank you.

Let me go to you, Dr. Bellinger. And let me just preface my remark or my question with this remark. I agree very much with the point you made earlier that Congress doesn't need to be involved in every decision.

For instance, I would not—I was not critical when President Biden made a decision he needed to make a strike in Iraq recently. That was clearly a one-off kind of thing, a quick response, I think very appropriately done under his authority. I know some of my colleagues, frankly, on both sides of the aisle, would disagree with that. But I see that as kind of routine exercise of executive authority very different than something like the deployment against ISIS in the Middle East and something, you know, that is obviously dif-

ferent than the decision to go into Iraq where you really had—and, to be fair, we did have a congressional vote on that.

But, anyway, your thoughts on how we bolster congressional will to actually use this authority that the Constitution gives us and hold ourselves responsible.

Mr. BELLINGER. So a couple of things.

One, actually, I would start small but realistically this year with something that I really do think could be done. I think that there is will in both Houses to repeal some of these old AUMFs, like the 2002 AUMF. You know, we might as well get rid of the 1991 AUMF as well. But, you know, the 2002 AUMF in particular, you know, should really not have been relied on as the use—as the authority to take a strike against Qasem Soleimani.

And I think, you know, I have heard from Republicans and Democrats that, you know, I think that is something you all really could start with this year and get that done. Then it gets harder.

Going to the other end of the spectrum, with the War Powers Resolution, you know, this will take some time to work one's way through it. I really do urge you all to look closely at the findings and the draft statute from the National War Powers Commission. They did a lot of testimony—Jim Baker, Warren Christopher, Brent Scowcroft, these are very smart people, and they really took into account both the law and the politics of it.

And the draft that they came up with ended these, you know, 60-day cutoffs and had a consultation requirement that they thought was realistic. And then—and you will have to tell me whether you think this works inside the House and the Senate, but required in the case of any significant use of force, the House and the Senate to vote within 30 days authorizing that use of force, so forcing each House to have a vote.

And, if they voted it up, then the use of force was authorized. If they didn't vote it up, then there would be a requirement for—that any Member could put forward to vote it down. Now, that would not end the use of force, but it would put Congress immediately on the record one way or the other. So I thought the National War Powers Commission struck the appropriate balance.

I don't disagree academically with things like a funding cutoff, but I just honestly—I don't think that is going to happen. I think Congress could not come to agree on those, and I think it would be vetoed by a President of either party. Neither a Republican nor a Democratic President is going to vote in favor of a law that says that you can cut off my authority to use force.

So I guess my recommendation to you today is to be realistic about taking back a congressional power. I agree with the things that both you and the chairman have said about what has happened, but I don't think Congress can claw back all the power that has been ceded to Presidents over the last 30 or 40 years.

Mr. COLE. Well, that is a very thoughtful answer, and, to your point, I remember when the majority flipped in 2007, 2006, but effectively 2007. There certainly weren't the votes to defund the effort in Iraq even though power had changed because the President would have vetoed that, and it would have been sustained, and everybody in both Houses knew it. We went to a big exercise, a big debate where everybody spent 5 minutes on the floor saying where

they stood, but effectively there was no ability to end that conflict at that point without Presidential consent.

But, with that, Mr. Chairman, I want to yield back to you. But, again, I want to thank you very much for this hearing. I want to thank our witnesses, and I particularly want to work with you as we go so that we actually do something legislatively, and certainly these smaller steps, I think, are very much within reason. Maybe something more robust as well.

As you said, we have an unusual opening in that we have an administration that actually wants to work with us rather than work against Congress as an institution in doing this and doing it the right way. And shame on us if we miss the opportunity to actually, you know, reclaim our authority when we actually have an administration that wants to help us get that done so we get a better balance than we have had in the last generation.

With that, I yield back to my friend.

The CHAIRMAN. Well, thank you. I thank the gentleman, and I look forward to working with him as we try to figure out how best to move forward here.

At this time, I would ask unanimous consent to add a letter, signed by 20 nonprofit organizations from across the political spectrum, supporting our hearing today and the effort to reform the War Powers Resolution.

The letter says, in part, that the undersigned organizations are calling on Congress to restore the balance of national security powers, including war powers, between the legislative and executive branches of government. We are committed to working with you to build on the momentum created by this hearing and to pursuing the reforms we hope will follow.

And so, without objection, I will put that in the record.

[The information follows:]

March 22, 2021

Rep. Jim McGovern
Chairman
House Rules Committee
370 Cannon House Office Building
Washington, DC 20515

Rep. Tom Cole
Ranking Member
House Rules Committee
2207 Rayburn House Office Building
Washington, DC 20515

Dear Chairman McGovern and Ranking Member Cole:

Thank you for organizing the hearing on *Reforming the War Powers Resolution for the 21st Century*, scheduled for March 23, 2021. We appreciate the committee's commitment to exploring the challenges Congress has faced in implementing the 1973 War Powers Resolution, and how it may be possible for Congress to reassert its authority on matters of war and peace. We believe strongly in the need for the people's representatives to regain their proper Constitutional role on this critical issue.

We appreciate the collegial approach that you and the other members of the committee are taking to this hearing and the underlying issues. It is especially encouraging to witness the members of this committee come together to promote the modernization of the War Powers Resolution in a substantive and bipartisan manner.

Many of us signed a statement of principles (attached) from 20 organizations across a wide spectrum of perspectives, calling on Congress to restore the balance of national security powers, including war powers, between the legislative and executive branches of government. We are committed to working with you to build on the momentum created by this hearing, and to pursuing the reforms we hope will follow.

Sincerely,

Brennan Center for Justice at NYU School of Law
Center for American Progress
Center for Civilians in Conflict
Common Defense
Concerned Veterans for America
Demand Progress
Foreign Policy for America
Friends Committee on National Legislation
International Crisis Group
Niskanen Center
Open Society Policy Center
Project on Government Oversight
Protect Democracy
Public Citizen
Quincy Institute for Responsible Statecraft
R Street Institute
VoteVets
Win Without War

The CHAIRMAN. I am now happy to yield to Mrs. Torres.

Mrs. TORRES. Thank you, Mr. Chairman. I don't want to take, you know, a lot of time. Just a short statement.

I want to associate myself with your comments and the comments of the ranking member. I think they are very appropriate during this time.

And I want to take an opportunity also to thank our esteemed panel that is with us today helping to guide this conversation.

I hate to be the skunk in this party, you know, but I am very concerned as to where the politics of, you know, this Congress is currently. If we cannot even, you know, agree on certifying a national election that had already been certified by, you know, all of our States, I am not sure, you know, where we could be—if there could be an agreement moving forward.

I appreciate the idea of baby steps to get us, you know, back to working together on national security issues. Maybe that is a way to get us, you know, to a, you know, more nonpartisan place. But, you know, from where I stand, weighing in what, you know, I have been experiencing, you know, in this Congress, just this year, I think it is going to be a very, very difficult place, you know, to work on recalling the authority of Congress.

More than anything, I would love to have, you know, a way to be able to be more transparent and accountable to my constituents when they come to me after a loss of, you know, a son or a daughter that has been serving our country abroad. How do I, you know, be more—how can I be more transparent and accountable when we are spending, you know, billions and billions and trillions of dollars in funding, you know, wars that have just gone on, you know, for much too long?

You know, those are some real concerns that I have as a Member of Congress, the inability to be able to share some of that with my constituents.

I am also concerned that many of our staffs do not have the proper certifications to be able to get just basic information on these wars, on these issues moving forward.

So those are just some of my concerns. I want to turn it back over to the chairman. I know that we have spent a lot of time on this already, and I just hope that, you know, we will continue this conversation and that we are mindful of where we are politically, the reality—you know, the dark reality of that as we move forward.

But thank you again for this hearing, and I yield back.

The CHAIRMAN. Thank you.

Dr. Burgess.

Dr. BURGESS. Thank you, Chairman. Thank you to you and Mr. Cole for holding this hearing. I know we have had a number of discussions about this over the years with both parties in power.

Mr. Bellinger, because we have thought through this in the past, and the question always comes up, I mean, as we are now on the—I guess the 20th anniversary of the 2001 authorization, and basically still in effect. Is a sunset on an AUMF a good idea? And, if it is, how do you avoid having that sunset date not just be the—basically the battle plan of your adversaries?

Mr. BELLINGER. Yeah, it is a great question that I have grappled with. And I have to say candidly, Dr. Burgess, that I am—my own

position has moved on this. As a purely executive branch lawyer and a lawyer sort of for the military and the President, I would rather not have a sunset in that, you know, what the President wants to say, I have only got authority for a year or 2 years or 3 years, and, you know, what is going to happen after that?

And what sort of a signal does that send to the other side that, well, we are only in this for a couple of years, or what does that—what does that send to our military that, well, Congress is in only for a penny but not for a pound?

You know, as I said, I was involved in the drafting of the 2001 AUMF. You know, the World Trade Center and the Pentagon were still smoldering at the time it was being drafted. You know, we would not have accepted an AUMF at the time if Congress had said, "Well, we are going to give you a year's worth of authority, and then we will see how it goes."

So that is kind of my general position, but 20 years later now, seeing just how much the 2001 AUMF has been stretched and how difficult it is—and I appreciate the difficult position you all are in—to vote on something that might go on for another 20 years, you know, what is past is prologue, I could come to that compromise and say, look, if the price of a new, revised AUMF is a sunset, you know, let's maybe do it for 3 years or 5 years, then with some sort of expedited procedure, though, that would require Congress to rapidly act on it.

So is a sunset a great idea? You know, no. But I don't do politics the way you all do politics, but I understand that, you know, it is difficult for you to vote on a new AUMF after the last one has gone on for 20 years.

So, if I were in the President's shoes, would I recommend that he agree to a sunset for, you know, 3 to 5 more years on a new AUMF? Yes, I would do that.

Dr. BURGESS. So, you know, it is interesting. On the entire Rules Committee, I guess the—Chairman McGovern and Alcee Hastings were the only two Members of Congress who were here when the two AUMFs that we currently have now were voted on. Mr. Cole and I came in the following year.

So most of us in Congress have never—have never—voted on an AUMF and really have not had to wrestle with what the implications were before casting that vote. And I have felt over the years that it would be useful that, from time to time, we would revisit our commitment. But I also spent some time researching the conclusion of the Vietnam War and the Cooper-Church Amendment and the efforts to suspend funding during the Nixon administration for the Vietnam War.

And, although, obviously, I was not in Congress at that time, when I came to Congress, we had a colleague, Ron Simmons from Connecticut, who had served in Vietnam, and I will never forget his poignant speech that he gave on the House floor when consideration was being made for military cuts. And he described how, as a young soldier in the field in Vietnam, his visceral and continued hatred for the United States Congress for sending him there and then cutting him off.

And you can just imagine that that is multiplied many, many times by the men and women that we have asked to go into harm's

way on our behalf. So it is a lesson I have never forgotten. And, although I do think that Members who have never had to vote on an AUMF should from time to time need to revisit that before it is continued, I also am sensitive to the fact that the down-range folks are really very much the ones we put in harm's way, and they are the ones who are going to be so desperately affected by what might be a perfectly arbitrary or academic funding lapse.

And, Mr. Bellinger, I don't know if you had any thoughts on that.

Mr. BELLINGER. I will simply say I agree with the points that you have made on both sides. I mean—and, as I say, in general, I don't think it sends a good signal to the troops to say, you know, we are only going to extend for 3 more years. On the other hand, the 2001 AUMF has gotten so old and stretched and really doesn't apply so much to modern terrorist groups that, you know, if that is what it takes to get a new 3-year authorization—I think the only thing I would add on and you all have—are better at the procedure than I am—is to guarantee that, if there is a—say, a 3-year sunset or a 5-year sunset, that there would then be a rapid process to look at it again so that there is essentially a safety net.

Dr. BURGESS. Yeah. And I also appreciate the fact you have used the word "flexibility" several times this morning. And I think the term also came up a variety of purposes. When we look at perhaps future activities in the Authorization for Use of Military Force, do you think we are flexible enough to incorporate cyber attacks into those AUMFs?

Mr. BELLINGER. Oh, boy. That is a tough one. You know, certainly against the terrorist groups that committed the 9/11 attacks or people who were associated or affiliated with them, yes. If we—you know, there is authority, which Congress has granted for us to, you know, take down a al-Qaida cyber infrastructure, or modern groups associated with them, but it is not—the 2001 AUMF, while very, very broad—many countries, any kind of use of force, no sunset—it is still tied to the nations, individuals, or groups that committed or are responsible for the 9/11 attack. So it is not general cyber authority.

So I think to have a broader AUMF that gave the President broader authority to use cyber against other targets, that would be very, very difficult to do. That, I would say probably best left inherent to the President's Article II authorities.

Dr. BURGESS. And not as part of Congress then only having oversight after the fact and—

Mr. BELLINGER. Oh, well, certainly a consultation. I am very much in favor of consultation. And, again, back to my recommendation to look at the National War Powers Commission report, which was all about consultation before the fact, during the fact, and afterwards, you know, I do think that, if the executive were to be planning some significant cyber attack, that they ought to be consulting with Congress.

Dr. BURGESS. Yeah. Of course, the big worry is, well, the greatest risk going forward may be a cyber risk, and I don't feel that we are completely prepared to handle that if and when it does occur.

But I thank everyone for being part of this discussion today.

And, Mr. Chairman, Ranking Member Cole, thank you for bringing it up, and I am going to yield back in the interest of time.

The CHAIRMAN. Thank you. I don't know. Was Professor Ingber—were you trying to get our attention, or——

Prof. INGBER. Yes. I just wanted to respond to that.

I really agree with Mr. Bellinger that we need to think about this question of sunsets in terms of not just the power that you are authorizing the President to use right now but also how these statutes could be read 20 years from now.

And so I just wanted to clarify—in particular to Representative Burgess' concerns—that an AUMF sunset is not a sunset for the United States in using force. It is a sunset for the executive branch's use of force before returning to Congress.

There is nothing stopping the President from continuing to engage Congress. There is nothing saying the President should just wait until the end of that 2-year sunset and then go back to Congress and leave a gap in the conflict. This is an incentive for the President to be continuously engaging Congress and to work with Congress. And, if Congress and the President together foresee that that conflict is not going to be over, that is an opportunity for them to engage prior to the end of that sunset.

This is not about the United States' use of force in any particular conflict. It is about who inside the United States is making these decisions and whether or not there is a role for Congress in doing so.

The CHAIRMAN. Dr. Bridgeman?

Dr. BRIDGEMAN. Yeah. Just really briefly, one quick point that I think might be helpful also to keep in mind on this sunset issue is that, with respect to the signal that we are sending to servicemembers, I think one other way to look at it, which is an alternative view, is that, if you have the courage to fight, we have the courage to vote, and we are going to come in behind you and support you. And we are going to show every 2 years, every 3 years, that we believe you should still be there, that we are going to authorize you to be there, and appropriate for you to be there, and provide what you need both when you are deployed and when you come home. So that is the other way that I would think about that.

And, very briefly with respect to cyber, I think it could be helpful to think about it in two different ways. One is, when you are authorizing a use of force, you generally would think about authorizing force against particular enemies but not choosing the means by which you fight those enemies. At least that has been the case since the 1700s when Congress did used to actually say you can only fight this much war.

Now, generally, Congress says you can fight within the law of armed conflict as much as you need, and that can include cyber weapons. That can include whatever means are appropriate that the Commander in Chief feels need to be used, so long as they are within the limits of the law of armed conflict.

The separate question, though, is whether cyber needs to be taken into account in war powers reform, and that is something that I think has been tricky as the executive branch has interpreted hostilities so narrowly in that context that a good range of cyber attacks wouldn't qualify as hostilities.

So something that I encourage you to keep in mind when you are looking at a new definition of hostilities in the war powers reform context is specifying that hostilities can include, you know, intermittent engagements, engagements that are low intensity, and engagements that are using force from remote weapons systems like cyber weapons, or like drones. And I think it is important to keep that at the forefront when you are thinking about the definition of hostilities.

The CHAIRMAN. Thank you very much.

And I want to say for the record, even though Dr. Burgess pointed out that I was, like, one of the few people that was here when the Authorizations for the Use of Military Force were voted on, that does not mean I am the oldest person on this committee.

Dr. BURGESS. No, not meaning to infer that at all, Mr. Chairman.

The CHAIRMAN. Okay. And I just want to say that, you know, I voted for the use of military force in Afghanistan after 9/11. I thought—way back when, I thought it was the appropriate thing to do and to respond—to go after those who were responsible for what happened in New York and at the Pentagon and in Pennsylvania.

But I will tell you, to be very honest with you, I look back—as I look back on that vote now, I am not sure I would do it again because I never thought that that could be twisted and interpreted in so many different ways and, quite frankly, that our mission in Afghanistan could change so dramatically over a period of time without coming back to Congress and getting—and having a debate and having, you know, Congress vote on it.

I voted against the use—Authorization for Use of Military Force in Iraq, in part because, you know, I was afraid where it would lead.

But let me just say this. I do think that it is—that there are cases where the United States can stumble into wars that are mistaken wars, that are the wrong wars, and we need to have a mechanism to be able to correct it if that is the case.

And I agree with Dr. Bridgeman. You know, just because you start a war, it may be the wrong war, but I can't think of anything more offensive in terms of respecting our troops than to keep them in a war that is mistaken. And so, you know, I remember I visited Afghanistan a couple years ago, and I was visiting with some troops from Massachusetts, and I remember a very candid conversation with one of our men who is deployed over there, who said, "Do you people in Congress even know what the hell is going on over here? I mean, when is the last time you debated what our policy is here? I mean, do you know what the reality is here?"

And, you know, it occurred to me that his frustration was the fact that we do very little oversight and debate on a conflict that continues to this day. And a lot of our troops—you listen to our troops. They have some very strong opinions about whether or not we should remain there, or whether we should come home.

But it seems to me, if, you know, they have the courage to go into our Armed Forces and to be deployed in harm's way, we ought to have the courage to be able to debate these issues.

And I go back to—you know, and Mr. Cole alluded to this as well. I mean, part of this problem is the executive branch wanting

to take as much power as it can possibly get, to have as much control over these matters as possible. Part of the problem is us.

You know, the fact that there are people on both sides of the aisle who would like nothing more than to avoid these discussions and these debates and these votes because when you vote, you are held accountable. And so, you know, there is this what I call moral cowardice that exists and has existed for some time where we have tried to dodge these very difficult issues, but hopefully we are moving beyond that.

And, at this point, I want to yield to Mr. Raskin.

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

And thanks to—well, to you and to the ranking member for your excellent leadership in framing this discussion.

And thanks to the witnesses who have done such a great job.

I wanted to go back to something that Professor Ingber started off with when she said that none of us can really answer the question anymore who we are at war with, or whether indeed we are in war at all, who are—you know, whether we are at war and against whom?

And the character of war has clearly changed in a whole bunch of ways. It has changed in terms of the identity of the enemies, and, you know, I think most people would probably answer the question of who are we at war with today with an abstract noun, like we are at war with terror or we are at war with terrorism or we are at war with extremism, or something like that.

And I wonder—let me—just to start off with you, Professor Ingber, like, to what extent is it a problem to think of war as being not against particular foreign governments, hostile governments with whom we are at odds, and instead to think of war as kind of crusades against problems in the world, whether it is, you know, terrorism or evil or extremism or, you know, Islamic fundamentalism or communism or whatever it might be?

Prof. INGBER. I think it is worth going back historically a little bit to what happened in the immediate aftermath after 2001 after the 9/11 attacks. The immediate instincts of the executive branch at that time were to go to Congress to ask for that kind of all-encompassing authority, just the ability to use force against all future threats on which, as you know, looked like a war on terrorism writ large.

But Congress, even in the immediate aftermath of 9/11, had the foresight to refuse that expansive authority to the President and to tie that authority instead to the specific attacks of 9/11, which were so extreme, and to using force against the organizations that had committed those attacks.

So we are not in any legal sense of the term involved in a war on some kind of ideology or a war on terrorism writ large. But, nevertheless, when I say that we can't identify the particular wars that we are involved in, I say that because there is a lot of legal interpretation that goes on to this day to answer those questions.

When I say that even executive branch officials might not necessarily be able to answer that question, it is because they don't necessarily answer that question until they absolutely have to answer that question because they are asked it.

So we might be using force against an entity, but not calling that an armed conflict. We might be using force in a particular state and not consider ourselves to be at war with that state based on the way we have interpreted and the executive branch has interpreted these legal authorities.

But, because we dont have the transparency that comes with having to present the case to Congress and then work this out through consultation with Congress through testimony of executive branch officials through Members of Congress demanding that the executive both make the case for why we need to use force in this particular instance and also make the case for how we are going to get out of this, what we see as the end game, we, the American people, don't have insight into that process. And Members of Congress don't have insight into that process. And even the very executive officials prosecuting these conflicts don't necessarily have to answer that question and so wouldn't necessarily have the answer to that question unless asked to provide it and create it.

Mr. RASKIN. Well, that leads me to Mr. Bellinger, who described in the process several years after the original Authorization for Use of Military Force tried to determine whether this group or that group actually came within the designation, which sounds a little bit like a bureaucratic delegation of the decision whether or not to go to war or be at war against a particular group based on your interpretation or your classification.

There is something to me kind of Orwellian about the idea that, you know, the executive branch or officials within it can just decide this is a group that we are going to be at war against and this one is not based on an interpretation. And I am wondering, Mr. Bellinger, what you think the solution to that problem is in order to have Congress really stay in the driver's seat?

Mr. BELLINGER. So let me answer that. And I do want to just go back to the 2001 period, and I was in the White House in the whole period from February 2001 to September 2001 as we were watching these threats gather in Afghanistan. And, of course, you know, then we had the 9/11 attacks, and there was a whole 9/11 Commission on why didn't President Bush prevent the attacks from happening? Shouldn't he have attacked al-Qaida in Afghanistan at the time?

And, you know, that was one reason why the use of force authority that was sought in 2001, when we really didn't know who had been responsible for the attacks—we didn't know, in the time that we asked Congress for the authorization, whether it was al-Qaida or some other group and whether they were plotting other attacks.

So the country was reeling, and the President asked for as broad authority as possible, not against all terrorists, but against terrorists who were planning attacks against the United States.

And so, to answer your question, Mr. Raskin, as these groups then began to splinter and morph and there became, you know, Al Shabaab and al-Qaida in the Arabian Peninsula and al-Qaida in Somalia. And they were all talking to each other and sharing information with each other.

And, as we saw the groups change—and of course this is what President Obama did 13 years later with respect to ISIS—now, in

that case, I think it was too much of a stretch to say that ISIS really was the same group as al-Qaida, when they weren't.

But, for the years in the Bush administration, as we saw al-Qaida begin to splinter and as they were driven out of Afghanistan into other countries, it was appropriate to determine whether these other groups were, in fact, continuing to plan attacks against the United States.

So let me just end up here with what to do about the 2001 AUMF because I think Congress now has three choices. We can either muddle through where we have been for the last 20 years with this, oh, 20-year—and this is, I think, what you are getting at, Mr. Raskin, is you know, the groups that threaten us today, which undoubtedly are not the same groups that committed the 9/11 attacks 20 years ago.

So do we continue to muddle through and keep stretching this further and further? Do we repeal it altogether, in which case Congress clearly knows that President Biden will use force against terrorists that attack us, so do we simply ask President Biden to rely on his Article II authorities—and that is not good either, or do we revise and replace the 2001 AUMF to authorize President Biden to use force against the groups that threaten us today?

So those are the three choices.

Mr. RASKIN. Okay. And, finally, I have got a question for you, Dr. Bridgeman, which is: You describe a situation where we have legitimate wars that are declared by Congress. We have those that have not been declared but are legitimate defensive actions taken by the President in an emergency type situation. But then, in the real world today, there is a whole spectrum of other kinds of military actions or hostilities that are engaged in and so on. To what extent was that part of the original constitutional design, that third category of things, which are neither unilateral executive action under Article II nor declared wars but just kind of twilight hostilities that are taking place where, you know, where we send—we bomb somebody one day, and we call it a day? You know, we engage with different nations in different ways. I mean, in other words, if we—I guess what I am getting at is, if we license that third category, I don't know that we are really going to be able to deal with this problem.

Dr. BRIDGEMAN. I agree with you. I don't think Congress should license that third category as a blank check. I don't think we should see it just as one simple category. Each threat, and each use of force that is not in response to a threat, is a very specific factual circumstance that needs to be taken on its own terms.

When you look back historically, your question started with the Constitution.

Mr. RASKIN. Yes.

Dr. BRIDGEMAN. There weren't really three categories. There were two categories. There were those immediate and sudden attacks on the United States that the President had to repel and potentially also this ability to rescue U.S. nationals abroad who are in peril.

I think those are considered core. I think those should be uncontroversial. I think the President needs the authority to respond in those two instances. And I think, if you look at the vast

majority of instances—and over half of the war powers reports indicating hostilities that have been filed since its enactment—have been those kinds of things, have been the embassy evacuation, the hostage rescue, the response to a threat.

I think the category that you are talking about, it is actually two different kinds of things. It is the humanitarian operations, the stabilization missions, the advise and assist missions. Those are the things that the Constitution absolutely envisioned Congress would authorize if we were to engage in them, if we were to come to the defense of an ally, for example, when the United States itself was not under threat.

But also the kinds of things that I think you are getting at are these one-off or low-intensity strikes where we are not in full-blown war, where Congress hasn't authorized it, and where the President is using Article II authority, or sometimes stretching an existing AUMF to claim the authority to act. And I think that is where we have to change our overall mind set about whether force is always the appropriate response.

When a group is not directly threatening the United States, when they don't have the ability to launch an attack that would harm the United States or our nationals, I think we need to take a much harder look and say, is the answer to that low-level threat a low-level use of force, or is the answer to that low-level threat that we employ the other tools in our toolbox? [Inaudible] or when necessary in our self-defense, or when Congress decides that, yes, this is in our vital national security interests or, yes, this is something that we need to do with coalition partners because it is imperative to our foreign policy, it is imperative for humanitarian reasons, et cetera.

So I think, in a new AUMF, if there is a new AUMF, I think it should explicitly preclude the use of that authority against groups or countries that are not named in that AUMF, but I think it should go one step further as well. I think it should drop groups that are no longer a threat.

And I think you can do this by requiring, say, every 6 months, that the ODNI along with the Secretaries of Defense and State certify whether a group still poses a threat to the United States, to our nationals, to our vital interests. If it does not, then the group is dropped from the AUMF if that certification can't be made, for example.

So, even if we do want to cover some of these smaller, you know, groups where we may not need to be at war for, you know, a period of time, but we think the President needs the authority to be able to use force in this kind of lower intensity or shorter time period, then those could be covered as long as there is some subsequent mechanism to drop them if they don't actually threaten us.

So I think what we need to do is keep our eye on, is it a threat that is actually, you know, vital to our interests? Is it a threat to the United States? Is it a threat to U.S. persons? If it is not, I think we need to use some of these other tools rather than just letting the President use force in a blank check.

Mr. RASKIN. Okay.

And, finally, do you think that acts of cyber war should be treated in the same way as acts of war or is that a different level?

Dr. BRIDGEMAN. Absolutely should be treated in the same way, yes.

I think the key question isn't what means are used in war. The question is, has there been an attack, or is there an imminent threat of attack on the United States or our nationals? It doesn't matter if that threat is by cyber means or by conventional weapons.

Likewise, in our responses we could be attacked with a cruise missile and choose to respond with a cyber weapon. There need be no symmetry in the means that are used, so long as they are lawful within the law of armed conflict.

So I think we should think about cyber as just another type of weapon. It is a type of weapon that can be used remotely. It is a type of weapon that sometimes its use can be concealed.

But those are things that the military deals with. This actually isn't a new phenomenon. We have had developments in weapon systems over thousands of years.

So we need to think about it in terms of ensuring that the executive branch is taking it into account in the definition of hostilities, as I referenced before.

But I don't think the rules that then apply should be any different. If anything, I think we have seen states come together and say we need to treat cyber weapons like weapons and apply the law of armed conflict when they are used.

Mr. RASKIN. Thank you very much.

Mr. Chairman, I yield back.

The CHAIRMAN. Thank you very much.

Before I yield to Mr. Reschenthaler, I just want to ask unanimous consent to add a letter from our colleague, Representative Barbara Lee, to the record.

[The information follows:]

BARBARA LEE
13TH DISTRICT, CALIFORNIA
DEMOCRATIC STEERING
AND POLICY COMMITTEE
Co-Chair

COMMITTEE ON APPROPRIATIONS
Chair, Subcommittee on
State, Foreign Operations, and Related Agencies
Member, Subcommittee on
Labor, Health and Human Services, Education
and Related Agencies
Member, Subcommittee on
Agriculture, Rural Development
Food and Drug Administration, and Related Agencies

COMMITTEE ON THE BUDGET

Congress of the United States
House of Representatives
Washington, D.C. 20515-0509

REPLY TO OFFICE CHECKED
☐ WASHINGTON OFFICE
2470 Rayburn House Office Building
Washington, D.C. 20515
Phone: (202) 225-2661
Fax: (202) 225-9817

☐ DISTRICT OFFICE
1 Kaiser Plaza, Suite 1010
Oakland, CA 94612
Phone: (510) 763-0370
Fax: (510) 763-6538

website: lee.house.gov

March 23, 2021

Hon. James P. McGovern
Chairman, House Committee on Rules
H-312 The Capitol
Washington, D.C. 20515

Dear Chairman McGovern:

Thank you for your longtime leadership and commitment to restoring the proper Constitutional role of Congress in matters of war and peace. Thank you also for convening this hearing and inviting me to contribute a few words in support of your efforts to advance War Powers Reform.

Congress is past due for a reexamination of our security needs and authorities to determine whether we are directing our efforts and resources in ways that truly make Americans more secure. We have a responsibility to not only reexamine current legal authorities but also the efficacy of the military-first approach of our foreign policy of the last two decades.

The post-9/11 wars have resulted in the deaths of over 800,000 people, including 335,000 civilians, and over 7,000 U.S. service members. They have cost $6.4 trillion in taxpayer funds. Had proper war powers safeguards been in place twenty years ago, it is entirely possible that some of this waste of lives and resources could have been avoided. At the very least, the American people would have had the full debate in Congress that the Constitution promises them.

Congress must take action to realign the legal authorities we need with the threats we face as well as our responsibilities to the U.S. Constitution and the American people. This process should include the repeal of decades-old authorizations for the use of military force, particularly the 2001 and 2002 AUMFs. These measures were both passed nearly 20 years ago and bear little resemblance to the threats we face today. The 2001 AUMF (P.L. 107-40) has been employed by successive presidents to wage war in ways well beyond the scope that Congress initially intended when it was passed on September 14, 2001. Over the past 19 years, three successive presidents have used military force pursuant to the 2001 AUMF in more than seven countries, against a continuously expanding list of targetable adversaries. These presidents have further identified to Congress combat-ready counterterrorism deployments to at least 14 additional countries, indicating that armed combat pursuant to the 2001 AUMF could arise in additional countries as well.

The 2002 AUMF (P.L. 107-243) was drafted more narrowly than the 2001 AUMF. It is not a necessary source of authorization for any current military operations. However, the 2002 AUMF has been stretched to cover past operations Congress never authorized, including the January 2020 killing of Iranian General Qassem Soleimani in Baghdad.

Both of these authorities should be reviewed closely. As a first step, the House should immediately pass H.R. 256, my legislation to repeal the 2002 AUMF. This bill currently has 94 bipartisan cosponsors in the House. The same language was adopted by the House in a bipartisan vote twice during the 116th Congress. Bipartisan Senate legislation led by Senators Kaine and Young would do the same.

Additionally, Congress must work urgently, in consultation with President Biden, to consider how the 2001 AUMF should be addressed. Once this AUMF is repealed, any new authorization for the use of military force should be based on a careful assessment of what authorities are truly necessary to respond to current, active threats, and must include—

1. A sunset clause and timeframe within which Congress should revisit the authority provided in the new authorization for use of military force;
2. A clear and specific expression of defined mission objectives, named opponents (i.e. specified states or organized armed groups), and countries in which the authority applies, as well as provisions to protect against expanding the authority to countries or entities not explicitly named in the authorization;
3. Language making clear that any new legislation to use military force is the sole, superseding statutory source of authority to use force against the state or armed group to which it applies;
4. Regular and specific reporting requirements to increase transparency, promote democratic accountability, ensure compliance with domestic and international law, and allow Congress to fulfill its oversight responsibilities; and
5. An explicit statement that its authorities are limited to "necessary and appropriate" actions and may only be exercised in compliance with the U.S. Constitution and America's other domestic and international legal obligations.

The Constitution entrusts Congress with the primary responsibility to make decisions about matters of war. We must uphold our duty to ensure America's full array of foreign policy tools are used to advance U.S. interests and national security while ensuring that military force is a last resort. I thank you again for your leadership on this issue, and I look forward with anticipation to the outcomes of this hearing and the advancement of war powers reform legislation.

Sincerely,

Barbara Lee

Barbara Lee
Member of Congress

Cc: Ranking Member Tom Cole

The CHAIRMAN. The letter says, in part: "Congress is past due for a reexamination of our security needs and authorities to determine whether we are directing our efforts and resources in ways that truly make Americans more secure. We have a responsibility to not only reexamine current legal authorities, but also the efficacy of the military-first approach of our foreign policy of the last two decades."

Congresswoman Lee continues by calling for passage of H.R. 256, which would repeal the 2002 AUMF and provides a framework for Congress to work with President Biden to address the 2001 AUMF.

And as my colleagues know, for decades, for the last two decades, Congresswoman Lee has been the moral center of issues of war and peace. And for too long she has been there alone. And I am proud to stand with her today. And I thank her for her unyielding commitment to peace.

And I now yield to Mr. Reschenthaler.

Mr. RESCHENTHALER. Thank you, Mr. Chairman. I appreciate it. And I appreciate you and Ranking Member Cole holding this hearing and all the witnesses for their testimony. And, as always, I would associate my remarks with Ranking Member Cole's.

With that said, I am coming to this discussion from a unique vantage point with some of my colleagues. I actually deployed to Baghdad in 2009 and prosecuted terrorists in the Central Criminal Court of Iraq. So it was interesting. I was prosecuting terrorists with an interpreter in the Iraqi court system.

And one of my big takeaways was that we are naive if we think that terrorists cannot extend influence to the United States and our allies in Europe and elsewhere, particularly Israel.

So with that said, Mr. Bellinger, I just wanted to look at what you said about the 2001 AUMF. So to paraphrase you—and I am going to yield to you in just a second—you said really we have three options.

You said, one, we can just muddle through it and just use what we have and try to just get by the best we could. Two, we could just revise it, and then we could fall back to Article II powers and see where that falls. I think then option three was we could repeal and replace it.

If we did take that third option, what could we put in the replacement that would make sure that we can rapidly act to address terrorist threats, whether it be al-Qaida, ISIS, or another iteration of an Islamic extremist outfit?

And with that, I will yield to you, Mr. Bellinger.

Mr. BELLINGER. Well, fantastic question, and those are the devil is in the details. And I have now testified, I think, three times before Senator Tim Kaine in the Senate side and he has been working very hard to come up with a bipartisan authorization that is neither too broad nor too narrow. And I know there has been work in the House as well, but I simply mention Senator Kaine because he has worked so hard at it.

And the difficulty, to touch on a couple of things that we have already covered, is if you just try to name particular groups, then—I see you nodding your head before I have even said it—they will just change their names, or they morph and become a new group.

We have looked at that. And I think at one point there were bills that said, okay, authorization can now be used against al-Qaida, period, or let's come up with seven different groups.

But things change, groups move, new groups come along that want to use force against the United States. So it is very difficult.

In theory, we want to give the President the authority to use force against the terrorist groups that are actually planning attacks against the United States. And so how do you—you could try to name them geographically. You could try to name them by saying, "or a group associated, affiliated, or that is sharing the resources with." We really worked hard to try to come up with those definitions.

And my belief is that it really, if we want to have Congress on record as authorizing the use of force against the groups that are threatening us every day, that there needs to be a new authorization or, otherwise, we are just leaving it up to the President under his Article II powers.

And I think, as Chairman McGovern said, then if we like what he did we will support it, and if we don't like what he did, then we will criticize it later.

But we need to try to come up—and it really is very difficult to come up with those details, because if it is too narrow and it is just these three groups, then they will just change. If you do these two countries, they will move to other countries.

But I get it. If you try to describe the threat too broadly, I think this is what Mr. Raskin was getting at, to try to authorize the use of force against all terrorists who threaten the United States anywhere, that is obviously too broad.

Mr. RESCHENTHALER. Right. I mean, it is absolutely maddening.

Mr. Bellinger, just to shift gears, we are also, as a military, we are involved in stabilization, peacekeeping efforts. I think for a period of the time when I was in Navy, we said: The U.S. Navy, a force for good. Right? So it is just beyond killing people and breaking things, as bluntly as some people describe the military.

So with our peacekeeping stabilization missions around the world, what can we do to frame future AUMFs? Or do you even think we need future AUMFs for these kind of missions? Do you have any thoughts on this particular facet of the military?

Mr. BELLINGER. So let me first, one, thank you for your service. I learned so much from my time in the White House, the State Department, from all the military services that I worked with.

I actually come from an Army family, but the Navy bore a lot of the brunt on the difficult legal issues. I certainly learned a lot about the laws of war from the Army, Navy, and Air Force JAG.

So thank you for your personal service and the service of all of those who I worked with.

So this actually does get to something that I would like to discuss. As I think Mr. Cole said earlier, agreeing with me, and I will go back to agreeing with him, I do think the President does have and needs broader authority under Article II than just to act to either respond to an imminent threat, repel an imminent threat, or rescue people.

Presidents have historically, just as you said, really without that much disagreement, engaged in humanitarian missions, engaged in

rescue missions for other nationals, of other countries. So President Bush 41 authorized the use of force in a humanitarian crisis in Somalia; President Clinton in Haiti.

I think the President as Chief Executive and Commander in Chief has authority to deploy the Armed Forces in that way, in the national interest. Congress has historically not wanted to vote on each one of those missions. I don't think they should.

I mean, just to give one example, a hypothetical, let's assume a group of British tourists are caught up on a Caribbean island or somewhere in Africa and are threatened by terrorists. That doesn't fall within the narrow category of things that my colleagues have said are only inherent in the President's power. I don't think Congress, though, is going to want to get together to have to pass an authorization to use force to authorize the President to engage in that mission.

So, bottom line, I certainly get that Congress has a very definite role in authorizing the upper end of war powers, significant war powers. But I also see that the President of either party has a pretty broad authority to use force in the national interest, as long as it is not getting us into a significant war.

Mr. RESCHENTHALER. Along the same lines, do you feel the same way about covert actions? For example, some of these covert actions could clearly lead to larger engagements, but we have to take them, and there have been numerous examples of that.

Do you want to just briefly touch upon your thoughts on covert actions?

Mr. BELLINGER. Well, of course, intelligence covert actions are governed by separate statutory authorities that are reported to the Intelligence Committees. And I think you are probably referring to sort of military special activities actions.

And, in general, I believe those are going to be reported under the War Powers Resolution in a classified briefing, if it is, in fact, troops that are deployed with the significant likelihood that they are going to get into hostilities.

And you, therefore, put your finger on, frankly, one of the problems in the War Powers Resolution is the 48-hour reporting requirement for troops into hostilities.

Now, we are seeing more recently Presidents relying more and more on classified reports.

Mr. RESCHENTHALER. Thanks.

And, Chairman McGovern, if you would let me go way philosophical just for one second, I promise I will wrap it at this. This question will be for all witnesses.

There was some talk and there was some information from the Cato Institute about when you are dealing with terrorists to basically go back to the days where the Brits would almost go after people that were engaging in crimes on the high seas. For example, you would issue a letter of marque.

And I know Dr. Ron Paul very early on in the war was saying that we should just issue letters of marque against individual terrorists or terrorist cells. I am not saying I agree with that. I am just saying it for thought.

Have you given any thought of going back to, I hate to say a letter of marque style, because it is so dated, but something like that

where you actually do an incredibly narrow resolution at a particular group or even a set of individuals?

Again, super hypothetical, but since we are just dealing with this and seeing how narrow we can get this, I wanted to see if the witnesses had any thoughts.

Mr. Bellinger, I will start with you.

And if the other witnesses want to jump in, I will yield to you.

But, Mr. Bellinger, I will yield.

Mr. BELLINGER. I guess I will be very brief and let my colleagues speak, to just say certainly intelligence agencies have certain specific authorities that are reported to the different Intelligence Committees.

The 9/11 Commission, for example, looked at—and this became declassified at the time—the specific authorities that had been given to the intelligence agencies in the Clinton administration to use force against specific al-Qaida members, including bin Laden, by name. That was prior to 2001. I don't know what they might be doing now. But there can be specific intelligence authorities.

Militarily, I think that would be difficult. I mean, certainly, as you probably know better than I, because you have served more recently than I, I am sure that there are specific military orders that allow the use of force against specific terror suspects. Those are just specific standing orders.

I don't think we would want to ask Congress, though, to get into the business of authorizing use of force against specific individuals.

Mr. RESCHENTHALER. And just to be clear, I am not advocating for this necessarily. I am just putting it out there for the discussion.

Dr. Bridgeman, did you want to—I will yield to you.

Dr. BRIDGEMAN. Yeah, I can just pick up on that. And I also want to start by thanking you for your service. I know that is a difficult job that you were doing.

So I think the final point that Mr. Bellinger made I would absolutely agree with.

But if you want to kind of stay philosophical for a minute, I do think the more specific you can be about individual groups, the better. And that is something that we have been talking about, is trying to say terrorism writ large is the enemy, of course, is untenable. It gets us into the situation that we are in today when interpretations of statutory authority get that broad.

But also just to kind of pick up on something you were mentioning before about stabilization operations and other kinds of things the Navy does. The Navy is everywhere. We need the Navy to be in a lot of places.

But I think we need to keep two different categories in mind. There are the things that the Navy does that are not uses of force and where we don't expect them to use force. There are freedom of navigation operations. Or operations where we need to send a ship off the coast of West Africa to deal with the Ebola crisis.

There are all kinds of things that Congress doesn't need to authorize through an authorization of use of force that don't implicate the war powers but, nevertheless, we rely on our military to do, and in particular the Navy.

And that is something that I think we can hive off from this discussion in a certain sense because there will remain that authority, even if we tighten up what we are doing on the war powers side.

So when we kind of cross into the war powers side of what we are doing that implicates using force, there is where I think the real question is—and the harder question is—about when we think Congress needs to authorize it versus when the President should have the authority to go it alone.

And I do think that the vision articulated that the President can use force when U.S. nationals and U.S. territory aren't under threat, I do personally think that is too broad.

I think there is a reasonable discussion to be had here, though. And I think the question for those who think it needs to be broader than just protecting the United States, protecting U.S. nationals is, how would you articulate the limiting principle then? Because I think that is what we have lost.

Right now we are saying, we see these lawyers, to go back to the beginning of this hearing, we all see lawyers saying it has just got to be in the national interest. And other than that, it has got to just not be a full-out ground invasion where we have substantial risk of casualties on our side as well.

That is the only limit right now, and it is not a limit really when you think about it, right?

So if we are going to go any broader than threats to our national security, to our territory, to our nationals, we have to think about what those limiting principles are going to be in advance.

So I don't think it is enough to just say we need more authority. I think we need to think about what that actually means in practice, what it looks like, and what the limits would be.

Mr. RESCHENTHALER. Thank you, Dr. Bridgeman.

And, Dr. Ingber, yes, I will yield to you. Thanks.

Prof. INGBER. Yes, thank you so much. I want to reiterate Dr. Bridgeman's thanks for your service. I also would love to talk to you about it sometime, because it sounds like you were doing really fascinating work.

I just wanted to respond to some of the things that you pointed out, because I think that—and in Mr. Bellinger's response—sometimes we talk about these decisions as if they are happening overnight in the executive branch, that there really is no time for Congress to engage.

And yet what we have seen, for those of us who have been working on these issues inside the executive branch, who have historically done so, we see that these issues, these questions about designating, for example, a new group as falling within a current authorization to use military force, happen gradually over time, that is they are the result of endless meetings, frankly, and endless memoranda and endless running into a SCIF to look at the latest white paper.

I think in the American public's imagination these are things that happen instantaneously. But when we are truly dealing with that kind of an instantaneous threat, the President does have—I think we all agree that the President does have some Article II authority to repel such a sudden, instantaneous threat.

What we are talking about when we talk about designating new groups under the AUMF is something that is the result of a slow, deliberative process that is happening inside the executive branch. And we are just suggesting here that it happen instead between the branches, in consultation with Congress.

Mr. RESCHENTHALER. Thank you, Dr. Ingber. I appreciate it.

And I sincerely just want to thank all the witnesses for answering the questions in this discussion. As a former Navy JAG, of course, I could sit here and geek out with you all day.

But for the sake of time, Mr. Chairman, I will yield back.

And, Mr. Chairman, I referenced an article and letters of marque and also a Cato Institute letter. So I will get those to you. And if you are okay with it, I would ask for unanimous consent to enter both of those articles into the record.

The CHAIRMAN. Without objection.

[The information follows:]

RECONSIDERING THE LETTER OF MARQUE: UTILIZING PRIVATE SECURITY PROVIDERS AGAINST PIRACY

Theodore T. Richard

Major Theodore Richard is an Air Force Judge Advocate and is currently serving as trial attorney in the Air Force Commercial Litigation Division in Washington, D.C. *This article was submitted in partial satisfaction of the requirements for the degree of Master of Laws in Government Procurement at The George Washington University Law School. The author thanks Professor Steven L. Schooner for his insight and guidance. The views expressed in this article are those of the author and do not reflect the official policy or position of the U.S. Air Force, the Department of Defense, or the U.S. Government.*

I. INTRODUCTION

A private vessel is fitted out and commissioned by the highest governmental authorities to hunt down pirates and recover their treasure. This venture is undertaken with full knowledge of great pirate exploits, especially the prodigious wealth they accumulated by capturing ships. Eleven months into its operations, however, the anti-pirate expedition fails to capture any prey. Its personnel, including former pirates and those desperate for profit, abandon any premise of legitimacy. First, they threaten a wealthy convoy but are driven off by a private armed escort. The marauding vessel subsequently happens upon a small merchant ship, which it attacks and captures. The merchant's crew is tortured to elicit the location of shipboard valuables, its provisions seized, and its commander taken. Reports of depredations continue for months. Eventually the rouge marauder's captain is arrested and tried for piracy.

These are not recent events, nor are they fictional. They are historical facts from the close of the seventeenth century involving the *Adventure Galley*, a ship captained by William Kidd. In 1696, prior to becoming an infamous pirate, Captain Kidd received a privateer commission from England's King William III to bring "Pyrates, Free Booters and Sea Rovers to Justice."[1] Kidd set off on his voyage with a crew described as "men of desperate fortunes and necessitous of getting vast treasure."[2] This was a foreboding sign of things to come, especially since Kidd and his crew only received compensation for prizes captured.[3] Kidd failed to find the objects of his commission; within a few months he murdered one of his own crewmembers and the *Adventure Galley* began attacking innocent trading vessels.[4] "As a pirate[,] Kidd proved himself much more successful than as a piratecatcher."[5] Captain Kidd was ultimately captured, tried, executed, and hung in chains over the River Thames.[6]

1. DANIEL DEFOE, A GENERAL HISTORY OF THE PYRATES 441 (Manuel Schonhorn ed., Dover Books 1999) (1724) (originally published as *A General History of the Robberies and Murder of the Most Notorious Pyrates*). This edition attributes authorship of *A General History of the Pyrates* to Daniel Defoe. The author originally listed in the 1724 edition was Captain Charles Johnson, believed to be a pseudonym for Defoe, who deliberately concealed the authorship of most of his works. Manuel Schonhorn, *Introduction*, *in* DEFOE, *supra*, at xi, xxii–xxiii. *But see* Arne Bialuschewski, *Daniel Defoe, Nathaniel Mist, and the General History of the Pyrates*, in PAPERS OF THE BIBLIOGRAPHICAL SOCIETY OF AMERICA 21, 22 (2004) (arguing the author of *A General History* was Nathaniel Mist, a former sailor, journalist, and publisher); ANGUS KONSTAM, PIRACY: THE COMPLETE HISTORY 109 (2008) (mentioning several possible authors).

2. DAVID CORDINGLY, UNDER THE BLACK FLAG: THE ROMANCE AND THE REALITY OF LIFE AMONG THE PIRATES 182 (1995).

3. *See id.* at 181.

4. *See id.* at 181–84.

5. PHILIP GOSSE, THE HISTORY OF PIRACY 182 (Dover 2007) (1932).

6. *See* CORDINGLY, *supra* note 2, at 186–89, 225. Although the *Adventure Galley* and its crew were definitely involved in piracy, Captain Kidd maintained his innocence. *Id.* at 189 (quoting Kidd as stating, "For my part, I am the innocentest person of them all."). Historians have subsequently questioned the degree of Kidd's culpability. *Id.* at 180 ("Kidd was a victim of circumstance, but he was also the victim of deficits in his character."); RICHARD ZACKS, THE PIRATE

Yet, despite Captain Kidd's precedent, private vessels remained viable tools for piracy suppression.

More recently criminal attacks on private shipping by Somali pirates have renewed concerns about maritime security. Once again private ventures are part of the response to the upsurge in piracy. Private security providers have played a significant role in Somalia's maritime security efforts over the last decade[7] and their efforts have increased notably within the last two years. For example in 2008 the private security firm Blackwater Worldwide[8] announced it would offer piracy protection services off the Somali coast.[9] U.S. Navy and Somali officials praised this news, with the latter expressing hopes for private security assistance in combating illegal fishing and toxic waste dumping.[10] Some shipping companies have recently started hiring armed protections; the armed private security team that thwarted a November 2009 Somali pirate attack on the Maersk *Alabama*, the same ship that had been famously seized by pirates earlier in the year, provides a compelling example.[11] Private security efforts, however, are not necessarily limited to defensive escorts during transits through dangerous waters. Another firm suggested a more aggressive role: HollowPoint Protective Services, a Mississippi-based company, offered maritime anti-piracy services,[12] including negotiated and physical retrieval of ships and crew members from pirates.[13]

To take advantage of the private sector, Representative Ron Paul (R-Tex.) called on Congress to "issue letters of marque and reprisal, deputizing private organizations to act within the law to disable and capture those engaged

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HUNTER 6 (2002) ("Kidd tried to tightrope his way between piracy and respectability."). *But see generally* ROBERT C. RITCHIE, CAPTAIN KIDD AND THE WAR AGAINST THE PIRATES (1986) (treating Kidd as a guilty pirate).

7. Stig Jarle Hansen, *Private Security & Local Politics in Somalia*, 35 REV. AFR. POL. ECON. 585, 585–86 (2008).

8. Blackwater Worldwide subsequently changed its name to Xe Services LLC. Associated Press, *Blackwater Changes Its Name to Xe*, N.Y. TIMES, Feb. 14, 2009, at A10.

9. Katharine Houreld, *AP Impact: Security Firms Join Somalia Piracy Fight*, USA TODAY, Oct. 26, 2008, http://www.usatoday.com/news/topstories/2008-10-26-2583935117_x.htm; David Isenberg, *Dogs of War: Yaargh, Here Be Contractors*, CATO INST., Oct. 24, 2008, http://www.cato.org/pub_display.php?pub_id=9748. As of May 14, 2009, Blackwater has not started any anti-piracy operations. Bill Sizemore, *Sailors Claim They Were Harassed on Anti-Piracy Ship*, VIRGINIAN-PILOT, May 14, 2009, at A8.

10. Houreld, *supra* note 9.

11. Sarah Childress, *Armed U.S. Ship Repels Attack by Somali Pirates*, WALL ST. J., Nov. 19, 2009, at A12; John Miller, *Loaded: Freighters Ready to Shoot Across Pirate Bow*, WALL ST. J., Jan. 5, 2010, at A18. In November 2009 with the aid of an armed security team, the *Alabama* fended off suspected pirates in a skiff using small-arms fire, long-range acoustical devices painful to the human ear, and evasive maneuvers. Childress, *supra*; Alan Cowell, *Pirates Attack Maersk Alabama Again*, N.Y. TIMES, Nov. 18, 2009, http://www.nytimes.com/2009/11/19/world/africa/19pirates.html. While none onboard the *Alabama* were injured, reports of pirate casualties vary from one injured, Childress, *supra*, to four killed and two injured, Cowell, *supra*.

12. *See* HollowPoint Protective Services, Maritime, http://www.hollowpointprotection.com/Maritime.php (last visited Feb. 23, 2010).

13. Houreld, *supra* note 9. Interestingly HollowPoint does not provide armed guards for ships. Miller, *supra* note 11, at A18.

in piracy."[14] This idea is textually grounded in the U.S. Constitution, which expressly invests Congress with authority to define piracies on the high seas and to issue letters of marque.[15] Representative Paul is motivated by a desire to both reduce costs and avoid increasing the size of the U.S. Navy ("Navy"), which he perceives as unable to suppress piracy without being "nearly omnipresent on the seas."[16]

The central question raised by Representative Paul's proposal is whether, from an economic, national security, or public policy perspective, governments should take advantage of these private sector capabilities. Governments frequently lack the resources or political will to provide security, training, and technical security equipment necessary for dealing with modern threats, creating opportunities for the private sector.[17] Other perceived benefits gained by hiring contractors include cost savings, especially once active piracy suppression is no longer needed.[18] The private sector's flexibility, adaptability, and lack of bureaucracy are also appealing.[19] Supplementing maritime capabilities

14. Ron Paul, *Responses to Piracy*, CAMPAIGN FOR LIBERTY, Apr. 21, 2009, http://www.campaignforliberty.com/article.php?view=58. Congressman Paul considered the issuances of letters of marque a "second line of defense" against the pirates and advocated allowing private shipping companies to arm their crews as the primary response to piracy. *Id.* Rep. Paul previously advocated issuing letters of marque to private companies and individuals to capture Osama bin Laden and his fellow terrorists. *Congressman Ron Paul Proposes "Marque and Reprisal" Bill Giving President Tool Against Osama bin Laden*, U.S. NEWSWIRE, Oct. 11, 2001, *available on* LexisNexis and Westlaw. Rep. Paul's anti-interventionalist foreign policy views have been generally criticized as "isolationist." Jonah Goldberg, *The Tradition of Ron Paul: Defeated in the Cold War, It Is Back in This Current War*, NAT'L REV., Dec. 17, 2007, at 18, 20; Katharine Q. Seelye, *A Scrappy Fighter, with a Debating Style Honed in and out of Politics*, N.Y. TIMES, Sept. 23, 2008, at A25 (quoting Senator John McCain's (R-AZ) criticism during the 2008 Republican presidential primary debates). A former presidential candidate for the Libertarian Party and later for the Republican Party, Rep. Paul rejects being labeled as an "isolationist" despite advocating U.S. withdrawal from Iraq, the United Nations, the International Monetary Fund, and the World Bank. *This Week: On the Trail; Ron Paul* (ABC News broadcast July 8, 2007) (transcript available on LexisNexis).

15. U.S. CONST. art. I, § 8, cls. 10, 11. Although the power to issue letters of marque rests solely with Congress, Congress has traditionally delegated the power to the U.S. Department of State or to customs officials within the Department of the Treasury during conflicts. DONALD A. PETRIE, THE PRIZE GAME 9–10 (1999).

16. Paul, *supra* note 14. Rep. Paul does not want a larger military, believing that American armed forces exist only to provide for the U.S. national defense, not for global security or peacekeeping missions. Ron Paul, *Congressional Action Weakens National Defense*, TEX. STRAIGHT TALK (Rep. Ron Paul, Wash, D.C.), Apr. 6, 1998, *available at* http://www.ronpaullibrary.org/document.php?id=40.

17. Carolin Liss, *The Privatisation of Maritime Security—Maritime Security in Southeast Asia: Between a Rock and a Hard Place?* 13 (Asia Res. Ctr., Working Paper No. 141), *available at* http://wwwarc.murdoch.edu.au/workingpapers.html.

18. In Iraq, for example, the costs of using Blackwater's services were comparable to those for the U.S. Army; cost savings would not be realized until peacetime when the contractor would no longer be needed. CONG. BUDGET OFFICE, CONTRACTORS' SUPPORT OF U.S. OPERATIONS IN IRAQ 17 (2008).

19. Claude Berube, *Blackwaters for the Blue Waters: The Promise of Private Naval Companies*, 51 ORBIS 601, 611 (2007); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1189 (1999); David A. Wallace, *The Future Use of Corporate Warriors with the U.S. Armed Forces: Legal, Policy, and Practical Considerations and Concerns*, 51 DEF. ACQUISITION REV. J. 123, 129 (2009).

with contractors allows policymakers to avoid "tough political choices" like increasing the size of the Navy.[20] Similarly some nations, like Taiwan, are more inclined to provide funding rather than actually mustering or deploying forces.[21] In Somalia, where the governments are relatively weak, properly utilized and responsible security contractors can help build and strengthen governmental authority.[22]

Just how would a national government engage the private sector's maritime security providers? Under one possible scenario armed security contractors can be hired to defend private vessels at the ship owner's expense.[23] Alternatively private individuals could be authorized to hunt down pirates in exchange for government bounties.[24] Yet another option involves governments directly employing security contractors in a coast guard or police-type role.

No matter how private security is addressed, additional controls are needed. Security companies have faced significant criticism after recent experiences in Iraq and Afghanistan, principally stemming from inadequate government regulation and accountability.[25] This lack of regulation and accountability

20. Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined Outsourced Government*, 16 STAN. L. & POL'Y REV. 549, 553 (2005) (quoting P.W. Singer, *The Contract the Military Needs to Break*, WASH. POST, Sept. 12, 2004, at B3).

21. Jian Chen, *Foreign Assistance "More Plausible" to Combat Somali Pirates: MOFA*, TAIWAN NEWS, Jan. 14, 2009, http://www.etaiwannews.com/etn/news_content.php?id=838250&lang=eng_news. Taiwan's Foreign Minister described providing foreign assistance as more plausible than dispatching naval vessels. *Id.*

22. Hansen, *supra* note 7, at 585. Employed improperly, security firms can also be destabilizing. P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 191–200, 204–05 (2003); *see also infra* Part VII.F.

23. The U.S. Coast Guard currently requires and reviews security plans for all U.S.-flagged ships operating in high-risk areas, but leaves it up to the carriers to decide whether vessels should be armed. Childress, *supra* note 11. *See generally* Rajesh Joshi, *Why the Time Has Come to Arm Crews*, LLOYD'S LIST, Mar. 27, 2009, at 5, *available at* http://www.lloydslist.com/ll/epaper/ll/contents.htm?issueNo=59891. Seemingly encouraging this option, the National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 3506, 123 Stat. 2190, 2720–21 (2009), requires the Secretaries of Defense and State to report on actions taken by their Departments "to . . . eliminate or reduce restrictions . . . on the carriage of arms and use of armed security teams on United States-flagged commercial vessels for the purpose of self defense in areas that are designated as being at high risk for piracy."

24. Brooke A. Bornick, Comment, *Bounty Hunters and Pirates: Filling in the Gaps of the 1982 U.N. Convention on the Law of the Sea*, 17 FLA. J. INT'L L. 259, 260–61 (2005). *But see* Gary Sturgess, *Privateering and Letters of Marque*, J. INT'L PEACE OPERATIONS, July–Aug. 2009, at 37, 38 (objecting to reinstating letters of marque based on concerns with the prize system). The bounty concept is reminiscent of the old prize system, where vessels captured in wartime were taken to specialized courts that adjudicated the facts surrounding the capture. The proceeds, if any, were then distributed according to established rules. PETRIE, *supra* note 15, at 1, 3.

25. For a discussion on the need for regulations over governmental security contractors, see, for example, Winston P. Nagan & Craig Hammer, *The Rise of Outsourcing in Modern Warfare: Sovereign Power, Private Military Actors, and the Constitutive Process*, 60 ME. L. REV. 429, 431 (2008); P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 524 (2004); Jeffrey S. Thurnher, *Drowning in Blackwater: How Weak Accountability over Private Security Contractors Significantly Undermines Counterinsurgency*

leads to immunity, which, in egregious cases, results in impunity for human rights violations.[26] Any use of private actors in anti-piracy operations must involve safeguards against abuse.

Letters of marque can provide such safeguards by commissioning the recipient as a government agent for specific purposes. The benefits inherent to the private sector remain while the government controls, licenses, and regulates the private sector's use of force at sea.

This article advocates a revival of the letter of marque to empower the private sector to assist governments in dealing with modern piracy.[27] Letters of marque can be used (1) by nations to license their private ships to carry arms for self-defense; (2) by nations to authorize anti-piracy operations by private parties; or (3) by littoral governments, like that in Somalia, to deputize private parties to enforce security and the rule of law in territorial waters.

This article first examines the Somali pirate problem, describing the continuing menace of piracy despite increasing international naval patrols. It also establishes links between piracy and an overall failure of the rule of law, specifically discussing how the piracy epidemic grew out of illegal fishing and waste dumping in Somali waters.

The second section of this article explores the development and different uses of letters of marque and privateers. Letters of marque were originally "self-help" authorizations to redress injuries caused by foreigners abroad; they then developed into mechanisms for commissioning private vessels as seaborne government agents. Most famously these ships, as privateers, attacked enemy commerce in wartime. Although wartime privateering was abolished in the nineteenth century, letters of marque had other purposes. Historically, these letters granted pirate-hunting licenses to private vessels. In their most limited form, letters of marque simply enabled private vessels to carry defensive weapons. In the modern era, letters of marque could still give private parties the authority to act as government agents in suppressing piracy. Since the United States currently authorizes letters of marque for anti-piracy operations, no new domestic legislation is required for their revival.

The third section of the article returns to the modern era, laying out the current legal framework relating to piracy and jurisdiction. Piracy is a crime of universal jurisdiction; any country may arrest, detain, and prosecute pirates.

The fourth section covers the successes and failures of Somalia's decade-long experience with maritime security contractors. Failures have been far

Efforts, ARMY LAW., July 2008, at 64, 65–66. For a discussion on the need for regulations over private sector security contractors, see, for example, Sklansky, *supra* note 19, at 1191; Liss, *supra* note 17, at 20.

26. *Private Security Companies Lack Oversight and Regulation—UN Working Group*, UN NEWS CTR., Mar. 10, 2008, http://www.un.org/apps/news/story.asp?NewsID=25924&Cr=human&Cr1=rights.

27. This article is not calling for a revival of the prize system, but only of the commissioning and regulatory components of letters of marque.

more numerous than successes, but lessons can be gleaned from both: contractors must have the capability to perform and must respect international law.

The fifth section of the article discusses the use of maritime contractors outside Somalia. Their services have subdued illegal fishing, one of the root causes of Somali piracy.

Finally this article addresses the challenges of contracting for private security, asserting that letters of marque can mitigate risks. Letters of marque are more than contracts: they commission recipients as government agents and contain enforceable rules. Maritime contractors violating those rules lose their government status and may be prosecuted for piracy, depending on the circumstances of any violations.

This article ultimately concludes that governments should give serious consideration to reutilizing letters of marque. The market will always demand private security because of government's limited security capabilities. Rather than turning a blind eye to the potentially dangerous operations of private security firms, governments can effectively manage and control their operations without inventing a new legal scheme. Letters of marque can provide authorization, regulation, and accountability in the maritime environment.

II. THE PROBLEM: SOMALI PIRACY

Piracy thrives in coastal regions where people are drawn towards criminality by desperate circumstances combined with an absence of law-enforcement authorities.[28] It follows that the world's piracy-prone areas are in South East Asia, including the Indian subcontinent; Africa; and the Gulf of Aden.[29]

28. MARTIN N. MURPHY, SMALL BOATS, WEAK STATES, DIRTY MONEY: PIRACY & MARITIME TERRORISM IN THE MODERN WORLD 30–32 (2008). Murphy explains that in addition to geography and a permissive political environment, piracy also requires cultural acceptability and the opportunity for reward in order to flourish. Martin N. Murphy, *Suppression of Piracy and Maritime Terrorism—A Suitable Role for a Navy?* NAVAL WAR C. REV., Summer 2007, at 23, 25.

29. ICC Commercial Crime Services, Piracy Prone Areas and Warnings, http://www.icc-ccs.org/index.php?option=com_content&view=article&id=70&Itemid=58 (last visited Feb. 23, 2010). A multilayered regional approach to coordinate maritime security and law enforcement reduced piracy in the Straits of Malacca in recent years. James Kraska & Brian Wilson, *Piracy, Policy, and Law*, U.S. NAVAL INST. PROC., Dec. 2008, http://www.usni.org/magazines/proceedings/archive/story.asp?STORY_ID=1697; Catherine Zara Raymond, *Piracy and Armed Robbery in the Malacca Strait—A Problem Solved?* NAVAL WAR C. REV., Summer 2009, at 31, 32; Yann-huei Song, *Security in the Strait of Malacca and the Regional Maritime Security Initiative: Responses to the US Proposal*, *in* GLOBAL LEGAL CHALLENGES: COMMAND OF THE COMMONS, STRATEGIC COMMUNICATION AND NATURAL DISASTERS 97, 139 (Michael D. Carsten ed. 2007) (Vol. 83, U.S. Naval War C. Int'l L. Stud.). Piracy off the Horn of Africa is different than in the Straits of Malacca, especially with regard to the regions' governmental, economic, and security capabilities. James Kraska, *Fresh Thinking for an Old Problem, Report of the Naval War College Workshop on Countering Maritime Piracy*, NAVAL WAR C. REV., Autumn 2009, at 141, 147.

Nowhere is the piracy situation more dire then in the Gulf of Aden and off the Horn of Africa, with 111 piratical attacks, 815 hostages taken, 4 crewmembers killed, 14 crewmembers missing, 2 crewmembers injured, and 42 vessels successfully hijacked in 2008.[30] Despite an international naval presence throughout 2009, Somali pirates increased their geographic range while carrying out 217 attacks, taking 867 hostages, injuring 10 crewmembers, killing 4, with 1 crewmember missing, and successfully hijacking 47 vessels.[31] "Pirates are now more desperate to hijack ships."[32]

The Somali pirates are sophisticated and heavily armed. They use the most current technological equipment such as satellite phones and GPS navigation systems.[33] They have well-placed informants in London, Dubai, and Yemen who gather details on targeted vessels, including potential victim layout, route, and cargo.[34] In at least one case, the pirates had enough advanced information to rehearse their assault.[35] The pirates' weapons include rocket-propelled grenades, antitank rocket launchers, Kalashnikov assault rifles, and Tokarev

30. *See* INT'L MAR. BUREAU, INT'L CHAMBER OF COMMERCE, PIRACY AND ARMED ROBBERY AGAINST SHIPS REPORT 5–6, 14, 22 (2008) [hereinafter 2008 IMB PIRACY REPORT]. The International Maritime Bureau's (IMB) piracy statistics include both piracy and armed robbery at sea. *Id.* at 3; see *infra* Part IV for a discussion of piracy definitions. Hijacking occurs when a person unlawfully and intentionally "seizes or exercises control over a ship by force or threat thereof or any other form of intimidation". International Maritime Organization (IMO), Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation art. 3, Mar. 10, 1988, 27 I.L.M. 672 [hereinafter Rome Convention]. The Rome Convention does not name this crime as "hijacking" per se, but the agreement was adopted in response to the hijacking of the *Achille Lauro* in 1985. Peter Lehr, *Maritime Terrorism: Locations, Actors, and Capabilities*, *in* LLOYD'S MIU HANDBOOK OF MARITIME SECURITY 55, 67 (Rupert Herbert-Burns, Sam Bateman & Peter Lehr eds., 2009).

31. ICC-INT'L MAR. BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS REPORT 21 (2010) [hereinafter 2009 IMB PIRACY REPORT]. Despite a formidable naval armada, the international response to the pirates has been a "dismal failure" according to Professor Eugene Kontorovich. Eugene Kontorovich, "A Guantánamo on the Sea": The Difficulties of Prosecuting Pirates and Terrorists 3–4, 12 (Mar. 30, 2009) (unpublished manuscript, on file with the CALIFORNIA LAW REVIEW), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1371122. The deployment of large numbers of warships from distant states is probably not sustainable, and it is not clear that the vast area around Somalia can realistically be patrolled at all, even by a large multinational force. Kraska, *supra* note 29, at 149.

32. 2009 IMB PIRACY REPORT, *supra* note 31, at 21. According to a United Nations report, "[A]s a result of the military presence in the region, pirates have employed more daring operational tactics, operating further seawards, towards the Seychelles, and using more sophisticated weaponry." The Secretary-General, *Report of the Secretary-General on the Situation in Somalia*, ¶ 56, U.N. Doc. S/2009/373 (July 20, 2009).

33. U.N. Sec. Council [UNSC], Comm. Established Pursuant to Resolution 751 (1992) Concerning Somalia, *Report of the Monitoring Group on Somalia Pursuant to Security Council Resolution 1811*, ¶ 138, U.N. Doc. S/2008/769 (Dec. 10, 2008) (*prepared by* Matt Bryden et al.) [hereinafter *2008 UNSC Report*]; Giles Tremlett, *This Is London—The Capital of Somali Pirates' Secret Intelligence Operation*, GUARDIAN.CO.UK, May 11, 2009, http://www.guardian.co.uk/world/2009/may/11/somalia-pirates-network.

34. Tremlett, *supra* note 33.

35. *Id.*

pistols.[36] They approach targets with high-powered speedboats, sometimes launched from a mother ship.[37]

Once the pirates capture a vessel they treat the ship, its cargo, and crew as hostages, holding everything and everyone for ransom.[38] Somali pirates took in between $30 and $150 million in ransom payments in 2008,[39] then kicked off 2009 by obtaining $3.2 million in ransom for the *Faina*, a Ukrainian ship carrying tanks, grenade launchers, antiaircraft guns, and ammunition.[40] Due to its sensitive cargo, the *Faina* ransom netted slightly more than the reported average ransom payment, estimated to range between $1 and $3 million.[41] By the end of May 2009, the pirates had taken in nearly $80 million in ransoms, laundered through organized criminal syndicates in Dubai and other Persian Gulf states.[42]

Somali pirates are also linked to other criminal activity, including weapons trafficking between Yemen and Somalia.[43] The pirates use the same boats for human trafficking, "mov[ing] refugees and economic migrants from Somalia to Yemen, bringing arms and ammunition on the return journey."[44] The smuggled weapons are not only for pirates, but are often destined for armed opposition groups in Somalia and Ethiopia.[45]

The pirate scourge originated in the failure of the rule of law and international institutions to prevent exploitation of Somali waters. These sophis-

36. *2008 UNSC Report*, *supra* note 33, ¶ 138. The Secretary-General of the United Nations reports a steady flow of weapons into Somalia despite an arms embargo. The Secretary-General, *Report of the Secretary-General on the Situation in Somalia*, Annex ¶ 8, U.N. Doc. S/2008/178 (Mar. 14, 2008). Most of the arms, ammunition, and military supplies in Somalia originate as commercial imports from Yemen. *2008 UNSC Report*, *supra* note 33, at 6. Weapons used in Somalia "originate in or are routed through Djibouti, Eritrea, Ethiopia, the United Arab Emirates, and Yemen." UNSC, Comm. Established Pursuant to Resolution 751 (1992) Concerning Somalia, *Report of the Panel of Experts on Somalia Pursuant to Security Council Resolution 1474 (2003)*, ¶ 3, U.N. Doc. S/2003/1035 (Nov. 4, 2003) (*prepared by* Johan Peleman et al.) [hereinafter *2003 UNSC Report*].

37. *2008 UNSC Report*, *supra* note 33, ¶ 137.

38. *Q&A: Somali Piracy*, BBC NEWS, Jan. 9, 2009, http://news.bbc.co.uk/2/hi/africa/7734985.stm.

39. *Id.*; Antonio Maria Costa, *Piracy Must Be Defeated in Courts, Ports and Banks, Not Just at Sea*, LLOYD'S LIST, Feb. 5, 2009, http://www.lloydslist.com/ll/news/piracy-must-be-defeated-in-courts-ports-and-banks-not-just-at-sea/1233756351265.htm. Costa is the executive director of the United Nations Office on Drugs and Crime.

40. Jeffrey Gettleman & Mohammed Ibrahim, *Somali Pirates Get Ransom and Leave Arms Freighter*, N.Y. TIMES, Feb. 5, 2009, http://www.nytimes.com/2009/02/06/world/africa/06pirates.html?_r=1.

41. Mary Harper, *Chasing the Somali Piracy Money Trail*, BBC NEWS, May 24, 2009, http://news.bbc.co.uk/2/hi/africa/8061535.stm#top.

42. *Id.* The *Economist* reports the Somali pirates collected $100 million in ransom payments during 2009, with the average payment rising from $1 million per vessel in 2008 to $2 million in 2009. *Somalia's Pirates: A Long War of the Waters*, ECONOMIST, Jan. 7, 2010, http://www.economist.com/world/middleeast-africa/displaystory.cfm?story_id=15214052.

43. *2008 UNSC Report*, *supra* note 33, ¶ 143. Somali pirates may be controlled by crime syndicates, including foreigners outside Somalia. 2009 IMB PIRACY REPORT, *supra* note 31, at 44.

44. *2008 UNSC Report*, *supra* note 33, ¶ 143.

45. *Id.* ¶ 144.

ticated and aggressive pirate operations are thought to have morphed out of a self-help police or military function into piracy earlier this decade. Somali fisherman started out trying to deter illegal dumping and fishing and graduated from attacking vessels to seizing them for ransom, with the Hawiye clan, based around Haradere in central Somalia, emerging as the dominant group of pirates in 2004.[46] When the short-lived Union of Islamic Courts government took over the Haradere area in 2006, they suppressed local piracy, so the Darod clan, with strongholds around the east coast of Somalia and in the semi-autonomous Puntland region[47] on the Gulf of Aden, took over the piracy role.[48] By 2008 a United Nations report described the pirates as "loosely organized and poorly trained," with a fluid membership.[49] The report described two significant overlapping networks: one in Puntland, mainly consisting of the Majerteen clan, and another in central Somalia, mainly consisting of the Habar Gidir clan.[50]

Puntland's current president, Abdirahman Mohamed Farole, has made fighting piracy a priority.[51] During a meeting with an international delegation in February 2009, President Farole explained that military operations against the pirates would not be sufficient to end the piracy problem.[52] Instead he "strongly suggested that the world must first address the root causes of piracy, including illegal overfishing and toxic waste dumping."[53]

46. Gary E. Weir, *Fish, Family, and Profit—Piracy and the Horn of Africa*, NAVAL WAR C. REV., Summer 2009, at 15, 18–20; Robert Wright, *Piracy Brings Rich Booty to Somalia*, FIN. TIMES, Mar. 2, 2009, http://www.ft.com/cms/s/0/0c99d484-0751-11de-9294-000077b07658.html; *see also Counter-Piracy Operations in the U.S. Central Command Area of Operations: Hearing Before the H. Armed Services Comm.*, 111th Cong. 7 (2009) (statement of Vice Admiral William E. Gortney, U.S. Navy Commander, U.S. Naval Forces Central Command) ("With a government powerless to stop illegal fishing and dumping in the waters off Somalia, local Somali fisherman began taking it upon themselves to deal with the problem by capturing what they perceived as illegal fisherman."). Somalia was known as a "pirate coast" among sailing circles by 1999. KLAUS HYMPENDAHL, PIRATES ABOARD! 226 (Martin Sokolinsky trans., 2003). Somali piracy, however, had not yet reached epidemic levels garnering world attention.

47. Puntland is a self-declared autonomous state consisting of the Somali regions of Bari, Nugaal, and northern Mudug. While it has been self-governing since 1998, it does not seek independence. CIA, CIA—The World Factbook—Somalia, https://www.cia.gov/library/publications/the-world-factbook/geos/so.html (last visited Feb. 11, 2010) [hereinafter CIA World Factbook].

48. Wright, *supra* note 46.

49. *2008 UNSC Report*, *supra* note 33, ¶ 29.

50. *Id.*

51. The Secretary-General, *Report of the Secretary-General Pursuant to Security Council Resolution 1846*, ¶ 7, U.N. Doc. S/2009/146 (Mar. 16, 2009) [hereinafter *2009 Secretary-General Report*]. On January 1, 2010, Puntland authorities reported apprehending nine pirates with a hijacked vessel. Mohammed Omar Hussein, *Somalia: Puntland Authority Apprehends 9 Pirates with Hijacked Vessel*, SOMALIWEYN.ORG, Jan. 1, 2010, http://www.somaliweyn.org/pages/news/Dec_09/30Dec6.htm.

52. *Somalia: International Community Welcomes Change in Puntland*, GARROWE ONLINE, Feb. 18, 2009, http://www.garoweonline.com/artman2/publish/Somalia_27/Somalia_International_community_welcomes_change_in_Puntland_printer.shtm.

53. *Id.*

The current president of the Somali Transitional Federal Government ("TFG"), Sheikh Sharif Sheikh Ahmed, also made anti-piracy a priority.[54] He emphasized the need to build military forces in general, as well as marine forces specifically, as a required step in being able to deal with piracy issues.[55] The TFG's capability of dealing with any of Somalia's problems is, however, questionable at best as it continues to face resistance from extremists.[56] As one analyst explained, "Presidents and prime ministers tend not to last very long in Somalia mainly because they have virtually no support base. The country is ruled for the most part by a combination of Islamist groups, notably the Islamic courts and the al-Shabaab, a militant youth group, and by competing clans."[57]

To be sure, illegal fishing by foreign vessels is a significant concern for Somali leaders: a United Nations Secretary General report lamented the "pillage of Somali Indian Ocean and Red Sea waters by literally hundreds of vessels from a variety of nationalities" and expressed concerns of overfishing and depletion of fish stocks.[58] In 2005 some of the intruding vessels attacked local Somali fishermen and destroyed their boats and equipment.[59] It should be no surprise that another United Nations report described the Somali fishery situation as resembling "naval warfare": "Fishing boats are typically mounted with heavy anti-aircraft cannons and many of the crews are armed."[60] This analogy has become even more appropriate in recent years, with reports of international naval vessels firing on local fisherman and protecting their own vessels illegally fishing in Somali waters.[61] Illegal fishing represents a loss of much-needed revenue for the TFG and the regional authorities in Puntland and Somaliland.

Somali piracy and its underlying causes are a global problem. Although Somali piracy only affects one percent of worldwide shipping, over 33,000 vessels annually transit the Gulf of Aden.[62] Not only does freeing captured ships involve burdensome direct costs, e.g., negotiations, ransom delivery, and

54. Peter Clottey, *Former Somali Ministers to Hand Over Power Officially to New Ministers*, VOA NEWS.COM, Mar. 2, 2009, http://www.voanews.com/english/Africa/2009-03-02-voa2.cfm.

55. *Id.*

56. CIA World Factbook, *supra* note 47.

57. David Smith, *A Land of Despair*, MAIL & GUARDIAN ONLINE, Mar. 2, 2009, http://www.mg.co.za/article/2009-03-02-a-land-of-despair.

58. The Secretary-General, *Report of the Secretary-General on the Situation in Somalia*, ¶ 63, U.N. Doc. S/2005/392 (June 16, 2005) [hereinafter *2005 Secretary-General Report*]. The overfishing of Somalia's unprotected, ungoverned waters is a classic "tragedy of the commons," where a resource open to all is overexploited and exhausted. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243–48 (1968), *available at* http://dieoff.org/page95.htm.

59. *2005 Secretary-General Report*, *supra* note 58, ¶ 63.

60. *2003 UNSC Report*, *supra* note 36, ¶ 144.

61. *SOMALIA: Getting Tough on Foreign Vessels to Save Local Fishermen*, IRIN, Apr. 2, 2009, http://www.irinnews.org/Report.aspx?ReportId=83755. IRIN is the humanitarian news and analysis service of the United Nations Office for the Coordination of Humanitarian Affairs.

62. Gortney, *supra* note 46, at 8.

ransom payment, but piracy also raises costs for the entire industry through increased insurance premiums, crew payments, delays, and diversions.[63] A human toll is exacted upon crewmembers captured, injured, and attacked; piracy contributes to an "acute shortage of seafarers today."[64] Humanitarian assistance to Somalia has been reduced in half because of the threat of shipping disruption from piracy.[65] The region suffers due to the pirates' trafficking in people and weapons. Most troubling, however, is the example set by these nefarious actors; the Somali pirates' exploits have contributed to a rise of piracy elsewhere in the world, especially in Nigeria and South America.[66]

III. LETTERS OF MARQUE

Somali pirates may be relatively new to the world stage, but pirates are not a new problem: "P[iracy], like murder, is one of the earliest of recorded human activities."[67] Nor are letters of marque a novel solution, as privately owned and operated vessels have been granted letters of marque to conduct anti-piracy operations for centuries. Such vessels were once popularly known as "privateers."

Letters of marque, a governmental authorization for private individuals to take the law into their own hands, have several purposes. Letters of marque are popularly perceived as governmental authorizations for private citizens to capture enemy property during wartime.[68] That use, however, is prohibited under international law. Other uses remain viable.[69] These include commissioning private individuals to conduct anti-piracy operations and licenses for defensive weaponry and actions at sea.

A. *Letters of Marque and Privateering During Wartime*

The most well-known purpose of letters of marque was to create wartime privateers. The letters were "[a]n authorization formerly granted in time of

63. John Knott, *Somalia, the Gulf of Aden, and Piracy: An Overview, and Recent Developments*, MONDAQ BUS. BRIEFING, Apr. 15, 2009, http://www.mondaq.com/article.asp?articleid=92048. "Insurance premiums covering pirate attacks have risen by 100 [percent] since attacks on ships in Africa surged." Carolyn Bandel, *Somali Pirate Attacks Boost Shipping Insurance Rates*, BLOOMBERG.COM, June 25, 2009, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aUoRbhJ0NVvw#.

64. Knott, *supra* note 63.

65. The Secretary-General, *Report of the Secretary-General on the Situation in Somalia*, ¶ 22, U.N. Doc. S/2007/658 (Nov. 7, 2007) [hereinafter *2007 Secretary-General Report*].

66. *2008 UNSC Report*, *supra* note 33, ¶ 130.

67. GOSSE, *supra* note 5, at 1.

68. Consider the title subject of Patrick O'Brian's 1988 fictional work *The Letter of Marque*. Privateers and privateering frequently appear in O'Brian's popular Aubrey/Maturn novels. The movie adaptation of these stories has a plot centering on efforts to capture a French privateer. MASTER AND COMMANDER: THE FAR SIDE OF THE WORLD (20th Century Fox et al. 2003).

69. Theodore M. Cooperstein, *Letters of Marque and Reprisal: The Constitutional Law and Practice of Privateering*, 40 J. MAR. L. & COM. 221, 252 (2009) (noting letters of marque may still

war by a government to the owner of a private vessel to capture enemy vessels and goods on the high seas."[70] Letters of marque and privateering commissions, however, have separate origins.

King Henry III of England first issued privateering commissions, in the form of licenses, in 1243, well before the Royal Navy came into existence.[71] In 1242 Henry III simply ordered all his subjects' vessels in the Cinque Ports to attack the French at sea.[72] Consequently the sailors in these ports behaved like pirates, plundering both foreign and domestic vessels.[73] Privateering licenses were subsequently granted to specific individuals to seize the king's enemies in return for splitting the proceeds between the privateers and the crown.[74]

Letters of marque were first used in England over fifty years later to allow the bearer to take the law into his own hands.[75] As Blackstone explained, the sovereign granted letters of marque, under the law of nations, to a subject who had been oppressed and injured by the subject of another state when that state failed to bring justice.[76] The letter of marque then authorized the recipient "to seise [sic] the bodies or goods of the subjects of the offending state, until satisfaction be made, wherever they happen to be found."[77] Thus, by holding a letter of marque, a person had the right to "attach and seise [sic] the property of the aggressor nation, without hazard of being condemned as a robber or pirate."[78] This use of letters of marque

have utility "[a]s a means to authorize private actors to seek international justice and use force in a public cause").

70. BLACK'S LAW DICTIONARY 904 (6th ed. 1990). As will be discussed, letters of marque had different purposes over time. Although the quoted definition is correct, it is not comprehensive. The editors of *Black's Law Dictionary* subsequently replaced the definition with an alternative one, reflecting an earlier understanding of the term. The definition currently reads, "A license authorizing a private citizen to engage in reprisals against citizens or vessels of another nation." BLACK'S LAW DICTIONARY 910 (9th ed. 2009).

71. Francis R. Stark, *The Abolition of Privateering and the Declaration of Paris*, *in* STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW 221, 270–71 (Faculty of Political Sci. of Columbia Univ. eds., Columbia Univ. 1897). The term "privateering" did not come into use until the seventeenth century. KENNETH R. ANDREWS, ELIZABETHAN PRIVATEERING 5 (1964).

72. Stark, *supra* note 71, at 271. The Cinque Ports are the coastal towns of Hastings, Romney, Hythe, Dover, and Sandwich. *Id.* at 270–71.

73. *Id.* at 271.

74. *Id.*

75. *Id.* at 272. The first known British letter of marque was granted in 1295 to Bernard D'Ongressil, who suffered damages at the hands of Portuguese sailors while in port at Lagos. *Id.* Unable to obtain redress in Portugal, D'Ongresil sought "license of marking the men and subjects of the kingdom of Portugal" until he was compensated. *Id.* Sir John of Brittany, lieutenant of Gascony, initially granted D'Ongressil and his heirs a five-year authorization to "mark, retain and appropriate" Portuguese people and goods until satisfaction was achieved. *Id.* The king confirmed this authorization in October 1295, including a provision that any surplus over the claim for damages should be accounted for to the king. *Id.*

76. 2 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 258 (1803).

77. *Id.* at 258–59.

78. *Id.* at 259.

was frequent in the early fourteenth century,[79] and continued through to the sixteenth century.[80]

Originally privateering commissions and letters of marque were "absolutely and essentially distinct."[81]

> The privateer was used only in time of war; the letter of mark [sic] was of no value to any one except in time of peace, which in theory it did not break. The avowed object of the privateer was "gain," half of which . . . must be paid to the king; there was no limit to the amount of booty which it might acquire. The object of the letter of mark was compensation, more than which it had no right to take, and the surplus beyond which, if any, had to be accounted for; as for the king, he received nothing at all. Privateers were to "annoy the king's enemies." The letter of mark was to redress a purely private wrong. The king, in granting the privateer's license, exercised a belligerent right; in issuing the letter of mark he conferred a sort of property grant . . . .[82]

Despite these original differences, wartime privateering licenses were described as "letters of marque," "letters of marque and reprisal," and sometimes "letters of reprisal" by the sixteenth and seventeenth centuries.[83] Additionally armed merchant vessels and their authorizations were regularly referred to as "letters of marque."[84]

Adding to the etymological confusion, "marque or reprisal" also referred to limited warfare via commissioned private vessels.[85] Sir Matthew Hale explained that the 1664 war between the English and the Dutch began with issuing letters of marque or reprisal:

> We may observe in the wars we have had with foreign countries, that they have been of two kinds, *viz.* special and general: special kinds of war are that, which we usually call *marque* or reprisal, and these again are of two kinds, 1. Particular, granted to some particular persons upon particular occasions to right themselves . . . .

79. Stark, *supra* note 71, at 275.

80. DAVID J. STARKEY, BRITISH PRIVATEERING ENTERPRISE IN THE EIGHTEENTH CENTURY 20 (1990).

81. Stark, *supra* note 71, at 273.

82. *Id.* at 274.

83. STARKEY, *supra* note 80, at 20–21.

84. *Id.* at 21; *see also* GEORGE COGGESHALL, HISTORY OF THE AMERICAN PRIVATEERS AND LETTERS-OF-MARQUE vi (3d ed. 1861) (stating that Coggeshall commanded two "Letters-of-Marque" during the War of 1812).

85. *See* Jules Lobel, *War and Responsibility: A Symposium on Congress, the President, and the Authority to Initiate Hostilities: "Little Wars" and the Constitution*, 50 U. MIAMI L. REV. 61, 67–68 (1995); J. Gregory Sidak, *The Quasi War Cases—and Their Relevance to Whether "Letters of Marque and Reprisal" Constrain Presidential War Powers*, 28 HARV. J.L. & PUB. POL'Y 465, 468–75 (2005); Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61, 84 n. 131 (2007); William Young, Note, *A Check on Faint-Hearted Presidents: Letters of Marque and Reprisal*, 66 WASH. & LEE L. REV. 895, 900–01 (2009). But *see* C. Kevin Marshall, Comment, *Putting Privateers in Their Place: The Applicability of the Marque and Reprisal Clause to Undeclared Wars*, 64 U. CHI. L. REV. 953, 977 (1997) (criticizing the interpretation adopted by Lobel, *supra*, of letters of marque as limited warfare through private ships).

> 2. General *marque* or reprisal, which tho it hath the effect of a war, yet it is not a regular war . . . .[86]

By the eighteenth century, the distinctions between letters of marque and privateer commissions, if any, were purely technical.[87] In 1739 King George II of England issued instructions to "Commanders of Merchant Ships and Vessells [sic] as may have Letters of Marque or Commissions for Private Men of War" without further distinction.[88] The Continental Congress similarly issued blanket instructions to commanders of "Private Ships or Vessels of War which shall have Commissions or Letters of Marque and Reprisal" in 1776.[89]

Eventually letters of marque became synonymous with wartime privateer commissions. The U.S. Constitution made no distinction between the two, enumerating the power to grant "Letters of marque and reprisal" without separately addressing privateer commissions.[90] According to U.S. Supreme Court Justice Joseph Story, who wrote several opinions on admiralty law, letters of marque and reprisal were the commissions granted to private persons and ships to make captures, usually during wartime.[91] Subsequently "[s]ome writers distinguished letters of marque on the one hand from letters of marque and reprisal on the other, based on whether they were issued during times of war (marque) or times of peace (marque and reprisal)."[92]

The *Oxford English Dictionary* explains that the term "privateer" designated "[a]n armed vessel owned and officered by private persons, and holding a commission from the government, called 'letters of marque', authorizing the owners to use it against a hostile nation, and especially in the capture of enemy merchant shipping."[93] Indeed, the "essential feature of privateering is commerce destroying."[94]

Importantly, privateers were privately financed:

> Merchants underwrote the venture and were guaranteed between one-third and one-half of the returns; captain and crew shared the remainder. As a risk specula-

86. 1 Matthew Hale, Historia Placitorum Coronæ: The History of the Pleas of the Crown 161 (Thomas Dogherty ed., 1800) (1736).

87. Starkey, *supra* note 80, at 21.

88. Instructions of George II to Captains of Privateers (Nov. 30, 1739), *in* John Franklin Jameson, Privateering and Piracy in the Colonial Period 347 (1923).

89. Edgar Stanton Maclay, A History of American Privateers 132–33 (Sampson Low, Marston & Co. 1900) (1899) (reprinting the instructions of the U.S. Congress to privateers signed into law on April 3, 1776).

90. U.S. Const. art. I, § 8, cl. 11.

91. Joseph Story, A Familiar Exposition of the Constitution of the United States: Containing a Brief Commentary on Every Clause, Explaining the True Nature, Reasons, and Objects Thereof 121 (Harper & Brothers 1865) (1847).

92. Wuerth, *supra* note 85, at 84–86, 91; *see* 2 Henry Wagner Halleck, Halleck's International Law or Rules Regulating the Intercourse of States in Peace and War 108–09 (Sherston Baker ed., Kegan Paul, Trench, Trubner & Co. 1893) (1861).

93. 2 Oxford English Dictionary 1389 (compact ed. 1971).

94. Maclay, *supra* note 89, at xxiii.

> tion, based upon hopes of seizing enemy merchant shipping, the crews were commonly enlisted on a "No Prize, No Pay" basis. The merchants gambled their ship and its outfit, and the seamen gave their time and risked their lives. Quite often these speculations paid fine dividends.[95]

While the Government claimed a portion of the money realized from the sales of the captured ships and cargo,[96] it did not spend appropriated funds in advance.[97]

European governments used privateers extensively for hundreds of years. Privateering was the principal form of maritime warfare by the English against Spain at the end of the sixteenth century.[98] The difference between privateering and semi-official expeditions in that era was whether they were totally financed and directed by private interests or whether the queen's interests predominated.[99] For example, Queen Elizabeth of England provided approximately one-third of Sir Francis Drake's costs; in return, Drake acted as her admiral and his expeditions against the Spanish had a strategic purpose beyond prize hunting.[100] Queen Elizabeth also invested in expeditions that remained completely in private hands.[101]

The popularity of British privateering remained intact well past the Elizabethan era. Not only did privateers operate without financially burdening nations struggling to build and maintain naval forces, but they captured enemy commerce and thereby boosted national wealth while simultaneously depriving the enemy of resources.[102] In the seventeenth century Sir Henry Morgan plundered Spanish possessions in the Americas under commission from the governor of Jamaica, then an English territory.[103] Morgan and his

95. JAMES G. LYDON, PIRATES, PRIVATEERS, AND PROFITS 25 (1970).

96. *See* MACLAY, *supra* note 89, at 7. Note that governments sometimes abandoned the state's share and awarded the privateer the entire prize. *See, e.g.*, Robert C. Ritchie, *Government Measures Against Piracy and Privateering in the Atlantic Area, 1750–1850*, *in* PIRATES AND PRIVATEERS 10, 18–19 (David J. Starkey et al. eds., 1997); CARL E. SWANSON, PREDATORS AND PRIZES: AMERICAN PRIVATEERING AND IMPERIAL WARFARE, 1739–1748, at 15 (1991).

97. The prize system is not unlike modern American bounty hunters who are legally entitled to use force to apprehend fugitives in certain states and paid for successful captures. *See* Christopher M. Supernor, *International Bounty Hunters for War Criminals: Privatizing the Enforcement of Justice*, 50 A.F. L. REV. 215, 232–34 (2001); Gregory Townsend, *State Responsibility for Acts of De Facto Agents*, 14 ARIZ. J. INT'L & COMP. L. 635, 663–64 (1997). Acting in the name of the sovereign and recovering upon success also exists in qui tam actions, permitting, in certain circumstances, suits by private parties on behalf of the United States. *See* Vt. Agency of Nat'l Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 769 (2000) (involving a qui tam action brought under the False Claims Act and discussing other qui tam statutes).

98. ANDREWS, *supra* note 71, at 6.

99. *Id.* at 5.

100. *Id.*

101. *Id.*

102. SWANSON, *supra* note 96, at 20.

103. CORDINGLY, *supra* note 2, at 50. Morgan's raids, like those of Drake, did not always occur when England and Spain were at war. Morgan captured Portobello, in Panama, after England and Spain signed a peace treaty that arguably made the raids acts of piracy. *See id.* at 48–54. In Morgan's defense, the Jamaicans were convinced their colony was in danger of Spanish invasion

privateers were Jamaica's de facto navy, intelligence service, and infantry.[104] Their success also contributed to making Port Royal, Jamaica's capital, into one of the largest and most prosperous cities in the Americas.[105]

The wars of the eighteenth century continued to manifest significant privateering ventures, as colonial conflicts were waged for trade rather than conquest.[106] Some of the most affluent and respected members of British North America were attracted to these private ventures.[107] The French, Dutch, and Spanish also licensed privateers to fight their enemies.[108] Privateering expanded as colonial American privateers began participating in wartime actions in greater numbers, so successive British governments acted to exert more control over this wartime enterprise.[109]

Privateering was extensive during the American Revolution.[110] Since the colonial governments did not have European-style military or financial strength, they relied on privateers to augment their weak navies.[111] The concept of privateers as private citizens who could be summoned for the defense

and Spanish privateers were attacking English ships. *See* STEPHAN TALTY, EMPIRE OF BLUE WATER 127, 187 (2007); Violet Barbour, *Privateers and Pirates of the West Indies*, 16 AM. HIST. REV. 529, 555 (1911). Even if Morgan's attacks were illegal under international law, the assaults on cities would not constitute piracy, which is limited to the high seas. *See infra* Part IV. Furthermore, Drake, Morgan, and their fellow privateers were not "real" pirates because they were not enemies of mankind who would attack vessels of any nation; instead, they were intensely patriotic and acted in the name of the sovereign. *See* PETER EARLE, THE PIRATE WARS 25–26 (St. Martins Press 2005) (2003); CORDINGLY, *supra* note 2, at 28–29.

104. TALTY, *supra* note 103, at 136.

105. KONSTAM, *supra* note 1, at 115.

106. *See* SWANSON, *supra* note 96, at 3. British privateering peaked during the eighteenth century. *See, e.g.*, David Eltis, *Introduction*, *in* GOMER WILLIAMS, HISTORY OF THE LIVERPOOL PRIVATEERS AND LETTERS OF MARQUE WITH AN ACCOUNT OF THE LIVERPOOL SLAVE TRADE 1744–1812, at xiii, xvi–xviii (McGill-Queen's Univ. Press 2004) (1897).

107. *See* SWANSON, *supra* note 96, at 6.

108. *See id.* at 16.

109. *See id.* at 29.

110. The importance of privateers in the first two major American wars, the American Revolution and the War of 1812, is often overlooked, but it was dramatically important:

> A careful review of British newspapers, periodicals, speeches in Parliament, and public addresses for the periods covered by these two wars will show that our [American] land forces, in the estimation of the British, played a very insignificant part, while our sea forces were constantly in their minds.

MACLAY, *supra* note 89, at x. American privateering during the Revolutionary War was successful, especially in the early years. By February 1777 American privateers had taken 250 British West India merchant ships, causing four major West India merchant companies in London to collapse. ROGER KNIGHT, THE PURSUIT OF VICTORY 45 (2005). The West Indian trade was vital to the British government because the profits from West India sugar fueled the British economy more than any other commodity. *Id.* Overall, the 792 American privateers during the revolution captured approximately 600 enemy vessels, while 64 governmental warships captured 196 enemy vessels. MACLAY, *supra* note 89, at viii. Some of these privateers were not actually privateers per se, but merchant ships armed for other purposes. *See* Faye Kert, *Cruising in Colonial Waters: The Organization of North American Privateering in the War of 1812*, *in* PIRATES AND PRIVATEERS, *supra* note 96, at 141, 148; *see also infra* Part III.C (further discussing armed merchants).

111. Sidak, *supra* note 85, at 474.

of the nation fit into the American founders' belief in militias and fears of standing armies.[112] Privateering reached its zenith in the United States during the War of 1812, where "the principal [United States] offensive strategy at sea was to interfere with enemy commerce."[113] Congress authorized President Abraham Lincoln to use privateers during the American Civil War, but none were commissioned.[114]

By the start of the twentieth century, privateering as a method of warfare had ceased. Government leaders began to advocate abandoning commerce raiding, or "war against private property on the ocean," altogether.[115] Others raised concerns about abuses and enormous excesses accompanying privateering, notably the way privateers dealt with neutral ships, which have a questionable status when shipping goods on behalf of a belligerent.[116] Official naval bureaucracies also disliked privateers due to competition for wartime prize money and governmental budgetary resources.[117] Most importantly, however, was the fact that privateering was a weapon of weaker naval powers; it was the only threat to Great Britain's naval supremacy in the middle nineteenth century.[118]

These factors coalesced in the 1856 Paris Declaration Respecting Maritime Law ("Paris Declaration"), which stated unambiguously, "Privateering is, and remains, abolished."[119] Although the United States was never a party to the Paris Declaration, it abided by the privateering prohibitions.[120] By 1900 the United States abolished naval prize money and began pursuing a larger,

112. *See* Alexander Tabarrok, *The Rise, Fall, and Rise Again of Privateers*, 11 INDEP. REV. 565, 576 (2007).

113. Nicholas Parrillo, *The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century*, 19 YALE J.L. & HUMAN. 1, 3 (2007). During the War of 1812 the 517 American privateers captured at least 1,003 enemy vessels, while 23 governmental warships captured 254 enemy vessels. MACLAY, *supra* note 89, at viii. Again, some of these vessels held letters of marque for purposes other than privateering. *See supra* note 110 and accompanying text.

114. *See* Parrillo, *supra* note 113, at 72–73. The Confederate government, however, commissioned privateers. MACLAY, *supra* note 89, at 504.

115. Ritchie, *supra* note 96, at 23; *see also* Parrillo, *supra* note 113, at 10. While private commerce raiding was abandoned, government navies continued to destroy enemy commerce. *See* MACLAY, *supra* note 89, at xxv. This was nowhere more apparent than with submarine warfare during the world wars. *See* LYDON, *supra* note 95, at 146.

116. *See* HALLECK, *supra* note 92, at 115–16; Ritchie, *supra* note 96, at 20; Stark, *supra* note 71, at 360–62; *cf.* HALLECK, *supra*, at 116 n.1 (describing a case where an English privateer captured a neutral vessel and entrapped its master into confessing that he was engaged in a contraband trade).

117. Gary M. Anderson & Adam Gifford Jr., *Privateering and the Private Production of Naval Power*, 11 CATO J. 99, 118–19 (Spring–Summer 1991).

118. *See* JANICE E. THOMSON, MERCENARIES, PIRATES, & SOVEREIGNS: STATE-BUILDING AND EXTRATERRITORIAL VIOLENCE IN EARLY MODERN EUROPE 73 (1994).

119. 1856 Paris Declaration Respecting Maritime Law, Apr. 15, 1856, *reprinted in* Stark, *supra* note 71, at 361–62.

120. "Of all the powers invited to accede to the Declaration, only Spain, Mexico, and the United States returned any answer but an unqualified affirmative." *Id.* at 367. The United States refused to sign unless the powers agreed to the inviolability of all private property on the High

more professional navy needing better coordination to prosecute blockades and to fight fleet-on-fleet battles than could be gained from independent privateers.[121] Thus, through long-term practice, the Paris Declaration's prohibition on privateering as a means of warfare became customary international law.[122]

One crucial shortcoming to the Paris Declaration was its vague definition of the term "privateering."[123] Not all publically contracted vessels in wartime

Seas. TRAVERS TWISS, BELLIGERENT RIGHT ON THE HIGH SEAS SINCE THE DECLARATION OF PARIS 3 (Butterworths 1884). At the outset of the Spanish-American War, President William McKinley proclaimed, "[T]he policy of this Government will be not to resort to privateering, but to adhere to the rules of the Declaration of Paris . . . ." President William McKinley, Proclamation (Apr. 26, 1898), *in* XIV A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 6474 (Bureau of Nat'l Literature 1909). McKinley's proclamation was limited to the Spanish-American War, as the American delegation to the 1907 Hague Peace Conference refused to renounce privateering unless the conference attendees agreed to establish the inviolability of private property on the seas. *See* Joseph H. Choate & Chandler Hale, *Report of the Delegates of the United States to the Second International Peace Conference Held at The Hague from June 15 to October 18, 1907* (June 15–Oct. 8, 1907), *in* II PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, at 1144, 1160–61 (1910).

121. *See* Parrillo, *supra* note 113, at 11. The United States has not legally commissioned any privateers since 1815. *See* PETRIE, *supra* note 15, at 140; RALPH M. EASTMAN, FAMOUS PRIVATEERS OF NEW ENGLAND 45, 47 (1928); MACLAY, *supra* note 89, at 400. World War II airships, however, have generated some confusion on this point. In 1946 the *Los Angeles Times* reported on the retirement of the airship *Volunteer*, explaining, "The big gas bag went to war as a privateer just 10 days after Pearl Harbor, with a hunting rifle as her only armament while she escorted merchant ships to sea." *Blimp Volunteer Mustered Out of Navy Service*, L.A. TIMES, Oct. 5, 1946, at A1. A similar story was repeated in a history of Goodyear a few years later: "The Goodyear blimp in California became the first privateer in the Navy service since the War of 1812, when Sea Frontier Defense at San Diego asked the Ranger, based at Los Angeles, to lend a hand, ten days after Pearl Harbor." HUGH ALLEN, THE HOUSE OF GOODYEAR 513 (1949). A subsequent history provides more detail, naming yet another airship: "The *Resolute*, operating in Los Angeles, was armed and in service even before completing the legal technicalities of swearing in the crew and commissioning. This made the crew members temporary pirates aboard a privateer, but international protocol was not much of a concern." MAURICE O'REILLY, THE GOODYEAR STORY 92–93 (James T. Keating ed., 1983); *see also* JAMES R. SHOCK & DAVID R. SMITH, THE GOODYEAR AIRSHIPS 43 (3d ed. 2002) ("The Los Angeles based *Resolute* was the only airship based on the west coast when the Japanese attacked Pearl Harbor on December 7, 1941. She operated for the Navy under privateer status, armed only with the pilot's hunting rifle, until joining the Navy officially . . . ."); Richard V. Whitney, *The Goodyear Blimps Go to War*, AM. AVIATION HIST. Soc'y J., Spring 2001, at 66, 66 ("The navy lost no time in issuing a 'Letter of Marque,' conferring 'Privateer' status on this airship [the *Resolute*] and its crew."). These airships were not privateers, especially if they lacked a legal commission. There is nothing in the *Congressional Record* authorizing any letters of marque during World War II, nor are there any executive orders commissioning these aircraft as privateers. Without congressional authorization, the Navy would not have been able to legally issue any letters of marque.

122. *See* ADAM ROBERTS & RICHARD GUELFF, *Prefatory Note to the 1856 Paris Declaration Respecting Maritime Law*, *in* DOCUMENTS ON THE LAWS OF WAR 23 (2d ed. 1989); *see also* MACLAY, *supra* note 89, at xxiii ("[T]he propositions made by [United States] delegates to the Peace Conference at The Hague in 1899, showed plainly enough that they had renounced old-time privateering."); George K. Walker, *United States National Security Law and United Nations Peacekeeping or Peacemaking Operations*, 29 WAKE FOREST L. REV. 435, 481 n.308 (1994). *But see* Robert P. DeWitte, Note, *Let Privateers Marque Terrorism: A Proposal for a Reawakening*, 82 IND. L.J. 131, 132 (2007); David D. Winters, *Bring Back the Privateer*, U.S. NAVAL INST. PROC., Apr. 2002, at 112, 112 (arguing the United States is not bound by the Paris Declaration).

123. Stark, *supra* note 71, at 373.

were privateers. For example, Prussia, a party to the Paris Declaration, issued a decree for a volunteer navy in 1870:

> The vessels were to be hired by the state, and one-tenth of their value paid to the owners as deposit; in case of loss, the other nine-tenths was to be paid; in case of restoration, the one-tenth paid was to be reckoned as hire. *The owner was to hire a crew*, the crews were to enter the Federal navy for the war, wear its uniform and badge of rank, take oath to the articles of war, receive pensions at the regular standard, and, if desired, obtain permanent establishment in the navy as a reward for extraordinary service. The hired ships were to sail under the Federal flag, and to be armed and fitted out at public charge. Premiums . . . were to be paid to such ships as should capture or destroy ships of the enemy; *and these premiums were to be paid to the owners of the ships to whom was to be confided the distribution in proper proportions amongst the crew*.[124]

France then protested and asked England, another party to the Paris Declaration, to intervene; but the Law Officers of the Crown were of the opinion that there were "substantial distinctions" between Prussia's proposed vessels and privateers.[125] Specifically the Prussian vessels "would be for all intent and purposes in the service of the Prussian Government, and the crews would be under the same discipline as the crews on board vessels belonging permanently to the Federal Navy."[126] Thus private ownership of the vessels and the prize system did not define privateers. According to Francis Stark, these vessels were not privateers for four reasons: (1) they were temporary public vessels based on contract, (2) the crews were under the control and same discipline as the regular navy, (3) they were intended to do regular navy type work, and (4) they were forbidden from preying on any private property.[127] In other words, the Paris Declaration did not prohibit contracting private vessels as naval adjuncts in wartime.[128]

124. *Id.* at 377–78.
125. *Id.* at 378.
126. Twiss, *supra* note 120, at 13.
127. Stark, *supra* note 71, at 379.
128. From 1942 to 1943 the United States monitored the Atlantic and Gulf Coasts with the Coastal Picket Patrol, titled the "Corsair Fleet" by the Coast Guard, and affectionately known by its own members as the "Hooligan Navy." Samuel Eliot Morison, A History of United States Naval Operations in World War II: The Battle of the Atlantic 268 (Univ. of Ill. Press 2001) (1947). This force consisted of borrowed and requisitioned yachts, motorboats, converted fishing boats, and small freighters. *Id.* These vessels were often crewed by their owners, who served enlistments as short as thirty days in the Coast Guard Auxiliary. *See id.* at 269. Other "Hooligans" were college students, boy scouts, beachcombers, ex-bootleggers, rum-runners, and those disqualified by age or minor physical defects from serving the regular Navy or Coast Guard. *Id.* at 269, 273. Their duties included observing and reporting enemy activities, as well as attacking and destroying enemy submarines. *Id.* at 270. Each vessel was supposed to be armed with four 300-pound depth charges and a .50-caliber machine gun, but many were sent out with nothing other than pistols and rifles. *Id.* at 270, 272. The Civil Air Patrol also performed combat duties during World War II, even though it was a civilian organization. *Id.* at 276. It organized, governed, and disciplined itself, forming a week before Pearl Harbor and becoming an auxiliary of the Army Air Force in 1943. *Id.* at 276–78. Even after becoming an auxiliary to the armed forces, its members remained civilians in uniform and its aircraft remained their private property. *Id.* at 278.

B. *Letters of Marque in Historical Anti-piracy Operations*

Not all ships holding letters of marque were "privateering" in the sense of preying on civilian merchants. The letters also were used during anti-piracy operations, where governments theoretically deputized private vessels to capture criminals. Unfortunately privateers frequently became pirates. At the same time, privateers were part of the solution to the piracy epidemic in the west. A brief examination of history shows that successful employment of privateers required regulation, accountability, organization, and respect for human rights.

Historian Phillip Gosse described an early example of commissioning private ships to address piracy during the reign of King Henry VII of England.[129] Pirates were plundering English shipping "without shadow of hesitation of scruple."[130] As piracy worsened, shipments of goods by sea ceased; instead goods were transported by land as much as possible.[131] In response, England issued letters of marque to allow the bearer to take the law into his own hands.[132] If a French pirate robbed an English merchant, the letter of marque authorized the merchant to seize like goods from any other French ship.[133] This solution actually made matters worse, especially as other countries adopted the practice.[134] For example, Sir Andrew Barton obtained a letter of marque from the Scottish crown, claiming his father had been robbed by the Portuguese many years before—Barton then indiscriminately plundered ships from all nations, especially English ones, trading at Flemish ports.[135]

Despite problems, privateers remained engaged against pirates through the seventeenth and eighteenth centuries due to the relatively weak English navy.[136] The numbers of privateers increased considerably after 1610, when the British Lord High Admiral began commissioning private captains with terms allowing them "to keep for their own use the vessels and goods of such pirates as they shall seize."[137] Thereafter, several pirates were captured, but not without drawbacks.[138] The private sector competition irritated the navy and, moreover, the risk of well-armed privateers becoming pirates remained.[139] Privateers, like Captain Kidd, were accountable for exceeding their commissions as they could be prosecuted for piracy.

129. Gosse, *supra* note 5, at 102. Henry VII ruled from 1485 until 1509. Britannia.com, Henry VII, http://www.britannia.com/history/monarchs/mon40.html (last visited Feb. 11, 2010).
130. Gosse, *supra* note 5, at 101.
131. *Id.* at 101–02.
132. *Id.* at 102.
133. *Id.*
134. *Id.*
135. *Id.*
136. *See* Earle, *supra* note 103, at 64.
137. *Id.*
138. *See id.*
139. *See id.*

Many privateers became pirates;[140] many pirates held privateer commissions.[141] Several privateers even have been viewed as pirates.[142] Many writers broadly assert that the only difference between privateers and pirates was the commission or letter of marque held by a privateer.[143] Privateers, like pirates, plundered merchant ships on the high seas. For example, the North African Barbary privateers, or "corsairs," bear a striking resemblance to modern Somali pirates.[144] During the privateering era, however, official naval vessels also operated under the prize system and plundered their fair share of merchants.[145] Although associating all European and American privateers with

140. GOSSE, *supra* note 5, at 176–77 (explaining how thousands of privateers turned to piracy after finding themselves unemployed following the Navigation Act and the Peace of Ryswick at the end of the seventeenth century, followed closely by the Peace of Utrecht in 1713); *id.* at 213 (explaining how privateers in the West Indies during the American Revolution and later struggles between England and France became pirates after the conflicts ended). Wartime privateers did not always degenerate into pirates after the cessation of hostilities. *See* EARLE, *supra* note 103, at 211 (describing no resurgence of piracy following any of the three great naval wars of the mid-eighteenth century despite the commissioning of large numbers of privateers); *see also* Kert, *supra* note 110, at 152 (privateers on both sides of the War of 1812 returned to peaceful pursuits following the cessation of hostilities).

141. LYDON, *supra* note 95, at 37 (describing how the "Red Sea Pirates" of the 1690s held privateering commissions from the governor of New York, despite his knowledge of their reputation for piracy); GOSSE, *supra* note 5, at 170 (describing the practice of selling letters of marque by the Caribbean island governors at the end of the seventeenth century).

142. The Spanish did not distinguish between pirates and privateers in the seventeenth century West Indies. *See* Barbour, *supra* note 103, at 531. Even though Sir Henry Morgan was commissioned as a privateer against the Spanish, they regarded him as a "corsair." *See* CORDINGLY, *supra* note 2, at 47. Corsairs were considered those pirates based in the Mediterranean, notably from along the Barbary Coast. *Id.* at xviii. The corsairs, in turn, had privateer commissions from the Barbary states. EARLE, *supra* note 103, at 39. Thus, "one country's privateer is another country's pirate." KONSTAM, *supra* note 1, at 37. This type of mischaracterization even extends to the regular navy. For example, John Paul Jones, the most famous American naval officer during the American Revolution, was called "an American Pirate" by Rudyard Kipling, a "privateer" by Winston Churchill, and a "corsair" by Theodore Roosevelt, even though Jones never held a privateering commission or engaged in piracy. Naval History and Heritage Command, Frequently Asked Questions: 250th Anniversary of the Birth of John Paul Jones, http://www.history.navy.mil/faqs/faq58-1.htm (last visited Feb. 11, 2010).

143. *See* BLACK'S LAW DICTIONARY, 9th ed., *supra* note 70, at 1315 (defining "privateer" as "[a] vessel owned and operated by private persons, but authorized by a nation on certain conditions to damage the commerce of the enemy by acts of piracy"); KONSTAM, *supra* note 1, at 8–9 ("[T]he privateer was a licensed pirate who did not attack his own people."); Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L. REV. 183, 214 (2004) (noting that "[p]rivateering did not differ from piracy in the substantive nature of the conduct, but only in the attendant formalities"); Max Boot, *Pirates, Then and Now*, FOREIGN AFFAIRS, July–Aug. 2008, at 94, 96 (privateering is "the term for state sanctioned piracy").

144. *See* Jeffery Gettleman, *What Tho. Jefferson Knew About Pirates*, N.Y. TIMES, Apr. 12, 2009, at WK 4, *available at* http://www.nytimes.com/2009/04/12/weekinreview/12gettleman.html?_r=1. The Barbary corsairs attacked Christian shipping from the sixteenth to the nineteenth centuries. *See* EARLE, *supra* note 103, at 39–40. The Muslim states, in turn, were attacked by Christian privateers, notably the Knights of Malta, "a terrifying menace from the sea which was just as feared in the east as the Barbary corsairs were in the west." *Id.* at 46–47.

145. PETRIE, *supra* note 15, at 2–6 (providing an overview of the prize system for naval vessels); *id.* at 143–44 (describing two cases where naval vessels violated prize laws); Sturgess, *supra*

pirates may be appropriate through the end of the seventeenth century due to their similar tactics and the overall lack of regulation,[146] this association is misleading in the subsequent period.[147]

As privateering matured, privateers faced significant regulations, including highly detailed and precise requirements for legal captures that were, in turn, subject to rigid enforcement in specialized prize courts.[148] Serious transgressions, like murder, rape, or mutiny, could result in imprisonment or death.[149] For example, a British privateer captain was executed for robbery constituting piracy in 1759.[150] Improper privateer conduct resulted in the loss of the commission, the bond, and, if applicable, the prize.[151] Thus most British and American privateers in the eighteen and nineteenth centuries were neither dishonorable nor piratical.[152] Importantly privateers played a significant role in ending piracy.

note 24, at 38 ("Fortunes were made out of prize-taking by many naval officers."). Taken to an extreme, some have argued that much of the European conquest of the Americas was piracy, starting with the actions of Christopher Columbus. *See* KRIS E. LANE, PILLAGING THE EMPIRE xv–xvi (1998).

146. In the sixteenth century, "trade and plunder were inseparable." ANDREWS, *supra* note 71, at 15 (stating also, "The business of sea-plunder attracted all kinds of men, from criminals to noble lords, and took forms which varied from uninhibited piracy to licensed privateering."). Although uninhibited piracy was a significant problem, the English made use of pirates who could concentrate on the "right prey." *Id.* at 16. Virtually every Elizabethan era maritime hero, including Sir Francis Drake, the "master thief of the unknown world," spent time as a pirate, a privateer engaged in piracy, or an "aider, abettor or employer of pirates." EARLE, *supra* note 103, at 22–23. Thus, Elizabethan England was known as "a nation of pirates." *Id.* at 18.

147. COGGESHALL, *supra* note 84, at xliv–li; PETRIE, *supra* note 15, at 69; RITCHIE, *supra* note 6, at 236–37 (arguing that at the dawn of the eighteenth century, the mature British government wanted to monopolize violence and refused to tolerate threats to law and order, especially threats to security or commerce); David J. Starkey, *Introduction*, *in* PIRATES AND PRIVATEERS, *supra* note 96, at 1, 3–4; SWANSON, *supra* note 96, at 5; Sturgess, *supra* note 24, at 38.

148. *See* STARKEY, *supra* note 80, at 19 (explaining that British privateering matured in the seventeenth century and took a place in the developing international legal system); Anderson & Gifford, *supra* note 117, at 105–06.

149. STARKEY, *supra* note 80, at 28.

150. *Id.* Under the Dutch privateering system, rules were highly detailed and exacting, featuring severe penalties for transgressions. *See* VIRGINIA WEST LUNSFORD, PIRACY AND PRIVATEERING IN THE GOLDEN AGE NETHERLANDS 13 (2005).

151. STARKEY, *supra* note 80, at 28–29.

152. MACLAY, *supra* note 89, at vii, 14 (asserting that, generally, privateers from the United States conducted themselves commendably and listing a number of distinguished American naval officers who "have pointed with pride to their probationary career in privateers"); PETRIE, *supra* note 15, at 69 ("Privateers were not plaster saints but, in most of them, a decent, civilized greed outweighed vainglory and blood lust. . . . [T]hey were generally civil to the few women whom they captured at sea, and they never fired a gun under false colors."); Starkey, *supra* note 147, at 3 (explaining that most privateers deployed during wartime in vessels owned by merchants, "and it was back to work as wage-earning seafarers that most returned once their commerce-raiding diversion had ended"). *But see* Kontorovich, *supra* note 143, at 215–16 (discussing allegations of excesses committed by privateers during the American Revolution, while admitting that some serious charges appear to have been exaggerations). The privateers of other nations continued to act piratically during the eighteenth and nineteenth centuries. During the Franco-American Quasi-War at the end of the eighteenth century, French privateers frequently

The western world's "Golden Age of Piracy" began in 1715, following the 1713 Peace of Utrecht, which brought an end to a decade of European warfare involving all the continent's major powers.[153] The upsurge in piracy was caused by the unemployment of significant numbers of sailors: the English navy alone discharged 54,000 sailors and privateers could no longer obtain commissions to attack European commerce.[154] This "Golden Age of Piracy" peaked around 1720 and reached an abrupt end in 1725.[155] More than anyone else, the man responsible for bringing this age of piracy to an end was Woodes Rogers.[156] In an early example of the "revolving door" between the private and public sector employment, Rogers was a privateer before being appointed as the Governor of Bahamas, then the pirate capital of the Americas.[157] In order to reform this territory, Rogers dispersed the pirates of the Caribbean with privateers.[158]

The piracy problem during this era was solved through a combination of tactics: (1) the British Parliament passed legislation allowing overseas piracy trials, rather than requiring suspected pirates to be brought to England; (2) captured pirates were publicly tried and executed; (3) pirates who turned themselves in were pardoned; (4) naval patrols were increased; (5) rewards or bounties were promised for the capture of pirates; and (6) private ships were licensed to attack and capture pirates.[159] Of these methods, the last is the most relevant here.

maltreated captured Americans. GARDNER W. ALLEN, OUR NAVAL WAR WITH FRANCE 37–38 (1909); Kontorovich, *supra* note 143, at 215–16. The colonial French prize courts were little more than formalities leading to confiscation. ALEXANDER DECONDE, THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE 1797–1801, at 8–9 (1966). At the beginning of the nineteenth century, rebel Latin American governments issued dubious letters of marque against their colonial masters. Even after achieving independence, many of the privateers turned pirate or continued attacks "claiming that they held letters of marque from juntas still fighting for their independence." KONSTAM, *supra* note 1, at 273.

153. Manuel Schonhorn, *Postscript*, *in* DEFOE, *supra* note 1, at 697, 701.

154. *Id.*; *see also* MARCUS REDIKER, VILLIANS OF ALL NATIONS: ATLANTIC PIRATES IN THE GOLDEN AGE 23 (2004) ("The British Royal Navy . . . plunged from 49,860 men in 1712 to 13,475 just two years later.").

155. EARLE, *supra* note 103, at 163; COLIN WOODARD, THE REPUBLIC OF PIRATES 1 (2007); *see also* CORDINGLY, *supra* note 2, at xvi (referring to the period starting in the 1650s until 1725 as the "great age of piracy"); REDIKER, *supra* note 154, at 8 (approximating the golden age of piracy from 1650 until 1730).

156. WOODARD, *supra* note 155, at 8.

157. Farley M. Foster, *Woodes Rogers Privateer and Pirate Hunter*, 29 HIST. TODAY 522, 530–31 (1979). The "revolving door" is a practice where government employees leave public service to work for government contractors, or contractors leave the private sector to work for the Government, and in either case are placed in a position to oversee or regulate their current or former employer. *The Politics of Contracting*, POGO, June 29, 2004, http://www.pogo.org/pogo-files/reports/government-corruption/the-politics-of-contracting/gc-rd-20040629.html. Rogers, as governor, had the power to commission privateers and personally to hold admiralty courts to adjudicate prizes captured by privateers. *See* JAMESON, *supra* note 88, at xii.

158. *See* WOODARD, *supra* note 155, at 262, 284–85.

159. CORDINGLY, *supra* note 2, at 203. These tactics aimed at establishing the rule of law in otherwise feral or criminal areas. *See* Matthew M. Frick, *Feral Cities—Pirate Havens*, U.S. NAVAL

Government regulations over privateers were a necessity, as exemplified by a fleet of ten private men-of-war commissioned out of Jamaica to hunt down pirates in 1715.[160] One of the privateer captains, Jonathan Barnet, captured a famous trio of pirates: Captain John "Calico Jack" Rackam and the female pirates Mary Read and Anne Bonny, along with their crew.[161] Captain Barnet operated under regulations imposed through his letter of marque: his commission and instructions directed him "by force of arms to seize, take and apprehend all piratical ships and vessels with their commander officers and crew."[162] He was to bring captured pirates to Port Royal, Jamaica; keep a journal of all proceedings; and fly a modified Union Jack.[163] Barnet followed these regulations, captured the pirates, and brought them to Jamaica for public trial.[164] Privateers were subject to increasing regulation over time.[165]

Another example of a privatized anti-piracy expedition illustrates the importance of organization. In 1718 the governor and council of South Carolina commissioned two privateers under the joint command of William Rhett, a wealthy merchant and militia colonel, to capture two pirate ships plundering the vessels using the port at Charleston.[166] The privateers, working jointly, located and captured a pirate ship, after a prolonged struggle, along with two of its captive vessels.[167] After the battle the privateers discovered that they had captured Major Stede Bonnet, a well-known pirate captain who sailed with Blackbeard.[168] The privateer returned Bonnet and his crew

INST. PROC., Dec. 2008, at 40, 45, *available at* http://www.usni.org/magazines/proceedings/archive/story.asp?print=Y&STORY_ID=1695. Max Boot expands on these piracy suppression tactics with a list of steps that countries took to eliminate piracy from 1650 to 1850, including changing public attitudes, rooting out corruption, establishing international cooperation, forming convoys, blockading and bombarding pirate ports, chasing pirates, and occupying and dismantling pirate ports. *See* Boot, *supra* note 143, at 103.

160. CORDINGLY, *supra* note 2, at 219.

161. *Id.* at 219–20. Calico Jack and his crew had accepted pardons. "But it was difficult for a man, or woman, who had once played the game of piracy to settle down to an honest life, and soon Rackam was off again with Mary amongst his crew." GOSSE, *supra* note 5, at 205.

162. CORDINGLY, *supra* note 2, at 220.

163. *Id.*

164. *Id.* During the capture, Mary Read and Anne Bonny fought gallantly while the remaining pirates behaved "in a most cowardly way and were soon driven below decks." GOSSE, *supra* note 5, at 203. Mary Read was so upset with the cowardly behavior of the hiding pirates, she "fired her Arms down the Hold amongst them, killing one, and wounding others." DEFOE, *supra* note 1, at 156. Calico Jack and other pirates were subsequently executed, but women were granted a reprieve due to pregnancy. CORDINGLY, *supra* note 2, at 63, 65. On the day of Calico Jack's execution, Anne Bonny told him, "[S]he was sorry to see him there, but if he had fought like a Man, he need not have been hang'd like a Dog." GOSSE, *supra* note 5, at 203.

165. *See* Kert, *supra* note 110, at 144–47.

166. CORDINGLY, *supra* note 2, at 220; WOODARD, *supra* note 155, at 274.

167. CORDINGLY, *supra* note 2, at 220–21.

168. *Id.* at 221. Prior to becoming a pirate, Bonnet had a good reputation, a plentiful fortune, and a liberal education. DEFOE, *supra* note 1, at 95. During his career at sea he became a pirate, sailed with Blackbeard, received a pardon, and became a legitimate privateer against Spain, or at least tried to. *Id.* at 96–97. Bonnet then threw off all restraint and "relaps'd in good Earnest into his old Vocation . . . and recommenced a down-right Pyrate, by taking and plundering all the

to Charleston, where they were tried and sentenced.[169] The success of this operation highlights the importance of centralized command and control. The privateers were under a single command and were not simply freelance operators. This was not always the rule in privateering—the independent nature of privateers was one of the reasons they were considered inferior to regular naval vessels.[170]

Privateers did not simply ignore the humanity of the pirates. Illustrative of the point are the facts surrounding the capture of George Lowther, a well-known pirate, and his ship and crew by Walter Moor, a privateer.[171] Moor was sailing near the island of Blanco off South America when its crew spotted a ship "aground in a sandy bay."[172] The privateer believed this grounded ship was a pirate vessel because the island was uninhabited and not frequented by traders.[173] The privateer ultimately captured the ship and some of its crew, but Lowther and others hid on the island.[174] Rather than immediately abandoning Lowther and the other remaining pirates on the island, the privateer crew searched the island for five days before leaving and taking the pirate ship to Venezuela and claiming it as a prize.[175] The Venezuela governor then sent a search party for Lowther and the remaining pirates.[176]

Private men-of-war did not single-handedly solve the piracy problem. Privateers supplemented regular naval forces; together they effectively hunted down pirates.[177] The role of privateers in ending piracy, however, is often ignored by critics opposed to the private sector's potential role in the legitimate use of force.[178]

C. *Letters of Marque as a Defensive License*

If pirate-hunting privateers were not covered by the Paris Declaration's abolition of privateering, then letters of marque as defensive licenses were also outside its coverage. Not all wartime ships holding letters of marque were

Vessels he met with." *Id.* at 98. Bonnet "was the first prominent pirate captain to be captured by British authorities." WOODARD, *supra* note 155, at 277.

169. CORDINGLY, *supra* note 2, at 221. Bonnet and thirty of his thirty-three pirate crewmen were hanged. *Id.*

170. *See* MACLAY, *supra* note 89, at xxiv.

171. CORDINGLY, *supra* note 2, at 221–22. Lowther had recently attacked an English ship, tortured its crew, forced the surgeon's mate and a carpenter to join, and plundered the English ship's cargo. *Id.* at 222.

172. *Id.* at 221; DEFOE, *supra* note 1, at 316.

173. CORDINGLY, *supra* note 2, at 221.

174. *Id.*

175. *Id.* at 222.

176. *Id.* Lowther's body was ultimately found; he had apparently committed suicide. *Id.*

177. *Id.*

178. Professor Janice Thomson argues that states were not able to develop international norms against piracy and suppress it until privateering, which she refers to as "state-sponsored individual violence on the high seas," was delegitimized. *See* THOMSON, *supra* note 118, at 140. Thomson ignores privateering's significant role in the suppression of piracy and contribution to ending the great age of piracy. She also ignores the golden age of piracy's conclusion in the west,

privateers.[179] Some ships were armed as blockade runners,[180] others wanted letters of marque to avoid delays associated with convoy requirements,[181] and others sought license to bear arms in their own defense. Thomas Jefferson explained,

> The ship Jane is an English merchant vessel . . . employed in the commerce between Jamaica and these States. She brought here a cargo of produce . . ., and was to take away . . . flour. Knowing of the war when she left Jamaica, and that our coast was lined with small French privateers, she armed for her defence [sic], and took one of those commissions usually called *letters of marque*. She arrived here safely . . . . Can it be necessary to say that a merchant vessel is not a privateer? That though she has arms to defend herself in time of war, in the course of her regular commerce, this no more makes her a privateer, than a husbandman following his plough in time of war, with a knife or pistol in his pocket, is thereby made a soldier? The occupation of a privateer is attack and plunder, that of a merchant vessel is commerce and self-preservation.[182]

Alexander Hamilton also was concerned with the indefinite "privateer" term and its applicability to merchants who took out letters of marque to arm their vessels for defense.[183] Thus, the letter of marque was not just for ships seeking prizes; it also served as a type of defensive license. This was evident during the 1798–1800 American "Quasi-War" with France, where the United States issued letters of marque, "but these were used chiefly by our merchantmen as a license to defend themselves from hostile craft."[184]

According to historian David Starkey, merchant vessels regularly took out "letters of marque, or commissions" after 1620 in order to "reap the rewards" of a chance encounter with a weak or incapacitated enemy during wartime.[185] Ship owners also took out these letters to encourage crews to be "gallant and brave in defending their ship" as if it were "one of His Majesty's Ships of War."[186] Commissions provided a financial incentive for bravery and successful defense:

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over a century before privateering was abandoned, despite a number of wars. *See supra* note 140. Piracy did reemerge in the early nineteenth century as a result of privateers, notionally supporting independence movements going rogue. EARLE, *supra* note 103, at 211, 219. The pirate crews, however, were not limited to privateersmen. Former naval personnel, sailors, fishermen, slaves, and criminals all joined pirate companies. *Id.* Newly independent states commissioning privateers may not have had the capacity to control their privateers once legitimate targets became sparse. Piracy suppression had less to do with delegitimizing privateering, and more to do with establishing the rule of law.

179. Kert, *supra* note 110, at 148 ("While all privateers had to carry letters of marque, not all letters of marque ships were privateers.").

180. *Id.*

181. *See* David J. Starkey, *A Restless Spirit: British Privateering Enterprise, 1739–1815*, *in* PIRATES AND PRIVATEERS, *supra* note 96, at 126, 130.

182. Letter from Thomas Jefferson to Gouverneur Morris (Aug. 16, 1793), *in* III MEMOIR, CORRESPONDENCE AND MISCELLANIES FROM THE PAPERS OF THOMAS JEFFERSON 275 (Thomas Jefferson Randolph ed., 1829).

183. Alexander Hamilton, Speech to the New York Assembly on February 6, 1787, *in* 8 THE WORKS OF ALEXANDER HAMILTON 29–30 (Henry Cabot Lodge ed., 1904).

184. MACLAY, *supra* note 89, at 503; *see* ALLEN, supra note 152, at 225.

185. STARKEY, *supra* note 80, at 22; *see* PETRIE, *supra* note 15, at 4.

186. STARKEY, *supra* note 80, at 52.

without them, captured enemies could not be claimed as a prize.[187] Any privateering aspect to defensive letters of marque would theoretically be covered by the 1856 prohibition.

The Paris Declaration and subsequent legal developments not only failed to define privateering, they also never addressed the use of letters of marque as defensive licenses.[188] International humanitarian concerns focused on government control over private ships engaged in armed conflict[189] and over warfare against civilians and property.[190]

D. *Letters of Marque in Modern Anti-piracy Operations*

While privately owned and operated vessels may no longer be used in an armed conflict to attack enemy merchant shipping, such vessels may legally conduct anti-piracy operations under international law. Properly deputized private vessels would not be attacking "enemy" merchants, but apprehending criminals.

Letters of marque currently may be used to commission private vessels for the express purpose of seizing pirate ships:

> The President is authorized to instruct the commanders of the public armed vessels of the United States, and to authorize the commanders of any other armed vessels sailing under the authority of any letters of marque and reprisal granted by Congress, or the commanders of any other suitable vessels, to subdue, seize, take, and, if on the high seas, to send into any port of the United States, any vessel or boat built, purchased, fitted out, or held as mentioned in [33 U.S.C. § 385].[191]

The vessels mentioned are those "built, purchased, fitted out in whole or in part, or held for the purpose of being employed in the commission of any piratical aggression, search, restraint, depredation, or seizure, or in the commission of any other act of piracy, as defined by the law of nations."[192] In other words, Congress has already authorized the president to deputize private entities to act within the law to disable and capture pirates.

IV. MODERN PIRACY LAW

Although Congress authorized granting letters of marque to suppress piracy, neither pirates nor piracy have specifically been defined.[193] Instead Congress has deferred to the vagaries of international law.[194]

187. *See, e.g., id.* at 22, 52.

188. During World War II the U.S. Navy provided and installed weapons on merchant ships. It also trained and provided official Navy personnel to crew the weapons. MORISON, *supra* note 128, at 297.

189. *See supra* Part III.A (discussing the Prussian volunteer navy); *supra* note 128 (discussing the U.S. Coastal Picket Patrol and Civil Air Patrol).

190. *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516.

191. 33 U.S.C. § 386 (2006).

192. *Id.* § 385.

193. That Congress has never promulgated a definition of either pirate or piracy is ironic, as the Constitution gives Congress the specific power to "define and punish Piracies and Felonies committed on the high Seas." U.S. CONST. art. I, § 8, cl. 10.

194. 18 U.S.C. § 1651 (2006).

Piracy has several definitions.[195] The International Maritime Bureau (IMB), a specialized division of the International Chamber of Commerce that was established to act as a focal point in the fight against maritime crime and malpractice, broadly describes piracy with armed robbery as "[a]n act of boarding or attempting to board any ship with the intent to commit theft or any other crime and with the apparent attempt or capability to use force in the furtherance of that act."[196] More simply, piracy can be any "unlawful depredation at sea involving the use or threat of violence possibly, but not necessarily, involving robbery."[197]

The United States currently criminalizes piracy as defined by the "law of nations."[198] In 1820 the Supreme Court decided a piracy case involving a similar definition.[199] Justice Story explained the law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising [sic] and enforcing that law."[200] He continued, "all writers concur, in holding, that robbery, or forcible depredations upon the sea, *animo furandi*,[201] is piracy."[202]

International law has evolved considerably since 1820 and piracy has been addressed, in one form or another, by several treaties.[203] The most important treaty directly addressing piracy is the 1982 United Nations Convention on the Law of the Sea ("UNCLOS").[204]

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195. Lawrence Azubuike, *International Law Regime Against Piracy*, 15 ANN. SURV. INT'L & COMP. L. 43, 46 (2009); Alfred P. Rubin, *The Law of Piracy*, 63 NAV. WAR C. INT'L L. STUD. 1 (1988).

196. 2008 IMB PIRACY REPORT, *supra* note 30, at 3.

197. MURPHY, *supra* note 28, at 7.

198. "Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life." 18 U.S.C. § 1651. In the English language, the term "law of nations" has been effectively replaced with the term "international law." PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 1 (7th ed. 1997); *see also* 44B AM. JUR. 2D *International Law* § 1 (2007).

199. United States v. Smith, 18 U.S. 153, 154 (1820). The case dealt with an indictment for piracy brought under an act of Congress on March 3, 1819. That act provides:

> That if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, *as defined by the law of nations*, and such offender or offenders shall afterwards be brought into, or found in, the United States, every such offender or offenders shall, upon conviction thereof, before the Circuit Court of the United States for the District into which he or they may be brought, or in which he or they shall be found, be punished with death.

3 Stat. 510, 513–14 (1819) (emphasis added).

200. *Smith*, 18 U.S. at 160–61.

201. *See* BLACK'S LAW DICTIONARY, 9th ed., *supra* note 70, at 103 (defining "animus furandi" as "[t]he intention to steal").

202. *Smith*, 18 U.S. at 161.

203. "Modern government efforts to codify international customary law on piracy include the 1958 and 1982 [United Nations Law of the Sea] Agreements and the 1988 Rome Convention." Bornick, *supra* note 24, at 261. The 1988 Rome Convention does not define "piracy" per se, but defines unnamed acts at sea as unlawful. *See* Rome Convention, *supra* note 30; *see also* Niclas Dahlvang, *Thieves, Robbers, & Terrorists: Piracy in the 21st Century*, 4 REGENT J. INT'L L. 17, 22–23 (2006).

204. United Nations Convention on the Law of the Sea (UNCLOS), Oct. 7, 1982, 21 I.L.M. 1245. President Bill Clinton signed UNCLOS in 1994. *United States: President's Transmittal of the United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation*

To summarize, piracy at sea involves (1) criminal acts of violence, detention, or depredation; (2) committed for private ends; (3) involving the use of the crew or passengers of a private ship to attack another ship; and (4) taking place on the high seas or in places outside the jurisdiction of any state.[205] The International Maritime Organization ("IMO"), the United Nations agency with responsibility for maritime issues, follows the UNCLOS definition.[206]

One major problem with the UNCLOS definition of piracy is the limitation to the high seas. Armed robbery and other piratical crimes cease to be considered piracy within a state's territorial seas, defined as those waters not exceeding twelve nautical miles from the low water line, also referred to as the "baseline" of the coast.[207] "The only people who are pleased are the pirates

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of Part XI to the U.S. Senate with Commentary, Oct. 7, 1994, 34 I.L.M. 1393 (1995). While the Senate has not yet ratified the treaty, the prospects for ratification in the near future are good, but by no means certain. Michael A. Becker, *International Law of the Sea*, 43 INT'L LAW. 915, 916–17 (2009). The 1958 United Nations Convention on the High Seas, to which the United States is a party, defines piracy much the same as the 1982 Convention on the Law of the Sea. United Nations Convention on the High Seas art. 15, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11. These definitions have become enshrined in customary international law. *See* Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT'L L. 1, 10 (2007). UNCLOS defines piracy as:

> (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
> (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
> (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
> (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

UNCLOS, art. 101.

205. Hans Tino Hansen, *Distinctions in the Finer Shades of Gray: The "Four Circles Model" for Maritime Threat Assessment*, *in* LLOYD'S MIU HANDBOOK OF MARITIME SECURITY, *supra* note 30, at 73, 76.

206. MURPHY, *supra* note 28, at 8–9. Under the IMO's Draft Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships, "'Piracy' means unlawful acts as defined in Article 101 of the [UNCLOS]." INT'L MARITIME ORG., DRAFT CODE OF PRACTICE FOR THE INVESTIGATION OF THE CRIMES OF PIRACY AND ARMED ROBBERY AGAINST SHIPS, annex § 2.1 (2000), *available at* http://www.imo.org/includes/blastDataOnly.asp/data_id%3D1880/984.pdf [hereinafter IMO DRAFT CODE].

207. UNCLOS, *supra* note 204, art. 3. States then are entitled to an exclusive economic zone not exceeding 200 nautical miles from the baseline. *Id.* art. 57. The high seas are defined as "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State." *Id.* art. 86. The piracy provisions within UNCLOS apply to the exclusive economic zone as well the high seas. *Id.* art. 58(2). The meaning of "high seas" within the intent of the U.S. Constitution's congressional authorization "[t]o define and punish Piracies and Felonies committed on the high Seas" was very different from the modern understanding.

> [T]he high seas embrace not only all the waters of the ocean, which are out of sight of land, but also all waters on the seacoast below low-water mark, whether those waters be within the territorial sovereignty of a foreign nation or of a domestic State. It has accordingly been held, by our ablest law writers, that the main or high seas properly begin at low-water mark.

STORY, *supra* note 91, at 120.

(one minute) or armed robbers (the next minute) as they skip from one side to the other of an invisible line that divides the high seas from territorial seas in order to evade capture."[208]

Although most modern pirate attacks occur in territorial waters,[209] Somali pirates are more than capable of piracy on the high seas. In 2009 on the high seas, Somali pirates seized the *Alabama*, an American-flagged ship owned by Maersk.[210] All vessels are warned to steer clear of Somali waters: "the old warning to stay at least 50 nautical miles from the coast has now been replaced by warnings to stay at least 200 nautical miles away."[211] But even this increased buffer is insufficient, considering that the Somali pirates hijacked the *Sirius Star*, a supertanker, 450 nautical miles southeast of Kenya's port, Mombasa.[212]

Forcible depredations like robbery, kidnapping, or hijacking occurring within the territorial waters of a state are considered armed robbery against ships, falling outside existing international rules.[213] If such an act occurs within the territorial seas of a country, it is a violation of that country's criminal code, "just as if a robbery occurred in one of that nation's cities."[214]

The waters surrounding Somalia may be an exception to the limitation of piracy to the high seas. UNCLOS also recognizes piratical acts as piracy when they occur "outside the jurisdiction of any state."[215] If none of the Somali governments can control the waters surrounding the territory, the alternate jurisdictional clause of the UNCLOS piracy definition should apply. Consequently Somalia's territorial seas are outside the jurisdiction of a state so long as they are ungoverned. Some argue that since Somalia is a failed state, any nation may take action against piracy in what would other-

208. MURPHY, *supra* note 28, at 9.

209. *See* 2008 IMB PIRACY REPORT, *supra* note 30, at 3.

210. "[T]he defendant unlawfully, willfully and knowingly seized and robbed, and aided and abetted the seizure and robbery, of a United States-flagged ship, the Maersk *Alabama*, while the ship was navigating in the Indian Ocean beyond the outer limit of the territorial sea of any country." Complaint at 1, United States v. Muse, No. 09-MJ-1012 (S.D.N.Y. filed Apr. 21, 2009).

211. ROGER MIDDLETON, PIRACY IN SOMALIA: THREATENING GLOBAL TRADE, FEEDING LOCAL WARS 4 (Chatham House 2008), *available at* http://www.chathamhouse.org.uk/publications/papers/download/-/id/665/file/12203_1008piracysomalia.pdf.

212. Mary Kimani, *Stopping High-Seas Piracy*, AFR. RENEWAL, Feb. 17, 2009, http://www.un.org/ecosocdev/geninfo/afrec//newrels/piracy-09.html. More recent attacks have occurred at distances over 1,000 nautical miles from Somalia's capital, Mogadishu. 2009 IMB PIRACY REPORT, *supra* note 31, at 21.

213. The IMO's Draft Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships defines "[a]rmed robbery against ships" as "any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of 'piracy', directed against a ship or against persons or property on board such a ship, within a State's jurisdiction over such offences." IMO DRAFT CODE, *supra* note 206, annex § 2.2; H.E. José Luis Jesus, *Protection of Foreign Ships Against Piracy and Terrorism at Sea: Legal Aspects*, 18 INT'L J. MARINE & COASTAL L. 363, 372 (2003).

214. Bahar, *supra* note 204, at 18.

215. UNCLOS, *supra* note 204, art. 101(a)(ii).

wise be Somali waters.[216] While this is an appealing argument, it is unnecessary: the United Nations Security Council has authorized international forces to apprehend pirates and armed robbers within Somalia's territorial waters.[217]

Once the crime of piracy is defined, governments must look to jurisdictional issues before taking action. Normally criminal jurisdiction requires some nexus between the state wishing to assert jurisdiction and the actor.[218] But piracy is a crime of universal jurisdiction.[219] Not only are all nations obligated to cooperate in the repression of piracy,[220] every country is authorized to seize and arrest pirates on the high seas or outside the jurisdiction of any state.[221] The common law recognized and punished piracy as an offence "against the law of nations, (which is part of the common law,) as an offence against the universal law of society, a pirate being deemed an enemy of the human race."[222] Theoretically pirates prey on any merchant, regardless of nationality, and governments should not wait until their own citizens become victims before acting. Thus any nation, including the United States, would have jurisdiction to apprehend pirates. This also would be true of any maritime nation wishing to participate in the efforts against piracy.

Professor Eugene Kontorovich recently explained the difficult legal issues involved when encountering suspected pirates. Under modern jurisprudence, pirates cannot be attacked and killed upon sight—they must be afforded a trial.[223] Unless a vessel is acting in self defense, anti-piracy contractors, like naval forces, may only seek to deter or apprehend pirates.[224] Furthermore, patrolling vessels have limited options when encountering suspected pirates, who are presumed to be civilians, until the suspects commit a piratical act, such as attempting to board another ship.[225]

216. James Kraska & Brian Wilson, *Fighting Piracy*, ARMED FORCES J., Feb. 2009, http://www.armedforcesjournal.com/2009/02/3928962.

217. Press Release, Security Council, Security Council Decides States, Regional Organizations May Use "All Necessary Means" to Fight Piracy Off Somalia Coast for 12-Month Period, U.N. Doc. SC/9514 (Dec. 2, 2008), *available at* http://www.un.org/News/Press/docs//2008/sc9514.doc.htm (last visited July 1, 2009).

218. *See* Joshua M. Goodwin, Note, *Universal Jurisdiction and the Pirate: Time for an Old Couple to Part*, 39 VAND. J. TRANSNAT'L L. 973, 984–87 (2006).

219. *See* Bahar, *supra* note 204, at 15–16 (arguing in favor of universal jurisdiction). *But see* Goodwin, *supra* note 218, at 984–87 (criticizing application of universal jurisdiction to acts of piracy); Kontorovich, *supra* note 143, at 215; Rubin, *supra* note 195, at 241–43, 272.

220. UNCLOS, *supra* note 204, art. 100.

221. *Id.* art. 105. None of the countries involved in the international naval patrols around Somalia has elected to prosecute a suspected pirate based on universal jurisdiction. *See* Kontorovich, *supra* note 31, at 4. Kenya has agreed to prosecute a limited number of pirates captured by the United States and Great Britain. *Id.* at 18–19. In order to prosecute these pirates, Kenya asserts universal jurisdiction. Azubuike, *supra* note 195, at 55.

222. United States v. Smith, 18 U.S. 153, 161 (1820).

223. *See* Kontorovich, *supra* note 31, at 21.

224. *See id.*

225. *See id.*

V. CURRENT ERA: SOMALIA AND ANTI-PIRACY CONTRACTORS

Of course, Somalia is primarily where today's pirates originate and operate; a viable Somali government would be in the best position to deal with the piracy epidemic. Somalia, however, is typical of a failed state.[226] The country has three relevant governments: the semi-autonomous region of Puntland, where one major pirate network operates;[227] the TFG, internationally recognized as having jurisdiction over Somalia's territorial waters despite a lack of capacity to exercise it;[228] and the self-declared independent region of Somaliland, with relatively little, if any, piracy.[229] All three have attempted to employ security contractors for maritime security with mixed results.

In addition to anti-piracy operations, the Somali governments have used contractors for coast guard services such as protection from illegal fishing and waste dumping.[230] They also have used these contractors to train local forces in a similar capacity.[231] The Somali governments have been involved with various maritime security contracts over the past decade. The semi-autonomous region of Puntland began using these contractors in 2000. The TFG has attempted to establish viable maritime security contracts since 2005. The self-declared independent region of Somaliland established a security contract in 2006. The lessons learned from the successes and failures of these ventures emphasize the need for responsible contractors, regulations, accountability, and a respect for the rule of law.

A. *Maritime Security Contracts by the Semi-autonomous Puntland Government*

Puntland has employed a number of different security contractors since 2000, meeting with various levels of success. It first contracted the British company Hart Security ("Hart") from 2000 to 2001.[232] Hart was hired "mainly to protect Puntland's maritime resources against illegal foreign fishing by providing training as well as on-ship support to the local Coast Guard."[233] The company's force consisted of one boat and seventy men, primarily Somalis with a balanced composition from the local clans.[234] Hart was financed through the sale of fishing licenses.[235] "Hart was very successful: the frequency of piracy

226. MURPHY, *supra* note 28, at 107.
227. *2009 Secretary-General Report*, *supra* note 51, ¶ 5.
228. *See* S.C. Res. 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008).
229. *2009 Secretary-General Report*, *supra* note 51, ¶ 5 (explaining that major pirate networks are in Puntland and in the southern Mudug region); Hansen, *supra* note 7, at 595.
230. Hansen, *supra* note 7, at 585.
231. *Id.*
232. *Id.* at 585–86; *2008 UNSC Report*, *supra* note 33, ¶ 40.
233. Hansen, *supra* note 7, at 587. In 1999 the Somali coast guard commandant was reportedly also the pirate commander-in-chief, using fishermen to spot prey. HYMPENDAHL, *supra* note 46, at 240.
234. Hansen, *supra* note 7, at 587.
235. *2008 UNSC Report*, *supra* note 33, ¶ 41.

declined, and the nucleus of a relatively efficient coast guard was formed with its spine consisting of British advisors and British-trained Somali militia acting as boarding parties."[236]

Hart successfully tapped British legal resources to settle international disputes.[237] For example, when the Somali coast guard detained a Spanish ship for illegal fishing, Hart contacted a British law firm and resolved the matter through arbitration.[238] Hart did not simply ransom the vessel, but made use of a legal international dispute resolution forum, strengthening Puntland's legal authority.[239] Hart stood apart from its successors by respecting the rule of law; it actively sought legal advice and followed fisheries guidelines.[240]

Internal conflicts within Puntland, however, ultimately doomed the Hart contract. First, Hart could not take action against certain pirate groups due to concerns over disturbing the fragile clan balance and peace in the area.[241] Second, Hart "suspected some members of the Puntland administration of collaborating with the pirates."[242] Understanding these circumstances, Hart took a careful and relatively successful approach to the problems until a Puntland civil war caused the contract to be terminated.[243] When this war erupted, the Hart-trained coast guard split into different factions.[244] Once fighting moved close to its operating bases, Hart withdrew from Somalia.[245] A United Nations report attributes Hart's ultimate failure as being primarily due to the Puntland administration's internal political disagreements as to how to share Hart-generated revenues.[246]

Hart was replaced by a Somali company, SOMCAN, a contractor "strongly connected to the Puntland political elite."[247] Like Hart, SOMCAN promised to generate its own income through the lucrative sale of fishing rights.[248] A report to the United Nations Security Council described the SOMCAN contract as a "joint venture" with the Puntland government and expressed concern over the sale of fishing rights: "[T]he sale of licences to foreign vessels in exchange for fishing rights . . . acquired the features of a large-scale 'protection racket', indistinguishable in most respects from common piracy."[249]

236. Hansen, *supra* note 7, at 587.
237. *Id.*
238. *Id.* at 587–88.
239. *Id.* at 588.
240. *See* Patrick Cullen, *Africa: Fisheries Under PSC Watch*, ISN ETH ZURICH, Nov. 11, 2008, http://www.isn.ethz.ch/isn/Current-Affairs/Security-Watch/Detail/?id=93699&lng=en.
241. Hansen, *supra* note 7, at 588.
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. *See* Ernst Jan Hogendoorn et al., *Report of the Panel of Experts on Somalia Pursuant to Security Council Resolution 1425 (2002)*, ¶ 161, U.N. Doc. S/2003/223 (Mar. 25, 2003).
247. Hansen, *supra* note 7, at 588.
248. *Id.*
249. *2003 UNSC Report*, *supra* note 36, ¶ 147.

Furthermore, SOMCAN used a significantly larger force than Hart, consisting "of about 400 men, one large boat and five . . . smaller vessels."[250] Even with its shortcomings, SOMCAN enjoyed some success. For example, it stopped a Philippine-flagged ship from dumping livestock with infectious diseases in Puntland.[251] The SOMCAN venture also resulted in seizing weapons from ships on a number of occasions, including several thousand AK-47 cartridges from one vessel in March 2003.[252]

SOMCAN's ties to Puntland's elites ultimately proved its undoing. It grew increasingly unpopular when it attempted to enforce a licensing system for subsistence fishermen and when it tried to collect fees from different clans.[253] In 2005 Puntland elected a president from a clan unrelated to SOMCAN.[254] The contractor's relationship with the Government greatly soured when SOMCAN's personnel clashed with governmental forces.[255] SOMCAN's reputation diminished further with accusations of piracy; in March 2005 three Puntland coast guard officers, who were also SOMCAN employees, were arrested for illegally detaining a Thai ship and crew and demanding a ransom of $800,000.[256] SOMCAN's failure could be viewed as resulting from its failure to respect the rule of law, through both cronyism and links to piracy.

As SOMCAN's contract faltered, piracy morphed into a major problem off Somalia, with more than thirty-four reported attacks on commercial shipping between March 2005 and late January 2006, including an unsuccessful attempt to capture the cruise liner *Seabourne Spirit* in early November 2005.[257]

Al Hababi Marine Services ("Al Hababi") and Puntland signed a contract in December 2005.[258] Like its predecessors, Al Hababi was to be funded through issuing fishing licenses.[259] It also had responsibility for guarding Puntland's coastal waters.[260] The company claimed to have 1,000 soldiers, mostly from the Bosasso area of Somalia; several Egyptian advisors; three coastal patrol

250. Hansen, *supra* note 7, at 588.
251. *Id.*
252. *2003 UNSC Report*, *supra* note 36, ¶ 144.
253. Hansen, *supra* note 7, at 588–89.
254. *Id.* at 589.
255. *Id.* SOMCAN contractors reportedly seized the Puntland airport in Boosaaso on September 14, 2004, because they had not received their salaries for several months. Radio Midnimo, *Guards Seize Somalia's Boosaaso Airport over Pay Dispute*, BBC NEWS, Sept. 14, 2004, *available on* LexisNexis.
256. Hansen, *supra* note 7, at 589; Jonathan Gatehouse, *This Cabbie Hunts Pirates*, MACLEAN'S, Jan. 19, 2009, *available on* LexisNexis; *Somali Militia Kidnaps Thai*, NATION (Thailand), Nov. 4, 2006, *available on* LexisNexis.
257. The Secretary-General, *Report of the Secretary-General on the Situation in Somalia*, ¶ 30, U.N. Doc. S/2006/122 (Feb. 21, 2006).
258. Hansen, *supra* note 7, at 589.
259. *Id.* at 590.
260. *Id.*

vessels; and several smaller craft.[261] "In April 2007, the Al Hababi-supported coast guard went on the offensive against illegal fishing vessels, and during a forty-eight-hour intensive patrolling period, thirteen Yemeni and Egyptian ships were captured, the first notable success in the company's effort to curtail illegal fishing."[262] Meanwhile reports of Somali piracy, which diminished significantly throughout 2006, began to skyrocket in 2007.[263]

The increase in piracy may be attributed to several causes. First, the Union of Islamic Courts reduced piracy when they took over southern Somalia in 2006.[264] Second, the Al Hababi-supported coast guard operations might have transformed into piracy. The United Nations Secretary General reported attacks on World Food Program vessels and an upsurge in Somali piracy in May 2007, a month after these coast guard operations got underway.[265] Without Hart's ability to seek international dispute resolution, the Somalis had no mechanism to resolve legal disagreements over the status of their operations. Without recourse to judicial settlement or accountability to the "rule of law," nothing discouraged attacks on innocent vessels.

In the summer of 2008 the Puntland government and SOMCAN again entered into a maritime security contract.[266] Shortly thereafter, in September 2008, the United Nations Special Representative for Somalia directly linked the pirates to Puntland's leaders.[267] Another United Nations report to the Security Council unambiguously stated, "Allegations of complicity in piracy activities by members of the Puntland administration are commonplace and well substantiated."[268] SOMCAN's touted example of a victory over pirates in October 2008 should be viewed with considerable skepticism. The SOMCAN-run coast guard did liberate a group of Syrian sailors being held on the *Wail*, a Panamanian-flagged bulk carrier, after an eleven-day standoff, capturing ten pirates, but the *Wail*'s Puntland-bound cargo of cement was the property of a Puntland government minister.[269] In December 2008, SOMCAN tried to persuade the United Nations and the European Union to give SOMCAN an additional $30 million per year to fund its operations.[270]

261. *Id.*
262. *Id.*
263. *2007 Secretary-General Report*, *supra* note 65, at 5.
264. *See* The Secretary-General, *Report of the Secretary-General on Children and Armed Conflict in Somalia*, ¶¶ 10, 25, U.N. Doc. S/2007/259 (May 7, 2007); Wright, *supra* note 46.
265. *See* The Secretary-General, *Report of the Secretary-General on the Situation in Somalia*, ¶ 51, U.N. Doc. S/2007/381 (June 25, 2007).
266. *See* Gatehouse, *supra* note 256.
267. *Somalia: UN Envoy Links Puntland Leadership to Pirates*, GARROWE ONLINE, Sept. 19, 2008, http://www.garoweonline.com/artman2/publish/Somalia_27/Somalia_UN_Envoy_links_Puntland_leadership_to_pirates.shtml.
268. *2008 UNSC Report*, *supra* note 33, ¶ 141.
269. Abdiqani Hassan, *Somali Forces Free Panama Ship from Pirates*, REUTERS, Oct. 14, 2008, http://www.alertnet.org/thenews/newsdesk/LE092321.htm.
270. *A Local Anti-Pirate Company*, INDIAN OCEAN NEWSL., Dec. 20, 2008, at 7.

B. *Maritime Security Contracts by the Somali TFG*

The Somali TFG was established in 2004,[271] but initially was a government in exile.[272] It attempted to form contracts with several security companies without ever realizing meaningful performance. The failures were due in part to the Government's inability to control territory and in part to the companies' inability to perform security services at the time of contract formation.

Shortly after the TFG moved into Somalia, an American company, Topcat Marine Security ("Topcat"), began to lobby TFG officials for a contract to protect Somali waters from illegal fishing, toxic dumping, and piracy.[273] In November 2005 the TFG awarded Topcat a $50 million security contract to supply all necessary equipment, training, and assistance in setting up five naval bases.[274] In order to secure the contract, Topcat apparently falsely promised financial support from the U.S. government.[275] The U.S. Department of State's Bureau of Arms Control stepped in, however, and issued a cease and desist order because the contract would have breached a then-effective Somali arms embargo.[276]

In May 2006 Topcat was replaced by Northbridge Services Group, Ltd. ("Northbridge"),[277] in conjunction with the African Institute for Maritime Research ("AIMR").[278] According to Northbridge, the companies were granted "the sole responsibility for securing Somalia's coastline from piracy/terrorism on the high seas" with authority to "seize illegal fishing vessels, eliminate toxic waste spills and organize a Somali coastal defence [sic] force."[279] Northbridge and AIMR also were purported to have been granted rights to negotiate and authorize licensing rights of oil concessions, exploration, and drilling to private companies or governments.[280] Northbridge said

271. The Secretary-General, *Report of the Secretary-General on the Situation in Somalia*, ¶¶ 2, 3, U.N. Doc. S/2005/89 (Feb. 18, 2005); The Secretary-General, *Report of the Secretary-General on the Situation in Somalia*, ¶ 7, U.N. Doc. S/2004/804 (Oct. 8, 2004).

272. *Yusuf the Uniter?* ECONOMIST, Feb. 19, 2005, at 46, 46.

273. Hansen, *supra* note 7, at 591. Hansen refers to the company as "Top Cat Maritime" although other sources, and the author, use "Topcat." *See* MIDDLETON, *supra* note 211, at 11; Isenberg, *supra* note 9.

274. *US Firm to Fight Somali Pirates*, BBC NEWS, Nov. 25, 2005, http://news.bbc.co.uk/2/hi/africa/4471536.stm.

275. Hansen, *supra* note 7, at 591.

276. *Armed Response*, LLOYD'S LIST, Oct. 30, 2008, at 7, *available at* http://lloydslist.com/11/epaper/11/contents.htm?issueNo=59790.

277. Northbridge Services Group was a British-based security company linked to the South African security company Executive Outcomes, which in turn contracted with the government of Sierra Leone between 1995 and 1997 to provide military equipment, security, and training during the African nation's civil war. David Ashenfelter, *Man from New Baltimore Is Accused of Global Plot*, DETROIT FREE PRESS, Sept. 16, 2004, at 1B.

278. Press Release, Northbridge Serv. Group, Ltd., Support for Transitional Federal Government of Somalia (June 12, 2006), *available at* http://northbridgeservices.org/somalia%20release.pdf.

279. *Id.*

280. *Id.*

it had 200 non-Somali personnel ready by 2007, though they were never deployed in Somalia.[281] Apparently Northbridge wanted to assert full control over the territorial waters adjacent to Somaliland and Puntland, but this plan would have potentially led to conflict between the weak TFG forces and the far larger and stronger Puntland and Somaliland armies.[282] Thus, like Topcat, Northbridge never started performing services.

After Northbridge failed to act, Secopex, a French military company, attempted to do the job. Secopex announced its contract with the TFG in May 2008, estimated to be worth between $75 and $150 million per year for three years.[283] Secopex said ninety-five percent of the contract involved maritime security: it would be involved in strengthening Somalia's customs agency and maritime police force, which would aim to combat piracy.[284] The company said it would be relying heavily on 2,000 personnel, mainly ex-military, to set up the new structures, but also planned on training Somali recruits.[285]

The Secopex contract significantly differed from previous anti-piracy security contracts with the TFG. First, Secopex was not given exclusive rights for maritime security.[286] Second, the TFG explained that it could not pay Secopex; instead, the contractor was required to obtain funding from international sources such as the United Nations or the U.S. or French government.[287] Secopex, like its predecessors, never performed maritime security services for Somalia.[288] Instead, it began contacting ship owners and maritime companies in Japan and the Netherlands, offering them armed maritime escorts that it intended to set up.[289]

With the failure of the Secopex contract, the TFG turned to another private firm, the Swiss-based company Odyssey Consulting SA ("OCSA").[290] On September 10, 2008, the TFG signed a memorandum of understanding with OCSA to "create a Somalian [sic] coast guard, train the local police forces, and take charge of the security of certain sensitive sites (such as airports) on behalf of the TFG."[291] The funding for OCSA's contract was earmarked through a financial package put together with Swiss banks and guaranteed by the TFG in the form of options against future oil revenue.[292]

281. Hansen, *supra* note 7, at 592.
282. *Id.*
283. *2008 UNSC Report*, *supra* note 33, ¶¶ 97–98.
284. *Somalia Hires French Firm to Boost Coastal Security*, LLOYD'S LIST, June 4, 2008, at 2, *available at* http://www.lloydslist.com/11/epaper/11/contents.htm?issueNo=59685.
285. *Id.*
286. Alisha Ryu, *Conflicting Reports Arise About Role of French Security Firm in Somalia*, VOANEWS.COM, June 20, 2008, http://www.voanews.com/english/archive/2008-06/2008-06-20-voa64.cfm.
287. *Id.*
288. *New Security Contract*, INDIAN OCEAN NEWSL., Dec. 6, 2008, at 4.
289. *SECOPEX*, INDIAN OCEAN NEWSL., Dec. 6, 2008, at 5.
290. *New Security Contract*, *supra* note 288.
291. *Id.*
292. *Id.*

C. *Maritime Security Contracts by the Self-Declared Independent Somaliland Government*

The Republic of Somaliland, formerly a British territory, is a self-declared independent country within the recognized borders of Somalia, but Somaliland is not recognized by any foreign government.[293] "Somaliland . . . has been fairly stable since it declared independence in 1991."[294]

Somaliland has successfully contracted with a private maritime security company, Nordic Crisis Management ("NCM"), a Norwegian firm. This company has a more limited role than the security contractors elsewhere in Somalia. NCM also appears to be responsible and has not been subject to accusations of complicity in illegal activities.

In July 2006 Somaliland hired NCM to develop a set of security systems for the territory's main port in Berbera and ensure that the port's security meets the maritime standards set by the UN and the IMO.[295] NCM trained the harbor's security forces and Somaliland's local police forces and evaluated the area's future coast guard requirements.[296] NCM provides "security planning and crisis management, as opposed to active security personnel."[297]

Importantly the NCM contract in Somaliland is entirely funded through developmental aid from the Norwegian Government.[298] Norway supports the contract because it perceives economic benefits from improved port security in Somaliland.[299] It also was argued that the project would help prevent piracy, even though piracy was a relatively small problem along the coast of Somaliland at the time.[300]

The Somaliland effort has been productive. In February 2009 the Somaliland coast guard arrested seven pirates from Puntland.[301] The men were apprehended with weapons including bazookas and were planning attacks along the Somaliland coastline.[302] They were sentenced to terms ranging from twenty to twenty-six years.[303] This was the third time that Somaliland coast guards successfully arrested pirates from Puntland and brought them in front of the Somaliland court.[304]

293. CIA World Factbook, *supra* note 47.
294. Robert Draper, *Shattered Somalia*, NAT'L GEOGRAPHIC, Sept. 2009, at 70, 86; *Just a Glimmer of Hope*, ECONOMIST, Feb. 28, 2009, at 48 48–50.
295. Hansen, *supra* note 7, at 594.
296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.* at 595.
300. *Id.*
301. *Somaliland Forces Apprehend Somali Pirates*, SOMALILAND PRESS, Feb. 12, 2009, http://somalilandpress.com/2247/somaliland-forces-apprehend-somali-pirates.
302. *Somaliland Court Jails Seven Pirates from 20 to 26 years*, BBC WORLDWIDE MONITORING SERV.: INT'L REP., Feb. 19, 2009 (excerpted from a Feb. 19, 2009, article on Puntlandpost.com).
303. *Id.*
304. *Somaliland Forces Apprehend Somali Pirates*, *supra* note 301.

VI. MARITIME SECURITY CONTRACTORS EMPLOYED BY GOVERNMENTS OUTSIDE SOMALIA

Somalia is not the only country to use marine security contractors. Other African nations have recently contracted with private companies for coastal law enforcement. Although it is probably too early to analyze these companies and their operations, these contracts raise questions about the sustainability of private maritime security ventures.

Liberia initiated a "Marine Control and Surveillance Project" in February 2008 and hired a private sector company, Marine Protection and Rescue Services Limited, to prevent ships from engaging in illegal fishing on Liberian territorial waters.[305] Sierra Leone has a similar contract in place to actively monitor, license, board, and fine international fishing trawlers operating illegally in territorial waters.[306] The Liberian government expected to reap over $300,000 in fines from a single arrest made through the project.[307]

Contract funding is crucial to the ultimate success of these programs. In the short term contractors can be funded through a percentage of the large fines levied against illegal fishing activities, as well as the possible confiscation of valuable fish catches and even the fishing equipment and boat itself.[308] Funding these operations through a system amounting to bounties, however, is not sustainable for the long term.[309] Once illegal fishing is suppressed, income sources dry up.[310] Unless the Government or the contractor invests in a sustainable fisheries program, these contracts are untenable.[311]

NCM ultimately succeeded in Somaliland because funding came from the Norwegian Government instead of a percentage of fines or licenses sold. Likewise, Hart's early funding through the sales of licenses was initially profitable, which, ironically, contributed to the contract's termination.[312] If international resources could be used to fund legitimate marine contractors, then their operations do not need to be dependent purely on bounty hunting.

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305. *Liberia: Government Arrest Illegal Fishing Ship*, ALLAFRICA.COM, Feb. 25, 2008, http://allafrica.com/stories/200802251555.html.

306. *See* Cullen, *supra* note 240.

307. *See id.*

308. *See id.*

309. *See id.*

310. Using bounties as an incentive in anti-piracy operations would be similarly unsustainable. Historically wartime privateers would frequently burst into action at the beginning of a conflict, finding abundant and poorly defended prey, then normally decline. *See* LYDON, *supra* note 95, at 126, 127–28; Starkey, *supra* note 181, at 131. This is not to say that bounties would be ineffective at apprehending pirates over a short timeframe.

311. Cullen, *supra* note 240.

312. *See* Hogendoorn et al., *supra* note 246, ¶ 161.

VII. CONCERNS RELATING TO GOVERNMENTAL UTILIZATION OF PRIVATIZED SECURITY

Security contractors, like those used in Somalia, remain controversial, especially in the role of government service provider.[313] The debate over the private sector's role in anti-piracy operations is complex. First, security firms may be hired to protect ships, to interdict pirates, or to provide a comprehensive coast guard function. Second, security personnel might be government contractors, but they also could be completely within the private sector. This is a distinction between companies hired by governments rather than being hired by private shipping companies. Governments maintain an interest in private security for private purposes, especially as questions about use of force and regulation arise. Letters of marque should be treated as governmental tools to resolve concerns with privatized maritime security.

A. *Security Is Inherently Governmental*

Conventional wisdom incorporates Max Weber's definition[314] of the state as having a monopoly on the legitimate use of physical force.[315] A primary concern over using any type of private security in the modern era is the argument that their military-like service is inherently governmental.[316] This argument posits that governments should have a monopoly on the military profession and national security.[317] As Blackstone explains, "the right of making war . . . is given up by all private persons that enter into society, and is vested in the sovereign power."[318] The military, however, is not the only public institution empowered with legitimacy to use force: a nation also has law enforcement organizations.

The authority of law enforcement personnel to forcibly arrest and detain people is not exclusively governmental. For example, American bounty hunt-

313. Wallace, *supra* note 19, at 130–34.

314. Weber wrote, "A compulsory political association with continuous organization . . . will be called a 'state' if and in so far as its administrative staff successfully upholds a claim to the *monopoly* of the *legitimate* use of physical force in the enforcement of its order." MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 154 (Talcott Parsons ed., A. M. Henderson & Talcott Parsons, trans., The Free Press 1964) (1947).

315. *See, e.g.*, THOMSON, *supra* note 118, at 7; Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49, 69 (2004); Nagan & Hammer, *supra* note 25, at 457–58; Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 885 (2004). *But see* Larry J. Sechrest, *Public Goods and Private Solutions in Maritime History*, Q.J. AUSTRIAN ECON., Summer 2004, at 3, 3 (2004). Sechrest argues that the history of privateering shows "national defense in the form of warfare on the seas was not, and need not, be monopolized by government." *Id.*

316. SINGER, *supra* note 22, at 7–8.

317. *See, e.g.*, *id.* at 8; MICHELLE SMALL, PRIVATISATION OF SECURITY AND MILITARY FUNCTIONS AND THE DEMISE OF THE MODERN NATION-STATE IN AFRICA (Accord Occasional Paper Series 2006), *available at* http://www.accord.org.za/downloads/op/op_2006_2.pdf; Nagan & Hammer, *supra* note 25, at 457–58; Rosky, *supra* note 315, at 997; Montgomery Sapone, *Have Rifle with Scope, Will Travel: The Global Economy of Mercenary Violence*, 30 CAL. W. INT'L L.J. 1, 10 (1999).

318. TUCKER, *supra* note 76, at 257.

ers are legally entitled to use force to apprehend fugitives and are paid for successful captures.[319] While bounty hunters enjoy police-like powers, they do not face the same restrictions as government agents in searching, questioning, or apprehending defendants.[320] Bounty hunters have proven themselves more efficient than public law enforcement at ensuring a defendant's presence at trial.[321] They return ninety-nine percent of bonded defendants who skip bail, playing a crucial role in the efficiency of the judicial system.[322] Bounty hunters, however, have been criticized for using unnecessary force and harsh tactics.[323] Certain states require bounty hunters to obtain licenses, which can be revoked for business-related incompetence, untrustworthiness, or unsuitability.[324]

Another exception to the governmental monopoly on force is evident in private sector security companies providing extensive police services in the United States, with roles in controlling crime, protecting property and life, as well as maintaining order.[325] In fact, private police within the United States exceed the public police in terms of both persons employed and dollars spent.[326] Private police, when deputized, have the same powers as the public police.[327]

The letter of marque is a tool to deputize and regulate private security operating internationally as agents of the state. In the military context, the intent behind the letter of marque was for governments to retain control over commissioned vessels while simultaneously expanding military capabilities. When privateers exceeded their commission, they were no longer under governmental authority and could be treated like criminals. Such was the case with Captain Kidd: he had a privateering commission, but he exceeded it and became a pirate.

In the law enforcement context, letters of marque deputize recipients with sovereign police powers. Historically anti-piracy privateers were similar to modern American bounty hunters; both were authorized to detain the objects of their commission and paid based on the success of the capture. Clearly the private sector, empowered with the legitimate authority to use force, may supplement public sector law enforcement without undermining the state. Letters of marque simply allow governments to retain their inherent control over the use of force in the international arena.

319. *See* Supernor, *supra* note 97, at 232. The commercial bond industry, under which bounty hunters operate, exists in all but five states. Gerald D. Robin, *Reining in Bounty Hunters*, 21 CRIM. JUST. 4, 7 (2006).

320. Robin, *supra* note 319, at 6; Andrew DeForest Patrick, Note, *Running from the Law: Should Bounty Hunters Be Considered State Actors and Thus Subject to Constitutional Restraints*, 52 VAND. L. REV. 171, 172 (1999).

321. Supernor, *supra* note 97, at 232.

322. Patrick, *supra* note 320, at 176.

323. Robin, *supra* note 319, at 7. Bounty hunters are not regulated on the national level. *Id.* at 11.

324. *Id.* at 8.

325. Joh, *supra* note 315, at 55.

326. *Id.* at 50.

327. *Id.* at 64.

B. *Loyalty*

Another concern with using private security personnel is their loyalty. American military service members take an oath to uphold the Constitution, whereas private individuals do not.[328] If anything, the private sector is primarily loyal to profit.[329] More generally, companies performing security services have loyalty to their shareholders, not to the country.[330] This is not a new concern: the British government was also concerned about privateer loyalty. For example, in 1692, the colonial government in New York, on the recommendation of the British Government, outlawed its citizens from serving on foreign privateers.[331] "Pirates who had masqueraded as privateersmen by shifting from flag to flag were now branded as such, closing one of the major avenues by which privateersmen slipped into piracy."[332] Between 1720 and 1760, the British increased regulation and bonding of privateers to effectively prevent privateers from turning pirate:[333]

> Infractions of the prize laws prompted quick action, and violations of international law no longer passed unchallenged. Royal edicts and proclamations dictated the conduct of the privateersmen, and failure to heed them cost a captain his commission. Every phase of the semi-official warfare became systematized, until a complete code of action had been defined, laying out the course that a commerce destroyer's captain must pursue, from the licensing of his vessel to the disposal of his prisoners.[334]

To address loyalty concerns of private security firms acting internationally, a license granted through a letter of marque should be contingent on a monetary bond.[335] This would apply both to private security working in the private sector and to government contractors. The letter of marque would contain

328. Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1089 n.309 (2004).

329. *Id.* at 1020 n.45.

330. Scott Shane & Ron Nixon, *In Washington, Contractors Take on Biggest Role Ever*, N.Y. TIMES, Feb. 4, 2007, at A1, *available at* http://www.nytimes.com/2007/02/04/washington/04contract.html?pagewanted=2&_r=1&sq=In%20washington%20contractors%20take%20on%20the%20biggest%20role%20ever&st=cse&scp=1 (quoting David M. Walker, former Comptroller General of the United States).

331. LYDON, *supra* note 95, at 47. The United States currently prohibits American citizens from fitting out or serving on privateers "employed to cruise or commit hostilities upon the citizens of the United States or their property . . . ." 18 U.S.C. § 1654 (2006).

332. LYDON, *supra* note 95, at 47.

333. *See id.* at 83.

334. *Id.* at 84.

335. Bonds are not currently required for security contracts with the United States. The Miller Act, 40 U.S.C. §§ 3131–3134 (2006), and the U.S. Federal Acquisition Regulation (FAR) require contractors to obtain bonds in construction contracts exceeding $100,000. FAR 28.102-1. The FAR does not require bonds for other contracts. FAR 28.103-1. It does permit bonds in the interests of the Government. FAR 28.103-2 (performance bonds); FAR 28.103-3 (payment bonds). Generally, the Government may impose the bonding requirement when it is reasonable and imposed in good faith. RCI Mgmts., Inc., Comp. Gen. B-228225, Dec. 30, 1987, 87-2 CPD ¶ 642, at 2.

regulations and articulate the recipient's duties and responsibilities; the bond links the recipient's profit motivation to those obligations.

C. *Risk of Unnecessary Force and Accountability*

On September 16, 2007, Blackwater contractors engaged in a firefight in a busy public area of Baghdad, Iraq, leaving seventeen Iraqi civilians dead.[336] Both the Iraqi Government and the U.S. military argue that Blackwater's personnel used excessive force.[337] Those involved in the shooting were indicted in federal court, but the complaint was dismissed.[338]

Concerns about use of excessive force and irresponsible use of firepower must be addressed when anyone performs security services; this is especially true when services involve arresting and deterring armed criminals. The risks are further magnified in Somalia's maritime environment. First, a gunfight in the vicinity of oil or chemical tankers is potentially devastating.[339] Second, there are significant risks about killing fishermen, especially considering the difficulty in distinguishing heavily armed Somali fisherman from pirates.[340]

Many risks of unwarranted violence can be mitigated with regulation.[341] Governmental regulation of privatized maritime security is often difficult

336. Rebecca Ulam Weiner, The Hidden Costs of Contracting: Private Law, Commercial Imperatives and the Privatized Military Industry 1 (Harvard Belfer Ctr. 2008), *available at* http://belfercenter.ksg.harvard.edu/files/Hidden%20Costs%20of%20Contracting_Dec%202008.pdf.

337. *Id.*

338. Indictment, United States v. Slough, No. CR-08-360 (D.D.C. filed Dec. 4, 2008), *available at* http://www.justice.gov/opa/documents/grandjury.pdf. The charges were brought under the Military Extraterritorial Jurisdiction Act of 2000 ("MEJA"), 18 U.S.C. §§ 3261–3267 (2006). *Id.* at 2. MEJA provides the United States with jurisdiction over felonies allegedly committed by those "employed by or accompanying the Armed Forces outside the United States." 18 U.S.C. § 3261(a)(1). The Blackwater personnel were under a State Department contract at the time of the gunfight; they argued that they were not employed by or accompanying the Armed Forces. Del Quentin Wilber, *Judge Refuses to Dismiss Charges Against Blackwater Guards*, Wash. Post, Feb. 18, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/02/17/AR2009021701938.html. In February 2009 the federal judge presiding over the case denied a motion to dismiss based on the argument that MEJA did not apply, but said the legal arguments against jurisdiction were "rather strong." *Id.* The criminal complaint was ultimately dismissed because the prosecution's case was built on sworn statements provided by the Blackwater employees "with the understanding that they would not be used against the guards in court. . . ." Del Quentin Wilber, *Charges Dismissed Against Blackwater Guards in Iraq Deaths*, Wash. Post, Jan. 1, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2009/12/31/AR2009123101936.html. Shortly after this complaint was dismissed, criminal charges were brought against two other former Blackwater employees for shooting civilians in Afghanistan. Jerry Markon, *Two Defense Contractors Indicted in Shooting of Afghans*, Wash. Post, Jan. 8, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/01/07/AR2010010703206_pf.html.

339. Carolin Liss, *Privatising the Fight Against Somali Pirates* 12 (Murdoch Univ. Asia Research Ctr., Working Paper No. 152, 2008), *available at* http://wwwarc.murdoch.edu.au/workingpapers.html.

340. *Id. See also SOMALIA: Getting Tough on Foreign Vessels to Save Local Fishermen*, *supra* note 61 (reporting recent incidents of international warships firing on innocent fishermen).

341. Liss, *supra* note 339, at 13.

since the personnel are operating on private vessels, which are, in turn, operating on the high seas and the territorial waters of a variety of countries.[342] Armed security personnel must follow the rules not only for their vessel's flag state, but for those of any nation through whose territorial waters they are transiting.[343]

Letters of marque can be part of the solution to the regulatory problem: the letters contain the rules by which security personnel operate and can be supplemented with further regulation. Just as every phase of privateering became systematized in the eighteenth century,[344] modern security personnel operating in the international maritime environment must be held to specific procedures and rules of engagement. Letters of marque should only be issued to security firms able to post a significant bond and meet specific qualification and training requirements. Ideally international standards for these requirements would be developed.[345]

Consequences for exceeding or violating commissions are also essential.[346] On the high seas, criminal sanctions for exceeding the authority of a letter of marque exist: offenders can be punished for piracy. Additional penalties would include forfeiture of the bond and potential impoundment of the vessels owned by security personnel.[347] If a bounty system is used to pay pirate hunters, the bounty could be forfeited. For government contractors, the contract could be subject to termination and the contractor could be subject to suspension and debarment. Tort liability for wrongdoing is also possible.[348]

The risks to innocent, but otherwise heavily armed, Somali fishermen will not be mitigated by issuing letters of marque to private companies. These risks, however, will exist whether piracy suppression is carried out by private

342. *Id.*

343. *Id.*

344. *See* LYDON, *supra* note 95, at 84; *see also* Tabarrok, *supra* note 112, at 572 ("Privateering worked only because it was backed by a substantial system of law, not only the common law of property, but also statutory creations such as admiralty courts and bond requirements.").

345. The International Organization for Standardization ("ISO") is a network of the national standards institutes of 161 countries and has published standards for marine port facilities. *See* International Organization for Standardization, ISO 20858:2007—Ships and Marine Technology—Maritime Port Facility Security Assessments and Security Plan Development, http://www.iso.org/iso/iso_catalogue/catalogue_tc/catalogue_detail.htm?csnumber=46051 (last visited Feb. 11, 2010).

346. One argument against reviving letters of marque is that it would be hard to control modern private sector pirate hunters. *See* Boot, *supra* note 143, at 104. Letters of marque, however, are the means to license and control private sector maritime security.

347. 2008 IMB PIRACY REPORT, *supra* note 30, at 40. The prospect of vessels being impounded by authorities during investigations into the use of force may be one reason merchant vessels hesitate to allow armed contractors aboard.

348. The real differences between governmental police and private security are the remedies for exceeding authority. Governmental police are immunized from tort liability as long as they act reasonably and in good faith, whereas private security personnel lack this protection. Sklansky, *supra* note 19, at 1186. In June 2009 Representative Frank LoBiondo (R-N.J.) introduced the United States Mariner and Vessel Protection Act of 2009 to limit private sector tort liability when defending against pirates. H.R. 2984, 111th Cong. §§ 2, 4 (2009).

or public efforts. Somalia must regulate the weapons its fisherman can carry in order to distinguish them from pirates.[349] These rules would then need to be enforced.

D. *Ability to Deliver Promised Services*

Some employers of contractors question whether the majority of maritime security contractors can actually deliver the services promised.[350] Because it is relatively simple and inexpensive to set up maritime security companies, their numbers are increasing.[351] These companies, however, have limited staff and often hire personnel after forming a contract.[352] While this provides flexibility, it brings into question the amount of experience and capability a contractor's personnel truly offer. For example, three employees of a British security contractor jumped off a tanker in November 2008 when their nonlethal devices failed to keep six intoxicated Somali pirates from boarding.[353]

Given the number of failures of the marine security companies in Somalia to deliver any services, capability concerns are legitimate. Indeed, the most effective security companies, like NCM and Hart—at least initially—were not "start-ups" and boasted a track record of service. Governments can screen out fly-by-night security firms by requiring significant bonds.[354]

E. *Centralized Organization and Oversight*

Private security providers working directly for governments must be centrally organized and controlled. One of the great defects in old-time privateering was lack of such organization.[355] Each ship operating as an independent freelance bounty hunter created significant problems. First, there were many examples of privateers running away from each other and throwing their guns overboard, thinking they were in the presence of an enemy warship because there was no way to communicate efficiently.[356] Second, privateers would

349. In all probability, the Somali fisherman will not willingly disarm unless illegal fishing is brought under control.

350. Liss, *supra* note 339, at 9.

351. *Id.*

352. *Id.*

353. Martin Fletcher, *The Pirates Had No Fear. We Fired Everything We Had but in the End We Had to Jump Overboard*, TIMES (London), Feb. 21, 2009, at 49, *available at* http://www.timesonline.co.uk/tol/news/world/africa/article5776340.ece. The contractors were protecting a tanker and were not permitted to carry guns. *Id.* Instead, they fortified the ship with water cannons and a long-range acoustic device, which was supposed to deter attackers with ear-splitting noise. *Id.* Due to equipment limitations, the contractors had to leave a ten-foot area on each side of the ship outside the coverage of the water cannons; the pirates attacked that area. *Id.* The long-range acoustic device, despite being directed at the pirates for at least thirty minutes, had no effect whatsoever. *Id.* The contractors ultimately jumped overboard and the ship was captured. *Id.* After fifty-six days the vessel and its crew were freed after payment of a $1 million ransom, but the security firm never recovered. *Id.*

354. *See supra* Part VII.B.

355. *See* MACLAY, *supra* note 89, at xxiv.

356. *Id.*

mistakenly fire upon warships from their own countries or receive fire from them.[357] The prize system by which these privateers were paid was a disincentive to multiship operations.

This is not to say privateers completely failed to work with regular naval vessels—successful joint operations against enemy ships did take place.[358] Between 1739 and 1763, during King George's War and the French and Indian War, privateers acted as auxiliary vessels carrying troops, scouting, partaking in convoy duty, and occasionally blockading enemy ports.[359]

Nonetheless organization, communication, and other control issues must be addressed in modern security contracts. One of the pervasive difficulties in Iraq was the lack of command and control over, and poor coordination with, security firms hired by various agencies and reconstruction contractors.[360] Letter of marque rules could dictate organizational, communication, and command requirements.

F. *Destabilizing Potential*

Some commentators fear private security providers contribute to both long- and short-term instability. Private security providers acting in military capacities for weak states may have destabilizing effects by altering the civil-military balance within governments.[361] The odds of negative influences primarily correlate to whether private firms supplant core public military positions or roles, decreasing the status of military officials.[362] Risks may be exacerbated when the compensation for employees of private firms greatly exceeds that for their public counterparts.[363] Not only could this lead to tensions,[364] but the private sector may drain valuable human resources away from the public armed forces.[365] Further problems may arise if local military officials perceive threats to their careers.[366] As Professor Anna Leander noted, "Reducing resources for public forces, draining them of their most qualified staff and diminishing their status could hardly be considered an ideal route

357. *Id.* The phenomena of public armed forces firing upon friendly private security contractors in Iraq have been dubbed "blue on white engagements." Thurnher, *supra* note 25, at 73.

358. *See* LYDON, *supra* note 95, at 136.

359. *Id.* at 132.

360. U.S. GOV'T ACCOUNTABILITY OFFICE, REBUILDING IRAQ: ACTIONS NEEDED TO IMPROVE USE OF PRIVATE SECURITY PROVIDERS 26 (2005); U.S. GOV'T ACCOUNTABILITY OFFICE, REBUILDING IRAQ: ACTIONS STILL NEEDED TO IMPROVE USE OF PRIVATE SECURITY PROVIDERS 3 (2006); U.S. GOV'T ACCOUNTABILITY OFFICE, REBUILDING IRAQ: DOD AND STATE DEPARTMENT HAVE IMPROVED OVERSIGHT AND COORDINATION OF PRIVATE SECURITY CONTRACTORS IN IRAQ, BUT FURTHER ACTIONS ARE NEEDED TO SUSTAIN IMPROVEMENTS 1 (2008).

361. SINGER, *supra* note 22, at 191.

362. *Id.* at 197.

363. *Id.* at 199.

364. *Id.*

365. Anna Leander, *The Market for Force and Public Security: The Destabilizing Consequences of Private Military Companies*, 42 J. PEACE RES. 605, 616 (2005).

366. *Id.*

for enhancing public security."[367] Finally, after a security contract expires, the highly trained and skilled personnel still exist and may not be beholden to any government.[368]

While private military firms potentially destabilize weak states, such companies also have restored governmental authority.[369] Firms acting in a consulting capacity may further enhance the capability and professionalism of public militaries by properly focusing them on technical and strategic demands of warfare.[370] Private security companies frequently absorb otherwise unemployed former military personnel, keeping them from being disaffected, dangerous, and disruptive.[371] U.S. Naval Academy Professor Claude Berube also observed that skilled naval officers leave the service after significant education and training costs have been invested in them: "One way for the Navy to continue to benefit from those investments would be to direct them to [Private Naval Companies], where they would be of direct use again to naval operations."[372]

Responsible maritime security providers should not undermine weak states.[373] These companies operate nautically and should not be trained or equipped for land-based operations posing a physical threat to a government. Their objective should be limited to suppression of criminal activity. Due to limited contract duration and scope, as well as their foreign nature, they might not build long-term governmental institutions alone.[374] Yet private security providers can help bring order out of chaos and help create an environment conducive to nation building.[375]

G. *Mercenaries*

An analysis of concerns relating to private security companies involved in anti-piracy operations would not be complete without addressing mercenar-

367. *Id.* at 617.

368. BOBBY A. TOWERY, PHASING OUT PRIVATE SECURITY CONTRACTORS IN IRAQ 1 (U.S. Army War College Strategic Leadership Course 2006), *available at* http://www.strategicstudiesinstitute.army.mil/pdffiles/ksil520.pdf. This echoes the history of privateers turning to piracy after the end of wars when meaningful legitimate employment was unavailable. *See supra* Part III.B.

369. SMALL, *supra* note 317, at 24. "Successful" private military operations include the suppression of rebellions in Angola and Sierra Leone, the consolidation of the border and establishment of security in post-genocide Rwanda, and other humanitarian operations. SINGER, *supra* note 22, at 107–15; SMALL, *supra*, at 24. The role of Executive Outcomes ("EO"), the private military firm involved in Angola and Sierra Leone, is not without controversy. EO played a dominating role in ending the rebellions and effectively trained the official armed forces. The training, however, was put to ill use in Sierra Leone once EO was out of the picture and political power shifted. Jesse Selber & Kebba Jobarteh, *From Enemy to Peacemaker: The Role of Private Military Companies in Sub-Saharan Africa*, MEDICINE & GLOBAL SURVIVAL, Feb. 2002, at 90, 92.

370. SINGER, *supra* note 22, at 201–02.

371. *Id.* at 203.

372. Berube, *supra* note 19, at 612.

373. Unscrupulous, unprofessional, or irresponsible security providers, however, are likely to contribute to piracy. *See supra* Parts III.B, V.A.

374. SMALL, *supra* note 317, at 25.

375. *Id.*; Juan Carlos Zarte, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT'L L. 75, 116 (1998).

ies, since security contractors are regularly distained as such in the media.[376] The term is indefinite and, in large part, inapplicable to maritime security providers.

As one scholar notes, "The very word 'mercenary' has certainly acquired an unflattering connotation. In the general psyche, to be 'mercenary' is to be inherently ruthless and disloyal."[377] Since mercenaries, as foreign soldiers for hire, are "often not part of the hierarchical command structure of regular military forces, lack ethnic or cultural connections to the civilian populations, and were often discharged from prior military service because of disciplinary problems," they are thought to be more likely to violate human rights and the laws of war than members of regular military forces.[378] Moreover, mercenaries require armed conflict for employment; thus, they have no incentive to seek peaceful or alternate conflict resolutions.[379] Generally mercenaries are thought to be prohibited under international law.[380]

The term "mercenary," however, is amorphous.[381] For legal analysis, certain treaties provide possible definitions. Additional Protocol I to the 1949 Geneva Conventions defines a mercenary as a person taking a direct part in hostilities, motivated by profit, who is not a member of the armed forces on official duty or a resident of the territory where the conflict occurs.[382] Private sector maritime security firms and their personnel do not qualify as mercenaries under this definition.

The Convention for the Elimination of Mercenarism in Africa established by the Organization of African Unity ("OAU") is a regional treaty applicable to Somalia. It uses roughly the same definition of mercenary as Pro-

376. *See, e.g.*, Matthew Russell Lee, *French Mercenaries to Patrol Somalia, Blackwater in Mia Farrow's Dream for Darfur*, INNER CITY PRESS, June 16, 2008, *available at* http://www.innercitypress.com/un1mercenaries061608.html; *Mercenaries to Police Somali Coast*, SOMALILAND TIMES, Nov. 27, 2005, http://somalilandtimes.net/sl/2005/203/26.shtml; Gregory Viscusi, *Mercenary Guards Jump Ship as Somali Pirates Remain Undeterred*, BLOOMBERG.COM, Dec. 18, 2008, http://www.bloomberg.com/apps/news?pid=20601109&sid=akZu86OC5JsI&refer=exclusive.

377. SINGER, *supra* note 22, at 40.

378. Sapone, *supra* note 317, at 3.

379. *Id.* at 4. The Angolan government committed itself to a military solution when it hired Executive Outcomes ("EO") in the 1990s to combat UNITA rebels, prolonging the conflict. Selber & Jobarteh, *supra* note 369, at 93. *But see* Leander, *supra* note 365, at 608 ("The EO guidance brought UNITA to the negotiating table, which eventually produced the . . . peace protocol."). Some of the EO personnel were later hired to fight for UNITA. Selber & Jobarteh, *supra*, at 93.

380. Singer, *supra* note 25, at 524.

381. SINGER, *supra* note 22, at 40.

382. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 47, June 8, 1977, 16 I.L.M. 1391, 1412 [hereinafter Protocol I].

> A mercenary is any person who:
> (a) is specially recruited locally or abroad in order to fight in an armed conflict;
> (b) does, in fact, take a direct part in the hostilities;
> (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation

tocol I.[383] The OAU convention only prohibits mercenaries specifically hired to overthrow governments or certain liberation movements.[384] Anti-piracy contractors would be involved in neither overthrowing governments nor suppressing liberation movements.

Another potentially relevant treaty is the 1989 U.N. International Convention against the Recruitment, Use, Financing and Training of Mercenaries.[385] This convention contains two definitions of mercenaries. The first is virtually identical to that found in Protocol I, but does not require a mercenary to actually take part in hostilities.[386] The alternate definition requires mercenaries to be recruited specifically to overthrow governments, or undermine the constitutional order or territory of states.[387] These requirements are considered to

substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
(e) is not a member of the armed forces of a Party to the conflict; and
(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

Id. The United States is not a party to Protocol I and does not recognize article 47 as customary international law. Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419, 426 (1987). Protocol I does not prohibit mercenaries per se but states that a mercenary shall not have the rights of a legal combatant or a prisoner of war. Singer, *supra* note 25, at 528.

383. The convention states:

1. A mercenary is any person who:
a) is specially recruited locally or abroad in order to fight in an armed conflict;
b) does in fact take a direct part in the hostilities;
c) is motivated to take part in the hostilities essentially by the desire for private gain and in fact is promised by or on behalf of a party to the conflict material compensation;
d) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
e) is not a member of the armed forces of a party to the conflict; and
f) is not sent by a state other than a party to the conflict on official mission as a member of the armed forces of the said state.

Convention of the Organization of African Unity for the Elimination of Mercenarism in Africa art. 1, O.A.U. Doc. CM/817(XXIX) Annex II (July 3, 1977), *available at* http://www.africa-union.org/root/AU/Documents/Treaties/Text/Convention_on_Mercenaries.pdf.

384. *Id.* art. 1(2); Singer, *supra* note 25, at 528–29 ("[T]he drafters [of the OAU convention] carefully constructed [it] to allow African governments to continue to hire non-nationals, as long as they were used to defend themselves from 'dissident groups within their own borders,' while disallowing their use against any other rebel groups that the OAU supported.").

385. International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, Dec. 4, 1989, 29 I.L.M. 91. Neither the United States, nor any major power, is party to this convention. International Committee of the Red Cross, International Humanitarian Law—State Parties/Signatories, http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=530&ps=P (last visited Feb. 11, 2010). Furthermore, nobody has been prosecuted under this treaty, and several of the parties have permitted or directly benefited from mercenaries, weakening the convention's legal significance. Singer, *supra* note 25, at 531.

386. International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, *supra* note 385, art. 1.

387. *Id.* art. 2 ("A mercenary is also any person who, in any other situation: (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed

be vague and virtually impossible to prove.[388] They certainly would not extend to maritime security contractors operating under letters of marque, especially since their objective is to secure order, not undermine a government.

One common element of all mercenary definitions looks to whether anti-piracy contractors are specially recruited to "fight in an armed conflict." Maritime security contractors, however, are not recruited to "fight" but to enforce laws; "fighting" might occur as they carry out their duties, but fighting is not the objective of the service. Furthermore "armed conflicts" under the Geneva Conventions are international conflicts between states.[389] Piracy suppression is not an armed conflict because the pirates are not agents of any government or other organized political movement. Protocol I expands the definition of armed conflict to situations "in which peoples are fighting against colonial domination and alien occupation and against racist regimes . . . ."[390] This definition also does not apply to piracy suppression, since the pirates are not fighting against any government, but against civilian targets.

The maritime security contractors operating in Somalia over the past decade fall outside other elements of Protocol I's mercenary definition. Traditionally most of the personnel used by the security firms are Somalis, i.e., they are "nationals" or territorial residents of the area where the conflict is taking place. Additionally the various Somali governments have made their security contractors part of the official coast guard.

Security and military service providers deputized by governments also avoid classification as mercenaries.

> [I]n a contract . . . with Papua New Guinea in 1997 to help the state defeat a local rebel army, [contractor] personnel were deputized by the [G]overnment as "special constables." This appointment occurred despite the fact that they were non-citizens, and . . . ensure[d] that the [contractor] personnel were not liable under any international laws dealing with mercenaries.[391]

Anti-piracy contractors would be deputized to defeat criminals and potentially enforce laws; thus, their status is properly akin to the private police.

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at: (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or (ii) Undermining the territorial integrity of a State; (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation; (c) Is neither a national nor a resident of the State against which such an act is directed; (d) Has not been sent by a State on official duty; and (e) Is not a member of the armed forces of the State on whose territory the act is undertaken.").

388. Singer, *supra* note 25, at 531.

389. Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316 [hereinafter 1949 Geneva Convention]. The 1949 Geneva Convention contains the minimum rules for armed conflicts "not of an international character." *Id.* art. 3. Both articles 2 and 3 are referred to as "common articles" because they appear in all four of the 1949 Geneva Conventions. Hamdan v. Rumsfeld, 548 U.S. 557, 629 (2006). Professor Kontorovich argues that an international armed conflict exists in Somalia. *See* Kontorovich, *supra* note 31, at 26–27.

390. Protocol I, *supra* note 382, art. 1(4). The United States does not recognize Protocol I's expansive definition of "armed conflict" as customary international law. Matheson, *supra* note 382, at 425.

391. Singer, *supra* note 25, at 532–33.

Maritime security providers can be structured to alleviate organizational concerns and prevent actors from being independent freelancers.[392] Generally employees of modern security firms do not act as individuals, but as part of the entity organizing their activity and are liable to their superiors.[393] Furthermore, letters of marque and accompanying regulations must guarantee ultimate governmental control over all operations.

Private security providers do not need to perpetuate hostilities for sustainment. While mercenaries require armed conflict for employment, privatized maritime security firms and the personnel they employ do not. The objective of a security contract is security; the objective of an anti-piracy contract is the suppression of piracy.

H. *Concerns Specific to Protection Contracts*

Concerns relating to protective services may overlap those for active pirate interdiction. Stand-alone concerns for protection services also exist. While contractors currently have a limited role in hunting down pirates, they have an expanding role in protecting merchant vessels. Ship owners have hired maritime security companies to provide armed security on board their ships or as escorts for the transit through the Gulf of Aden.[394]

Both the IMO and IMB are concerned that arming merchant vessels will make pirates more aggressive.[395] The pirates, unsure of whether a vessel is armed, theoretically will be more likely to open fire on all vessels.[396] In cases where defensive weapons are used, the defending merchant vessels could be delayed or detained over questions about the appropriateness of the use of force.[397] This problem would be even greater if sailors or fishermen are killed or injured.[398] The IMB is concerned about ships and owners without security

392. *See supra* Part VII.E.

393. Singer, *supra* note 25, at 532.

394. 2008 IMB PIRACY REPORT, *supra* note 30, at 39; Miller, *supra* note 11, at A18. In March 2010 security personnel successfully defended a Spanish fishing vessel from pirates attacking with rocket propelled grenades. *Armed Spanish Trawler Repels Pirate Attack*, EU BUS. NEWS, Mar. 4, 2010, http://www.eubusiness.com/news-eu/somalia-shipping.3h3. Later that month armed contractors shot and killed a pirate during an attack on the *MV Almezaan*, a Panamanian-flagged cargo ship. Katherine Houreld, *Private Guards Kill Somali Pirate for 1st Time*, NAVY TIMES, Mar. 24, 2010, http://www.navytimes.com/news/2010/03/ap_somali_pirate_killed_032410/.

395. The IMO maritime safety committee revised its anti-piracy guidance mid-2009. INT'L MAR. BUREAU, INT'L CHAMBER OF COMMERCE, ICC-IMB PIRACY AND ARMED ROBBERY AGAINST SHIPS REPORT—SECOND QUARTER 31 (2009) [hereinafter 2009 SECOND QUARTER IMB PIRACY REPORT]. Currently the guidance is for flag states to discourage seafarers from carrying weapons to defend themselves, and to set their own policies for armed security, military, or law enforcement personnel. *Id.* The IMO and IMB previously opposed arming merchant vessels. *See* 2008 IMB PIRACY REPORT, *supra* note 30, at 40; Noor Apandi Osnin, *Private Maritime Security Company (PMSC) in the Strait of Malacca—Options for Malaysia*, 5 WORLD MAR. U. J. MAR. AFF. 195, 197 (2006). Although no longer opposed to arming merchant vessels, the organizations are still concerned about an "arms race at sea." 2009 SECOND QUARTER IMB PIRACY REPORT, *supra*, at 31.

396. *See* 2008 IMB PIRACY REPORT, *supra* note 30, at 40.

397. *See id.*

398. *See id.*

services: these ships would be left to defend themselves against pirates unable to seize the better-armed vessels.[399]

Despite such opposition, armed defense of merchant ships appears to be unavoidable.[400] Requiring defensive letters of marque for armed merchant vessels or their escorts would license and regulate security efforts; it would help ensure legitimate force was used appropriately.

Letters of marque as governmental commissions also address the right of innocent passage through coastal waters by merchant vessels.[401] According to UNCLOS, ships of all states "enjoy the right of innocent passage through the territorial sea" of another state.[402] Passage is considered innocent, however, "so long as it is not prejudicial to the peace, good order or security of the coastal State."[403] Examples of not-so-innocent passage include the threat or use of force[404] and the exercise or practice with weapons.[405]

Since littoral states have sovereignty over their territorial seas under UNCLOS,[406] some argue "the legitimate monopoly over the use of force in matters of security lies with the State and not with ships passing through those waters."[407] To further complicate matters, some countries, like Malaysia, have strict laws against private individuals bearing arms.[408] Thus, any protection service provided to merchants transiting through territorial waters is potentially contentious.

Letters of marque can mitigate some concerns relating to innocent passage. First, the letters clarify the status of private security providers as government agents.[409] Thus, laws against private individuals bearing arms would not be applicable. Second, commissioned vessels would have the same rights, and limitations, as governmental naval vessels, which have the right of innocent passage despite being armed.[410]

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399. *See id.*

400. After the April 2009 attack on the *Alabama*, Maersk decided to hire armed security for the ship because it regularly travels through high-risk waters to deliver food aid. Maersk stated, "Armed security is not the preferred route . . . ." Childress, *supra* note 11; *see also* Kraska, *supra* note 29, at 142 (reporting that counter-piracy policy experts believe that the provision of private armed security may be appropriate in some cases).

401. Osnin, *supra* note 395, at 203.

402. UNCLOS, *supra* note 204, art. 17.

403. *Id.* art. 19.1.

404. *Id.* art. 19.2(a).

405. *Id.* art. 19.2(b).

406. *Id.* art. 2.

407. Osnin, *supra* note 395, at 203; *see* PETER CHALK ET AL., COUNTERING PIRACY IN THE MODERN ERA—NOTES FROM A RAND WORKSHOP TO DISCUSS THE BEST APPROACHES FOR DEALING WITH PIRACY IN THE 21ST CENTURY 5 (RAND Nat'l Def. Research Inst. 2009).

408. Osnin, *supra* note 395, at 204.

409. D. Joshua Staub, *Letters of Marque: A Short-Term Solution to an Age Old Problem*, 40 J. MAR. L. & COM. 261, 265 (2009).

410. *See* Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 55–56 (Apr. 9). In this case, British warships kept their guns unloaded and in their normal stowage position, but the ships could retaliate quickly if fired upon. *Id.* at 59. Albania argued this was not innocent passage. *Id.* at 56. The

Defensive letters of marque overall would not exacerbate the problem of piracy. Somali pirates are currently becoming more aggressive because of the increased number of warships on patrol around Somalia and overall precautionary measures.[411] Pirates are simply more desperate to hijack ships.[412] They fire rocket-propelled grenades and automatic weapons indiscriminately to intimidate vessels and force their surrender.[413] Disarming merchants and removing private security would send an inappropriate message to the pirates, whereas licensing and regulation through letters of marque could contribute to governmental control over the security situation.[414]

VIII. CONCLUSIONS

Representative Paul's call for the United States to issue letters of marque may not seem likely to gain traction on Capitol Hill,[415] but it should be seriously considered. Private sector security exists because the Government's protective services do not extend to all places at all times. The security industry offers considerable potential benefits to supplement military efforts, including cost efficiency, flexibility, and technical skills.

Littoral governments should reconsider letters of marque to license and control privatized maritime security. The letters can be used to license defensive weapons on merchant vessels, and could even be used to authorize active anti-piracy operations. Furthermore Somali governments can use the letters to deputize their security contractors. Maritime security contractors can be part of the solution to piracy—especially if they are properly licensed and regulated through letters of marque.

International Court of Justice disagreed, finding the measures taken by the United Kingdom did not violate Albania's sovereignty. *Id.* at 60.

411. *See* 2009 SECOND QUARTER IMB PIRACY REPORT, *supra* note 395, at 20.

412. *See id.*

413. *See id.*

414. *See* James P. Terry, *Eliminating High Seas Piracy: Legal and Policy Considerations*, JOINT FORCE Q., July 2009, at 116, *available at* http://www.ndu.edu/inss/Press/jfq_pages/editions/i54/27.pdf (providing an overview of the U.S. strategy to combat piracy, which does not include arming merchant ships or reissuing letters of marque).

415. Berube, *supra* note 19, at 608; Joseph Goldstein, *Makin' 'em Walk the Plank*, A.B.A. J., July 2009, at 17.

There Is More Than One Way to Use a Maritime PSC

MAY 30, 2010 • COMMENTARY

By David Isenberg

This article appeared on *The Huffington Post* on May 30, 2010.

On May 27 I wrote about the pros and cons of using private security contractors to fight piracy. But that article considered just the use of putting armed guards aboard ship. That is not the only way, or even the best way, private security firms can be involved in fighting pirates.

Using private contractors help provide security against pirates is an increasingly popular notion. Congressman Rep. Ron Paul (R-Tex.) called on Congress to "issue letters of marque and reprisal, deputizing private organizations to act within the law to disable and capture those engaged in piracy." Indeed, this idea is grounded in the U.S. Constitution, which expressly invests Congress with authority to define piracy on the high seas and to issue letters of marque. (Art. I, § 8, cls. 10, 11).

Journal. Richard is an Air Force Judge Advocate and is currently serving as trial attorney in the Air Force Commercial Litigation Division in Washington,

As Richard notes, piracy thrives in coastal regions where people are drawn towards criminality by desperate circumstances combined with an absence of law-enforcement authorities. The pirate scourge originated in the failure of the rule of law and international institutions to prevent exploitation of Somali waters. The now sophisticated and aggressive pirate operations are thought to have morphed out of a self-help police or military function into piracy earlier this decade. Somali fisherman started out trying to deter illegal dumping and fishing and graduated from attacking vessels to seizing them for ransom, with the Hawiye clan, based around Haradere in central Somalia, emerging as the dominant group of pirates in 2004.

When the short-lived Union of Islamic Courts government took over the Haradere area in 2006, they suppressed local piracy, so the Darod clan, with strongholds around the east coast of Somalia and in the semi-autonomous Puntland region on the Gulf of Aden, took over the piracy role.

By 2008 a United Nations report described the pirates as "loosely organized and poorly trained," with a fluid membership. The report described two significant overlapping networks: one in Puntland, mainly consisting of the Majerteen clan, and another in central Somalia, mainly

the root causes of piracy, including illegal overfishing and toxic waste dumping."

It is not excuse for piracy to point out that it is not well realized that illegal fishing by foreign vessels is a significant concern for Somali leaders: a United Nations Secretary General report lamented the "pillage of Somali Indian Ocean and Red Sea waters by literally hundreds of vessels from a variety of nationalities" and expressed concerns of overfishing and depletion of fish stocks.

In 2005 some of the intruding vessels attacked local Somali fishermen and destroyed their boats and equipment. It should be no surprise that another United Nations report described the Somali fishery situation as resembling "naval warfare": "Fishing boats are typically mounted with heavy anti-aircraft canons and many of the crews are armed."

This analogy has become even more appropriate in recent years, with reports of international naval vessels firing on local fisherman and protecting their own vessels illegally fishing in Somali waters.

Richard points out that Puntland has employed a number of different security contractors since 2000, meeting with

Hart was very successful: the frequency of piracy declined, and the nucleus of a relatively efficient coast guard was formed with its spine consisting of British advisors and British-trained Somali militia acting as boarding parties.

Hart successfully tapped British legal resources to settle international disputes.

For example, when the Somali coast guard detained a Spanish ship for illegal fishing, Hart contacted a British law firm and resolved the matter through arbitration.

Hart did not simply ransom the vessel, but made use of a legal international dispute resolution forum, strengthening Puntland's legal authority.

Hart stood apart from its successors by respecting the rule of law; it actively sought legal advice and followed fisheries guidelines.

go.

If governments, rather than commercial shipping companies, hired private security contractors for that purpose we might see real progress in fighting pirates. But that, as Richard notes "must be centrally organized and controlled."

In that regard letters of marque might be a useful tool. Richard concludes that:

> Littoral governments should reconsider letters of marque to license and control privatized maritime security. The letters can be used to license defensive weapons on merchant vessels, and could even be used to authorize active anti-piracy operations. Furthermore Somali governments can use the letters to deputize

The CHAIRMAN. And I have another thing to ask unanimous consent to add into the record, a letter from our colleague, Representative Peter DeFazio.

[The information follows:]

Congress of the United States
Washington, D.C. 20515

The Honorable Peter A. DeFazio
Testimony for the House Committee on Rules
Full Committee Hearing – *Article I: Reforming the War Powers Resolution for the 21st Century*
March 23, 2021

Chairman McGovern and Ranking Member Cole:

Thank you for the opportunity to submit testimony as part of the Rules Committee's hearing on reforming the War Powers Resolution of 1973. I appreciate the Committee's leadership in holding this hearing and bringing attention to this important issue.

The Constitution is absolutely clear: Article I, Section 8 grants Congress, not the Executive Branch, the power to declare war and authorize use of force. Once congressional authorization has occurred, Article II grants the President authority to direct the Armed Forces as Commander in Chief.

The War Powers Resolution of 1973 and Continued Executive Overreach
After the Vietnam War and President Nixon's unauthorized, secret bombing campaign in Cambodia and Laos, Congress passed the War Powers Resolution (WPR) of 1973 – overriding President Nixon's veto in the process – in an attempt to prevent presidents from involving U.S. forces in overseas conflict without congressional authorization.

This was a significant statement from Congress to reassert its war powers authorities under Article I of the Constitution, but unfortunately the final version of this legislation was flawed. It did not adequately prevent presidents from circumventing Congress to engage in unauthorized use of military force. Since then, presidents of both parties have unlawfully exerted sole authority to introduce U.S. forces to overseas hostilities, resulting in U.S. involvement in more and more unchecked and never-ending conflicts.

Congress Shares the Blame
Unfortunately, the blame for gradual erosion of Congress's war powers does not only lie at the feet of the Executive. For decades, Congress itself has shirked its own constitutional responsibility to declare war and prevent Executive overreach, determining that it's easier to take the credit for unauthorized involvement in popular conflicts or blame the president for unpopular ones.

While the WPR of 1973 is a flawed document, it still has teeth. If Congress wanted to, it could remove U.S. forces from unauthorized engagement in hostilities today through the passage of a concurrent or joint resolution, as provided under the WPR of 1973. Yet to this day it has never been successful in doing so.

Introduction of the War Powers Amendments
During my first term in Congress, I introduced the War Powers Amendments of 1988, legislation to reform the War Powers Resolution of 1973 and reassert and strengthen Congress's constitutional war powers authority. By this time, it was already clear that serious reform of the WPR of 1973 was needed, as it had not reined in unauthorized involvement of U.S. forces in hostilities. I have reintroduced a version of this legislation in numerous Congresses since then, including recently introducing H.J.Res. 29, the War Powers Amendments of 2021.

Going Beyond AUMF Repeal
Reform of the WPR of 1973 was already a pressing issue before September 11, 2001, but it has become even more crucial in the post-9/11 era. Unfortunately, the flaws in the WPR of 1973 led directly to the inadequate drafting and subsequent presidential abuse of the 2001 and 2002 Authorizations for the Use of Military Force (AUMFs), resulting in the U.S.'s ongoing "forever wars" over the past two decades.

I have long advocated for repeal of the 2001 and 2002 AUMFs – including my introduction of legislation to repeal the 2002 AUMF in February 2003, before the Iraq War ever started – and I have strongly supported efforts spearheaded by my fellow colleagues, including the Honorable Barbara Lee, who have long pushed for repeal as well. While repeal of these AUMFs is an important step, it is essential that

Congress go further to put in place necessary checks on Executive authority. If Congress simply repeals the current AUMFs that multiple administrations have regularly invoked, there is nothing stopping Congress from passing future open-ended AUMFs or preventing any president from avoiding the constitutional obligation to seek congressional authorization prior to involving U.S. forces in hostilities.

President Biden's recent unauthorized strikes into Syria only underscore this issue. Instead of citing the 2001 or 2002 AUMF as justification, he simply pointed to "self-defense" authorities under Article II. Using this logic, the President can essentially order U.S. forces to attack anyone at any time or anywhere he or she claims there's a perceived threat – without seeking authorization from Congress.

It's beyond time for Congress to tackle the heart of the matter: reform the WPR of 1973.

H.J.Res. 29, the War Powers Amendments of 2021

That's why I recently reintroduced legislation – H.J.Res. 29, the War Powers Amendments of 2021 – to reform the WPR of 1973 and reassert and strengthen Congress's constitutional war powers authority. This includes clarifying under the Constitution that every president must seek congressional authorization prior to sending U.S. forces into hostilities and setting strict parameters for any future AUMF that Congress might consider. Specifically, H.J.Res. 29 would:

- **Reaffirm Congress's War Powers:** H.J.Res. 29 clarifies that U.S. forces may be introduced into hostilities only with a declaration of war or a specific statutory authorization (AUMF) from Congress.
    - Exceptions, Consultation, and Immediate Removal: H.J.Res. 29 allows the president an exception to the above in the case of an imminent threat to the U.S., its forces, or its citizens overseas. For these cases, H.J.Res. 29 requires congressional consultation prior to taking action and sets up an Executive-Legislative Consultative Group. It also requires immediate removal of unauthorized forces within 30 days, with an opportunity to extend for only 15 more days.

- **Set Strict Parameters for Future AUMFs:** H.J.Res. 29 requires any future AUMF to clearly identify the threat, mission, objectives, parameters for when use of force should end, specific countries where use of force will take place, and the specific countries or organized armed groups against which the U.S. will use force. It also requires a new authorization to expand any of these.
    - Two-Year Sunset Clause: H.J.Res. 29 requires any AUMF to terminate within two years, unless Congress reauthorizes it. Any subsequent reauthorization will also terminate within two years. This will prevent "forever wars" and ensure every Congress has to vote on AUMFs, upholding Congress's constitutional responsibility to declare war.
    - Prohibits Funds: H.J.Res. 29 prohibits funds for unauthorized military actions not in accordance with this bill.

- **Require Regular, Unclassified Reports to Congress:** H.J.Res. 29 requires the president to send Congress a report at least once every month on ongoing use of force, including a public, unclassified version to help ensure public transparency. It also requires a cost report/estimate for ongoing operations.

- **Close Loopholes and Update the WPR for 21st Century Warfare:** H.J.Res. 29 updates definitions such as "hostilities", "introduce", and "Armed Forces" to close loopholes exploited by successive administrations. It ensures that advanced technologies like remote piloting/drones, actions like targeting assistance and mid-air refueling, and U.S. personnel beyond the Armed Forces – including contractors – all fall within the bill's parameters if introduced into hostilities. This legislation also requires congressional authorization and consultation no matter whether the U.S. is directly or indirectly involved, no matter whether offensive or defensive.

- **Provide Expedited Procedures and Judicial Review:** H.J.Res. 29 sets out expedited procedures for House and Senate consideration of AUMFs. It also gives Members of Congress standing to sue if the president fails to comply with any of the requirements of this bill, and it grants expedited judicial consideration.

As this Committee evaluates its next steps and looks to potentially advance legislation to reform the WPR of 1973, it's critical that any bill include the broad parameters I have outlined. I would also urge this Committee to continue its consultation with the recognized panel of experts who have been invited to testify today, as well as other relevant stakeholders.

In closing, I have long called on presidents of both parties to respect Congress's constitutional authority to declare war and consult with Congress before committing U.S. forces to any military conflict, as laid out in Article I of the Constitution and the WPR of 1973. Congress, our men and women in uniform, and the American people deserve to know the full scope of any potential conflict – including an exit strategy – before the U.S. even considers engaging U.S. forces in hostilities. It is Congress's duty to represent the American people and ensure that their will is heard before committing American lives and taxpayer funds to overseas conflict.

Thank you again for the opportunity to submit testimony today, and I look forward to this Committee's work on this critical issue and advancing much-needed reforms to the War Powers Resolution of 1973.

Sincerely,

Peter A. DeFazio
Member of Congress

The CHAIRMAN. As my colleagues may know, Representative DeFazio first introduced a bill to reform the War Powers Resolution in his first term in Congress back in 1988. And since then, our colleague has shown relentless commitment to making our government live up to its constitutional duties.

On Congress' role, he says this: "Unfortunately, the blame for gradual erosion of Congress' war powers does not lie at the feet of the executive. For decades, Congress itself has shirked its own constitutional responsibility to declare war and prevent executive overreach, determining that it is easier to take credit for unauthorized involvement in popular conflicts or blame the President for unpopular ones."

He also says: "While repeal of these AUMFs is an important step, it is essential that Congress go further to put in place necessary checks on the executive authority," saying that there is nothing stopping Congress from passing future open-ended AUMFs.

And he concludes by saying: "It is beyond time for Congress to tackle the heart of the matter and reform the War Powers Resolution of 1973."

And I ask unanimous consent to put that in the record.

And I now yield to Ms. Scanlon.

Ms. SCANLON. Thank you, Mr. Chairman. Thank you for holding this hearing. And thank you for our witnesses.

So I represent southeastern Pennsylvania, which is where Pennsylvania began, and it was founded by an Irish Quaker named William Penn. And the region that I represent is still very heavily influenced by Quakers.

So I have regular delegations of constituents wanting to know what I am going to do about the AUMF of 2002 and generally having very strong views on the War Powers Act. So this is something that I expect my constituents will be very interested in seeing and talking about in the days ahead.

I think we just circled back to something I wanted to talk about that the chairman touched on at the start of the hearing, and that was about the fact that Congress has not just ceded the war powers generally, but particularly the role that the executive has taken with respect to determining when those war powers should be exercised and the fact that we seem to have defaulted to this 1992 Office of Legal Counsel memo which sets out whether the President could reasonably determine that a proposed action serves important national interests. And administrations of both parties have been criticized for their reliance on this very broad standard.

So if we could just talk a little bit. We seem to have some agreement that the standard probably needs to be clarified. But could each of you address maybe what kind of terms should be in this standard, maybe starting with Dr. Bridgeman?

Dr. BRIDGEMAN. Sure. Yeah, I think that is, in fact, one of the key questions, and I am glad you brought us back to it.

I do think there is some daylight between us on this panel in terms of how broad that authority should be, how to define it, and what the limitations should be.

But I do think we all agree, as you said, the "national interest" test is no test at all. It is simply a collection of past executive

branch practices. It is sort of, if we have done it before, we can do it again. And then we, in fact, add new national interests each time.

And, likewise, I think the idea that the only limiting principle on the other end is a so-called war in the constitutional sense, which in the executive branch's view has required thousands of troops on the ground for a prolonged period of time, when there are exchanges of fire and a high risk of casualties on the U.S. side, I don't think that is anywhere near what the Constitution intended.

And as I have said a few times today, I think that matters, because it means there is not democratic accountability for operations short of that threshold.

So I think, and what I have proposed in my written testimony today, is that Congress should retake the authority here, because I don't think the executive branch is going to start issuing opinions limiting itself. I think they are going to keep building on their past practice. As Professor Ingber said, they are going to do that in good faith for reasons they think are important. But I think that is why we need Congress to assert itself.

And I would say that there is a pretty simple way to phrase it. I think Congress should make clear that the President may use force when it is absolutely necessary.

And here is how I would frame the two circumstances. One is to repel an imminent or sudden attack on the United States. And that is clearly what the Framers had in mind, the "sudden attack" language you can find in the Constitutional Convention.

But I would add a second category, which I think many believe was actually also envisioned by the Founders but which we have seen as sort of a gloss on that sudden attack category over the years, which is to protect, evacuate, or rescue U.S. nationals in situations where there is a direct and immediate threat to their lives.

I would note that the current War Powers Resolution has something a little bit similar to this in its current text, but it is in that "purpose and policy" section, up in section 2, and both the executive branch and courts will look at that as essentially surplusage, unfortunately.

So, in looking at reforming the War Powers Resolution, I think that needs to be in an operative paragraph, and I think it needs to be spelled out clearly.

But I think, regardless of what is there, unfortunately, the political reality is that the executive branch is going to try to push the boundaries, unless Congress gives itself teeth to enforce those boundaries.

And that is where I think you need that funding cutoff and the shortening of the currently 60-day clock to ensure that when the President does exceed those boundaries it doesn't drag us into a full-blown war.

And I think there is always going to be some give and take between the branches there about where exactly that boundary is. What does it mean to protect a citizen facing imminent peril? That is a healthy debate to have.

But right now we are not having that debate at all. Right now we are not asking, is the United States under threat? We are not asking, are our nationals under threat? We are asking, is there a

national interest, and is it this kind of huge ground war? Those are simply the wrong questions.

So I would bring it back into the frame that I have just been describing. I would give yourself the tools to police that framing.

And I would say, finally, that the idea that there is a need to engage in these other types of operations, these humanitarian operations, these stabilization operations, I would say Congress used to authorize those kinds of things and could do so again. But the question is really, does the United States need to be using force? And I would say sometimes the answer is going to be yes; other times the answer is going to be no.

But we can't simply assume that it should be up to the President to decide every time when our nationals and our territory are not, in fact, at risk. That is where I am saying we do need to draw a line in the sand and require Congress to do its duty.

So that is how I would set out the framework.

Ms. SCANLON. Mr. Bellinger, it looks like you are prepared to comment. Do you want to add to this discussion?

Mr. BELLINGER. I will, although I realize that you are a distinguished lawyer with a distinguished legal background. So debating OLC opinions may be a dangerous thing.

But I think this is where there is going to be a disagreement between me and my two colleagues and friends, is I do think that the President has a broader authority as Chief Executive and Commander in Chief and under the Constitution, Presidents of either party, to deploy forces.

A mere national interest test is obviously too broad. And I really would be very surprised if Congress were to say that either if President Biden or if President Obama or if President Bush were to not have authority to use force on a humanitarian mission, to help another country, a close ally in distress, or if its nationals were in distress, whether it be British or Australian or Canadian or Israelis.

I think the idea that other than having just being able to defend against an attack, repel an attack, or rescue Americans is much too narrow a vision of the President's authorities.

And I wouldn't encourage Congress to try to say that. I mean, if Congress tried to pass something that said those are the President's only authorities, a President of either party would veto that.

So that is why I go back to saying let's try to come up with something that is realistic, that recognizes the President's authorities up to a certain point, but also puts Congress in the game.

And once again, I do urge you to go back to look at the balance that was struck by the National War Powers Commission, because I thought that was both appropriate legally but also struck the appropriate political balance.

Ms. SCANLON. Thank you.

Professor Ingber, do you have any suggestions on how we might narrow the national defense standard as it is being used?

Prof. INGBER. Yes, I do. And I really appreciate the concerns that John is raising here.

But I also want to caution against the risk here of slapping a Band-Aid on this issue right now and calling it a day and then going another 50 years without having another opportunity to do

really substantial war powers reform, and also the risk of just giving the President constitutional delegation of authority to do everything that the President is currently interpreting falls within his Article II authority and his expansive read of the 2001 and 2020 AUMFs.

So I agree with Dr. Bridgeman's language. I think that already is a fairly substantial authority for the President.

And I also want to just say that I think something that you are getting at is that you are not going to be able to prevent the executive branch from determining where they believe the line to be. They are going to continue to assert their constitutional prerogative.

But it is then for Congress to stand up as part of that interactive dance and say where Congress believes that line should be, not prophylactically backing up because the President keeps moving forward but rather pushing back itself.

The result will be in some kind of mix. Recognizing that the President has some authority to repel sudden attacks means that there is going to inherently be some discretion for the President in making those determinations.

But even those determinations that are initially secret, those events are always going to later emerge. And when they do, the President is going to have to justify his or her actions. And it will be better that the President have to justify what she did on a self-defense basis than to simply be able to say, well, it was within 60 days.

And so I think that cabining this authority narrowly is critical at the outset so that you can participate as an equal player in that dance with the President.

Ms. SCANLON. Thank you.

That kind of gets back to the area I wanted to explore briefly. I mean, we have talked a lot about having teeth in the War Powers Resolution or whatever Congress has in order to force the President to do something or cut off the administration from doing something.

But as someone who has served during a time when it has been extremely difficult to get Congress to act, I am interested in what I think Mr. Bellinger was talking about from the War Powers Commission, which is some kind of trigger to force Congress to Act, to force Congress to take charge of moral courage or whatever and put itself on the record.

So, Mr. Bellinger, do you want to speak to that? How could we put ourselves in a better situation where at least Congress, but, at best, both Congress and the administration, have to engage in this dance to make sure that we are actually acting as a check and balance?

Mr. BELLINGER. Sure. So the war powers, the National War Powers Commission's recommended legislation—which, by the way, was introduced in the Senate by both John McCain and Tim Kaine, ultimately did not go anywhere, but I would urge it to be picked up again—essentially sort of flipped some of these presumptions.

So instead of trying to cut off the President's authority after 60 days, which was just simply not working and, therefore, made the

War Powers Resolution look ineffective, what it set up was a required consultation process.

And then—and I think this is the key point and you-all will have to tell me whether this works as a matter of congressional procedure—within 30 days of any significant use of force, i.e., not just a narrow rescue mission but something that has gone on for more than 30 days, each house would be required to put forward a concurrent resolution that would move immediately to the floor of each house under your respective procedures and then would have to be voted on promptly.

So that if the President was using force beyond 30 days, Congress would have to vote on it. And you would, if you voted it up, then it would be authorized. If you voted it down, the President didn't have to stop but he would be—or the Congress would have been on record as having voted down what he was doing.

Congress could then go further and then put forward a concurrent resolution to force him to stop. And if you successfully voted to force him to stop, then he would have to veto that. If he vetoed it, he vetoed it. And if Congress felt so strongly that he ought to stop, then you would override that veto.

So I thought those procedures actually, if Congress could engage in that self-discipline to require those votes within 30 days, that is really putting Congress in the game.

Ms. SCANLON. Well, I don't have any doubt that the Rules Committee of the House would be able to move in such an expeditious fashion and perform its duty. I may have some doubts about the Senate.

Dr. Bridgeman, do you have any comments on this proposal?

Dr. BRIDGEMAN. Yeah. Thanks for coming back to me.

I think that there are a couple of things we need to keep in mind.

One is we ended with a situation, again, where you require a supermajority in both Chambers to stop the President from using force, even when it is unauthorized and it exceeds his Article II authority in the view of the Congress.

And I just think that is fundamentally both unworkable—I don't think you are going get those supermajorities—but it is also, again, turning the constitutional design on its head in a way that matters. It is shielding the President and his uses of force abroad from democratic accountability.

So I think instead of just saying it wasn't working, let's look at why it wasn't working and fix those problems.

One of the reasons why the 60-day cutoff wasn't working was because the executive branch was defining hostilities so narrowly that it said that clock never even applied, let alone did it run its course in various important cases.

The other reason it wasn't working is *Chadha*, as Prof. Ingber explained to us at the beginning of this hearing, is the key enforcement mechanism, in which a simple majority of both houses could terminate a war once begun, was gutted. And that wasn't working anymore either.

So I think if we want to look at how to fix the actual problems, we need to look at what those problems actually were. So we need to define hostilities, which there are plenty of sound proposals out there to do it. I have offered one. There are others.

And we need to fix the *Chadha* problem by providing for that funds cutoff. And I think the incentives are all to the better if we shorten that clock. I just heard 30 days recommended. I think that could be workable, 20, 30, something in that time range.

But I think the last thing, and you picked up on this in the beginning with your question for John but it is important, is how do we make sure Congress votes? So I think those priority procedures are absolutely imperative to retain.

And there is a version of what John was describing that I think works well, which is that within that period of the pendency of the clock—within those 20, 30 days, whatever number you decide—if the President submits a request for the authorization to continue using force beyond that time period, it must come to a vote.

And that is something that can also, you know, the procedures can be crafted such that it can be amended. So it is not just an up or down on the President's specific language, but it could be like was done in the 2001 context where the President came to the Congress and said, "This is the authority I think I need," and the Congress said, "Oh, I need to tweak it because that is a little too broad. But here you go. We are going to vote on that."

So you can require that that vote be taken. You can require that it be taken within that period of time. And that gives the President the opportunity to come to you to say this use of force needs to extend beyond that period.

And Congress gets to decide, are we going to escalate this into an armed conflict, are we going to provide that authority, or have we determined that the purpose has been met? Have we determined that, no, that, in fact, we are at a point where the situation no longer requires the use of armed force? Or do we think, as has been the case in some of the engagements described by members today, do we think it is actually an unwise use of force?

And shortening that clock is really important to making sure that we are not already so embroiled that it would be irresponsible to pull ourselves back. So I think we need to keep it in mind for that reason as well.

The final thing that I will say about this is the idea of automaticity of a funding cutoff I think is bothering some people. You can see that that is difficult. And it has been suggested that no President would accept it.

I would note that President Nixon did not accept it. Congress passed it anyway. There is an automatic cutoff from the War Powers Resolution as enacted. Within 60 days, uses of force that were not authorized had to be terminated. And it was a simple majority of both houses that was sufficient to enforce that.

But even without that vote, if a use of force was not authorized, it was to be terminated without Congress acting at all.

I am simply proposing that that needs to be the case again, but that now, given the state of the law, given Supreme Court precedent, given the way that we have seen the current war powers framework failing, we just need to update that mechanism.

And it may be that you will face political headwinds in doing so. But this isn't a Republican/Democrat issue. This is an Article I/Article II issue.

So I would say it may be tricky, but it is something that Congress has done before. And this is that once in a generation opportunity to do it again and to make sure that that framework is shored up in a way that is actually meaningful.

Ms. SCANLON. Thank you.

Professor Ingber, if you have anything to add here kind of within a focus on how do we make sure that Congress is doing its job.

Prof. INGBER. Yes. Honestly, I can't really say that better than Dr. Bridgeman just did.

But I agree that this is a really important question. And the issue here is about flipping the status quo: making it so that if Congress cannot act, the President cannot act, rather than when Congress is unable to act for political reasons the President just has the space to do whatever the President wants to do.

The one thing that I want to add to all this is that the *Chadha* decision affected *inter-branch* relationships. The *Chadha* decision established that Congress can't make law effectively without the President, unless they can supersede a Presidential veto.

But the *Chadha* decision and the Supreme Court did not undermine how Congress addresses its own internal procedures. That is within your control. So it is within your control to change those procedures in order to establish that these things can come to a vote.

And I think these are really important questions. These are important discussions to have with the House and Senate parliamentarians. As Dr. Bridgeman said, these are not partisan issues. These are questions about Congress' institutional prerogatives as a whole and reestablishing a sense of responsibility for Congress to act.

It may well be that because this is not truly a partisan issue, this might be one area where Members of Congress can work together.

Ms. SCANLON. Well, thank you.

And I appreciate all of your insight. It has been really, really helpful.

As I said, I am interested in how we can get Congress back in the game because, as Professor Raskin always tells us, there is a reason why Congress is Article I.

But with that, I would yield back. Thank you.

The CHAIRMAN. Thank you.

Mrs. Fischbach.

Mrs. FISCHBACH. I appreciate the conversation about the procedures, because I did have some questions about that. And so if there is anything that any of the witnesses would want to add about maybe suggestions regarding the procedures and how it happens.

But I did want to throw this out and to any of the panelists. Should there be distinctions in the types of actions?

I know we talked about the length, but potentially it is certain actions tied to certain lengths of engagement, such as a single mission or ongoing engagement. I guess maybe to add that into the discussion about procedures.

And whoever would like to start, I would love to hear some ideas on that or just thoughts on that.

Mr. Bellinger, you looked like you wanted to—there you go.

Mr. BELLINGER. I was going to defer to my academic colleagues. But I will go ahead and serve something up.

Let me actually just briefly go backwards one step in terms of saying I think you heard from my opening statement that I am also very much in favor of war powers reform, both the 2001 AUMF, the 2002 AUMF, and the War Powers Resolution. But I also go back to something that the chairman said in his first sentence, is we have an administration and a President who says he is prepared to support war powers reform, but if Congress goes too far he is going to veto it.

And so I urge Congress to seize this opportunity to come up with something that the President is going to support and not veto.

The War Powers Resolution in 1973 was passed over President Nixon's veto, but this was in the middle of the impeachment of Richard Nixon. Congress was not pleased with President Nixon at the time.

Now is the time, whether you are Republicans or Democrats, that one can, I think, work with President Biden on realistic war powers reform. But if you try to clip the President's powers too much, you are going to get a veto, it is not going to be overridden, and then the whole exercise will have been academic.

So I urge you to come up with realistic war powers reform.

I think you are exactly right that certain kinds of force should be recognized that the President has within his authorities, but other kinds of force that are certainly going to get us into a significant war or going to last more than a certain period of time—and, again, that is what the National War Powers Commission tried to do, was to recognize and give the President a fair amount of flexibility, while saying, if it goes beyond a particular time or beyond a certain amount of force, that that is when Congress would be required to take a vote.

So it didn't actually, to your procedural question, it didn't require Congress to take a vote every time the President used force beyond a rescue mission. I think they said a use of force that continued to last beyond 30 days with troops on the ground somewhere.

So I think you are right that that is an area where one could try to come up with refinement about what the Congress considers acceptable and what they want to be able to have a vote on.

Mrs. FISCHBACH. Thank you very much.

Professor Ingber.

Prof. INGBER. I think it is going to be very much fact-dependent. I don't think you necessarily need to include in the War Powers Resolution itself, should you reform it, language about whether or not your future AUMFs will carve out particular activities.

But I do think that each time the President comes to you and you have this engagement—that may seem unimaginable now, but would become a natural reality should you pass this reform, you will be having those conversations. You will be hearing the President present evidence about what the President's advisers believe is necessary to prosecute the war.

And then you will be making a determination about whether or not you think you need to cabin that or whether or not you trust

the President's vision and what you think, if you don't include a sunset, that is going to look like in 20 years.

So while I think up front it is important to talk about things like including sunsets for these exact reasons, I think once you create a scenario where the status quo is the President coming to Congress in order to have exchanges of information before entering into these conflicts, you are going to start to have views about the President's use of those authorities. And so you may well want to include those kinds of determinations inside your future AUMFs.

Mrs. FISCHBACH. Thank you.

And, Dr. Bridgeman, do you have anything to add?

Dr. BRIDGEMAN. Just briefly, I'll add that I am glad you are focused on the priority procedures, because I think they matter quite a lot. We have seen this in the Yemen and Iran votes. Those priority procedures are why those votes took place.

But I think it is also right to focus, as some of us have been talking about, on what are the priority procedures that are going to be in place if the President comes to you asking for an authorization. How do you make sure that that gets the vote that it deserves when the President says, no, we need to be using force for a longer period of time or we need to be escalating our use of force into a broader conflict?

So I think both of those situations need to be addressed, both how Congress Members, in the absence of the President coming to you, can use those priority procedures to cut off a use of force, but also how you vote to make sure that you can authorize something that needs to be authorized.

The last thing I will say is in relation to I think your question picked up on this question of short uses of force or uses of force over kind of individual, discrete time periods.

So I think you may be referring in part to what within the executive branch is colloquially called the intermittence theory of war powers, where I take a strike on Monday and I call it closed and I report it on Wednesday, and then I take a strike on Thursday and I call that matter closed and I report it on Saturday, and then I take a strike on Sunday.

And so is the clock running or not? Are we getting into a conflict or not? This is something where I think there can be some reasonable disagreement as to whether each of these strikes was, in fact, discrete, whether you saw the other ones coming in advance.

But I think the more kind of faithful way to go about looking at this question is to consider a series of strikes against the same enemy in the same theater, or to consider an escalation that we see developing over time, to consider that part of one escalation into hostilities or one escalation into a situation where at least we know with some certainty that hostilities might be imminent in that kind of escalating series.

Now, it is Republicans and Democrats who have done this. President Reagan did this in the tanker wars, and President Obama did this in the summer of 2014 with what became the counter-ISIL campaign.

So, again, I think this is an inter-branch issue, not a political issue. But it is one that I think Congress can address by saying low-intensity uses of force or intermittent uses of force are still

things that are going to count as hostilities, or imminent hostilities, for the purposes of us looking at whether they need to be authorized before they escalate into a full-blown war.

So I would take those into account, and I think you are right to be focused on that as well.

Mrs. FISCHBACH. Well, thank you very much.

And I will say there is a lot to think about with just the procedures, not all of the others. And so I appreciate that, that there is going to have to be a lot of discussion regarding those procedures.

And I appreciate all of your answers.

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

The CHAIRMAN. Thank you.

And I just want to ask unanimous consent to add a letter from our colleague, Representative Brad Sherman, to the record.

[The information follows:]

BRAD SHERMAN
UNITED STATES CONGRESS

PH: (202) 225-5911
FAX: (202) 225-5879

March 22, 2021

The Honorable James P. McGovern
Chairman
Committee on Rules
U.S. House of Representatives
Washington, DC 20515

The Honorable Tom Cole
Ranking Member
Committee on Rules
U.S. House of Representatives
Washington, DC 20515

RE: Letter for the Record, Article I: Reforming the War Powers Resolution for the 21st Century

Chairman McGovern and Ranking Member Cole,

Thank you very much for the opportunity to share my thoughts with you as you meet to hear testimony on reforming the War Powers Resolution (50 U.S.C. 1541) for the 21st century.

I have long been involved in Congress' efforts to ensure the Executive Branch's compliance with the War Powers Resolution (otherwise known as the War Powers Act). Following U.S. military action in Libya in 2011, I offered an amendment to the FY2012 Defense Appropriations bill which would force compliance with the War Powers Act. That amendment, adopted by a vote of 316 to 111, prohibited the expenditure of funds in contravention of the War Powers Act. The amendment passed the House and was subsequently enacted into law. The provision has been included in every Defense Appropriations bill signed into law since then.

The War Powers Act prevents the president from continuing hostilities undertaken in emergency or exigent circumstances without seeking and obtaining Congressional approval within certain time periods. Under the War Powers Act, the president must obtain Congressional approval for hostilities he or she commences within 60 or 90 days. Certainly, if the President seeks to go beyond that period of time, or the other limits of the War Powers Act, he or she should do so only pursuant to statutory authorization prescribed by the War Powers Act or a declaration of war.

Unfortunately, since 1973, every president, Democrat and Republican, has claimed that the War Powers Act was not constitutional. They have either violated the Act or claimed that compliance was voluntary. Unfortunately, many constitutional scholars agreed with them. Many constitutional scholars believe that Congress can make the War Powers Act binding on presidents, if – and perhaps only if - we tie it to the expenditure of funds. Former Republican

Attorney General Michael Mukasey testified to that effect before the Foreign Affairs Committee on July 25, 2017.

Since 2012, Congress has used its authority over appropriations to prevent presidents to comply with the War Powers Act—but only with a series of temporary one-year provisions in Appropriations bills. That is why I introduced H.R. 2108, the War Powers Act Enforcement Act, which simply seeks to make permanent law the following language annually included in the Defense Appropriations Act: No Federal funds may be used in contravention of the War Powers Resolution (50 U.S.C. 1541 et seq.). I look forward to working with Chairman Meeks to pass this important enforcement provision into permanent law.

I know that both the Rules and Foreign Affairs Committees will be considering a number of additional reforms Congress should make to the War Powers Resolution to reassert our Constitutional authority over the use of force and to make the War Powers Resolution enforceable. I commend you for holding these hearings as a step in this process. A critical component of these efforts will be tying Executive Branch compliance to the appropriations power of Congress. Also, Congress needs to reform or repeal the Authorizations for Use of Military Force we adopted in 2001 and 2002. There are ongoing arguments as to whether these acts of Congress authorize our involvement in northern Syria (2014 to present) or the recent bombing of a militia in eastern Syria. We need to make sure that presidents can no longer take the position that they are always authorized to wage war virtually anywhere and everywhere with at best strained, and at worst dubious, legal authority under existing Congressional authorizations.

As we seek to reform the War Powers Resolution, we must use the power of the purse to compel adherence to the War Powers Resolution. Using existing authorizations for entering into hostilities whenever and wherever a president so desires must also end.

Thank you very much for your consideration and I look forward to working with you to ensure we have a strong War Powers Resolution that best ensures Executive Branch compliance with the War Powers Resolution.

Sincerely,

Brad Sherman
MEMBER OF CONGRESS

The CHAIRMAN. He has worked for more than a decade to use the power of the purse to strengthen the War Powers Resolution and to rein in the executive branch's overreach. And in the letter that he sent to us, he discusses his efforts to make these restrictions on use of appropriations without prior authorization for military actions stronger and clearly stated in the law.

So I would put that into the record.

And I now want to yield to Mr. Morelle.

Mr. MORELLE. Thank you, Mr. Chairman, to you and to the ranking member.

This is one of those—we don't have many instances where we do original jurisdiction hearings, but I always find them incredibly important, thoughtful. I appreciate the comments of all my colleagues. So I just want to thank you, Mr. Chairman and the ranking member, for putting this together.

And I want to thank the witnesses. This has really been a very illuminating conversation obviously about a very, very important topic.

One of the, I guess, I don't know if this is an advantage or a disadvantage of being near the end, is that a lot of things that you were going to ask have been asked. But what it leaves you with is a lot of different things that have been touched on. So this is going to seem like the lightning round in a game show. It will be all over the place, and they won't necessarily come together.

But I do fundamentally agree with the chair, with Mr. Cole, and my colleagues relative to the balance here between Article I and Article II, and the need to ensure that the Framers' intent, as I understand it, to vest this power in the people, because we were directly elected and we would be the closest to the people, so we would best represent the views of the public around the serious question of war.

So I want to just go back to sort of the Framers and just for historical context, because it is clear that war in the 21st century or conflict in the 21st century is dramatically different than it would have been in the 18th century.

And so in the colonial era, was it—I don't know how to say this without sounding like an idiot—but was it necessarily a declaration of war? Did governments have conflicts with each other only around declarations? Or was it as it is today, just minor battles here and there without a formal declaration?

And I don't know who is best to answer that, whoever the historian in the group is. But just sort of curious as to just the roots of use of the phrase "declaration of war" in the Constitution which is clearly given to the Congress in Article I.

Prof. INGBER. Yes. I am happy to start.

I don't think any of us are historians, but we have all been thinking about these issues for so long we probably all have some sense of it.

There was a lot of discussion about what "declare war" would mean between the Framers when they were crafting the language for the Constitution. And it was understood to include attacks. It was essentially the power to bring the country to war. But there was a lot of discussion about what it would also not include.

Mr. MORELLE. I am sorry, may I interrupt for one second? Somewhere I read, and I don't know if this is accurate, that the original draft had the phrase "make war," which was then changed to "declare," as though it was a more formal thing. And I am sorry to interrupt you, but that occurred to me. I should probably have asked it as part of the question.

Prof. INGBER. No, you are absolutely correct. There was a whole discussion about this. Should it be "make war," should it be "declare war," and what does this mean?

And this is where we get the understanding, from this direct conversation that was happening as they were crafting the language, about the repel sudden attacks authority.

We keep talking about this repel sudden attacks authority, but that is actually not written into the Constitution.

The Constitution quite explicitly gives Congress a whole range of powers. And the only thing the Constitution says about the President's power is that the President is the Commander in Chief.

So there was some discussion about this, and there was, if I recall correctly, there was one representative who wanted to put this in the President's hands. And everyone was up in arms, like, "I can't believe someone would suggest this."

Mr. MORELLE. Right. Right.

Prof. INGBER. That "we have just left the king," right?

And so this is where that conversation about the repel sudden attacks happened. It was understood that by giving this declare war power to Congress that there would be this limited, implicit, because it was not explicit, an implicit carve-out for the President only to be able to act to repel sudden attacks.

And that was, again, upheld 100 years later by the Supreme Court in the Prize Cases when the President finds himself at war in a very different context, in a civil war.

And the Supreme Court said, when there is actually de facto war on the ground, when the war comes to the President rather than the President initiating the war, of course the President is able to respond. And the Supreme Court pointed out: when there is no time to convene Congress.

Mr. MORELLE. Yeah. But even in the colonial era there were battles without declared wars. Was that part of the conversation? Like, if the United States engages in conflict without a declaration? Or just simply silent on it and sort of, I would imagine, not wanting to get too much into the details, because you can never have a fact pattern that is always going to be the case in a future conflict?

Dr. BRIDGEMAN. I can add to that, if helpful.

You can look back very early on at some examples of this. We start falling out with the French and the French Navy starts seizing our merchant vessels. And what does the President do? He comes to Congress and he says, "I need an authorization."

And, lo and behold, Congress does not declare war against France, because that would have imported all of the war authority—that would have been essentially saying "you do whatever you need to do within the law of armed conflict."

No, the Congress said, well, we are going to authorize this because we see a need here, but we are going to make it limited.

And Congress could even say you can seize ships going in one direction but not the other because that is where the threat is originating from and we don't need to police it in the other direction and that would just escalate conflict. We want to deescalate. We want to give you the authority you need, but we want to deescalate.

And Congress would make those very fine choices, and the Supreme Court would uphold Congress' ability to do that.

So there is a long history of Congress really regulating the extent of armed conflict as well.

Mr. MORELLE. I think there were instances, too, of Jefferson, where the United States Navy commandeered ships, basically took supplies off and then released them because there was no declaration of war at the time and he was much more of a limited view on this.

Mr. BELLINGER. Mr. Morelle, could I just have one second on this? And I realize you asked a historical question.

But I do think the text here is important, which is that the Framers could have said that Congress has the authority to authorize the use of force, but they chose the words "declare war." And in Article II they said the President is the Commander in Chief of the military.

So I really would argue that even textually—and this is, I think, supported historically—that Congress clearly has the authority for a major declaration of war or to authorize getting into something that is going to be a war. But it is not a lower level to say that Congress has the authority to tell the President every time he is going to use force. That is an Article II power for the President to be Commander in Chief.

So I think those words "declare war" are significant.

Mr. MORELLE. I did want to get to this, because I think that really brings me to some questions about present day.

But before I do that, is the declaration necessary for a state of war to exist between any states?

Prof. INGBER. No.

Dr. BRIDGEMAN. No.

Mr. BELLINGER. No.

Mr. MORELLE. So Pearl Harbor happened. The Japanese attacked the United States. We are effectively in war even without a declaration by Congress, aren't we?

Dr. BRIDGEMAN. Correct.

Mr. MORELLE. So tell me then—because I am sure there is precedent in the Supreme Court and others around when a state of war exists, it can clearly exist without a congressional declaration—tell me a little bit about when that state occurs.

Is it then necessary for Congress to affirm that, to declare it? And how long could that go on? How long could a war go on without a congressional declaration?

Prof. INGBER. So this is addressing two different bodies of law. The body of law that most directly deals with when a state of conflict is occurring is actually international law. Under international law, a state of armed conflict exists between two states, whether or not the states recognize it, whenever there is a use of force between those states.

And so certainly when the Framers were using the concept of war at the time, they were using that word against a backdrop understanding of what it meant under international law—These are people who had copies of Vattel on their bookshelves—and so that leaves the understanding for a state of armed conflict between states.

It gets a little bit more complicated when you are talking about a state of conflict between a state and nonstate actor because surely not every use of force between a state and any individual out there who is not themselves a state actor is not going to a state of armed conflict, right? Normally those issues are more properly addressed under a criminal justice framework.

It is only certain kinds of hostilities, prolonged hostilities with a group that has the capacity to act as a military actor, has a military hierarchy, can direct orders—We call those organized armed groups—and it is only really prolonged hostilities between United States or any state and an organized armed group that has those capacities that we think of in war terms.

And so we stopped using declarations of war for a variety of reasons, in part, just as that the international law of this concept was shifting. Around the same time, the international community prohibited war, prohibited the use of aggressive force to solve, for example, policy disputes. And, therefore, it became only lawful for states to use force when acting in self-defense. And around that same time, Congress stopped declaring wars and started issuing Authorizations to Use Military Force.

But today, the executive branch interprets an Authorization to Use Military Force as if it provides all the powers of a declaration of war unless it is cabined in particular ways.

Mr. MORELLE. And so the—I think our last declaration of war was 1942. Is that right? That is the Congress-led——

Dr. BRIDGEMAN. That was Romania, uh-huh.

Mr. MORELLE [continuing]. Against the Axis Powers. So—and obviously we have been in, you know, conflict, Cold War, Korea, Vietnam, the Middle East, for much of the 80 years since that declaration of war.

So the whole question of declaration of war seems—it really is, then, about the use of force and when Congress shall be consulted, but it is less about declaration because Article I doesn't say anything short of declaration of war. It doesn't give us the power to appropriate. So that is obviously one of the powers preserved in Article I.

So how do you—like——

Dr. BRIDGEMAN. Yeah.

Mr. MORELLE [continuing]. Give me a sense of your interpretation of that without—so Article I says declaration of war by the Congress. It gives us powers to appropriate, but it doesn't say anything about use of military force. To Mr. Bellinger's point, maybe that is what the Framers ought to have done. I don't know whether that was a part of the discussion.

But I am just sort of curious—and this may be a fundamental sort of—too basic a point, but I am just sort of curious your take on it.

Dr. BRIDGEMAN. I think, if I can comment on this briefly, I think they very much did understand themselves to have vested that in Article I, in Congress. It wasn't just the power to declare war. It was, as you say, the power to raise and support armies and navies, you know, the power to grant letters of marque and reprisal, to define and punish offenses against the law of nations.

They were dealing with essentially the range of threats that one could envision at the time, right? It was piracy. It was, you know, your merchant vessels being seized by another nation's navy that hadn't declared war on you. It was all of this range of things and there are very much equivalents in the modern day. They vested all of that in Congress.

The one thing they carved out for the President was the ability to respond if you are attacked. And that is, I think, still the place where we should think about drawing the line, although I agree it needs to be a little bit broader than just an armed attack on the United States. I do think there is that, you know, rescuing U.S. nationals in peril.

But, if we go beyond self-defense, if we say the Commander in Chief has authority beyond that, I do think it is ahistorical. I don't think it is——

Mr. MORELLE. Well, if I——

Ms. BRIDGEMAN. Yeah.

Mr. MORELLE. Yeah. And I don't want to put too fine a point on that. I certainly don't mean to be argumentative, but since the power still is—just the power to appropriate is still clearly vested with the Congress, couldn't an argument be made that if we are sort of imbalanced, the Congress could stop funding activities overseas that they think violate or that are not in the public interests around national security, and we still have the power to do that?

So what—so might someone say, so what is the conflict?

Dr. BRIDGEMAN. The conflict is that the Congress hasn't been doing that, right? And——

Mr. MORELLE. Well, we haven't been appropriating.

Dr. BRIDGEMAN. Well, Congress hasn't been cutting off funds effectively, and I think one of the reasons that the War Powers Resolution contained that termination provision was to add some automaticity to that, and that is why this idea of a funds cutoff, which isn't new in today's hearing of course, is to put that power right back in the heartland of the President's core Article I authority.

So I think the other thing to keep in mind was Congress didn't used to appropriate for a standing army at all. There wasn't one.

Mr. MORELLE. Right.

Ms. BRIDGEMAN. The way defense budgets work are something you all are more expert at than I am, but it is very easy for the military to shift vast sums of money around. So, you know, trying to authorize or cease authorization through appropriation has actually become a lot trickier, and that is why I think, too, a funds cutoff is something that is cleaner, is less ambiguous, and is going to be more easy to accomplish.

Mr. MORELLE. So—and I apologize, Mr. Chair, but I will close with just sort of this sort of observation. Maybe people could comment on this.

The one thing that I do worry about is sort of the nature of war and the nature of conflict now. So interrupting the supply chain with cyber attacks, it does seem to me that what we do will be—maybe even in the course of conflict, will be less around use of force in the traditional sense and more about getting our power plants to stop operating, or attacking our commercial and banking system.

And so I wonder, first of all, about whether—what our role is or what the—how we divide those responsibilities and what will be perhaps ongoing continued, not intermittent, unless you decide to take that view, which is sort of an interesting observation—an intermittent war, but this is instead—and just depend on it, that the Chinese, the Russians, whoever it is, is going to employ continuous, ongoing, continued threats to the United States and without necessarily sending troops because that is, you know, 20th century, 19th century warfare, but that warfare we look at will be completely nontraditional. And how do we sort of reconcile all of that?

And the last thing I would say and I would be happy to have people comment on, sort of supply chain, use of influence, but other cyber technology, AI and et cetera.

And then, finally, this—you know, I feel a little bit like the way we talk about this now is like, you know, a telegram from me to my mother in college, you know, "spent too much, gambled all my tuition money away, stop, send money, stop, love Joe, stop," and then wait for her response, and then we respond.

And it almost seems, in the modern world, where you have these ongoing conflicts and ongoing hostilities, that maybe a different mechanism rather than declare war, appropriate money, consult 90 days, 60 days, that maybe there ought to be something more like a cell phone conversation where the executive and the Pentagon is meeting with a select group of members—maybe it is the Intelligence Committee. Maybe it is House Armed Services. But there is dialogue literally every day about conflicts and hotspots, and then some judgment by that assigned group to bring it to Congress when appropriate.

You know, again, I don't know how you would work this out. It just seems the way that we talk about it isn't necessarily reflective of the world in which we live.

And the final thing I will say is the observation that, if something can be vetoed by the President requiring two-thirds to get where the Congress is when we only need a majority to declare war seems completely upside down, that, if you are going to use these kinds of congressional stops, they would have to be almost it won't happen unless there is affirmative authorization by the Congress because any other way, it just—it doesn't make any sense, so—and I am not sure if people want to respond to—not about my spending the tuition money on, you know, poker, but just the nature of the way we do this and whether or not we need to have a different kind of conversation about that balance between the executive and the legislative branches to help, you know, continue the integrity of Article I, Article II responsibilities.

Prof. INGBER. I will just briefly weigh in to say that—that, first of all, I agree with the last point you made entirely, that you need to reset that balance.

On the question of regular, constant consultations, I do think that resetting the balance will incentivize those kinds of regular conversations. So I don't think that the behind the scenes, one-off calls with a few Members of Congress can replace congressional Authorization for the Use of Military Force, but——

Mr. MORELLE. Right. Right.

Prof. INGBER [continuing]. I do think that, if Congress is in the position of having to make those determinations, that is going to require that there be much more constant, regular communication at sort of a lower level, with not just Members of Congress and Secretary of Defense, but also with staff—between staffers.

And those kinds of conversations, again, we think of the executive branch as acting with dispatch, but the reality is the executive branch is also a "they." It is also thousands and thousands of people, and so they are having these conversations. This is not something that turns on a dime either.

And so it is not asking too much to have them expand that conversation to also engage Congress. And that will happen in the way you are describing if Congress is in control of the appropriations in a more sort of specific targeted means of doing so, of actually having to authorize force rather than simply stand up and throw itself in front of an already well-on-its-way war.

The CHAIRMAN. Thank you. Any other——

Mr. BELLINGER. Just briefly, on the consultation point, I will simply say—again, I know I have talked a lot about the National War Powers Commission, but they did spend 2 years sort of looking at these war powers issues and took a lot of testimony, and they—as part of the replacement legislation for the War Powers Resolution, in addition to these procedural reforms that I talked about earlier, they would create a joint congressional consultation committee, which would essentially take the chairs of the key committees and then have essentially just what you said, Mr. Morelle, constant consultation both before and during a conflict.

So it wasn't just, you know, a 48-hour report lobbed up to Congress and then nothing and then 60 days and a sudden cutoff. I mean, real constant consultation between the executive and the legislative.

Dr. BRIDGEMAN. If I can comment on this too, briefly, I do think consultation is vitally important, but I would note that the—this commission model, it did allow, if I am recalling correctly, the President to put off those kinds of exchanges until 3 days after the conflict has commenced if secrecy so demands. And I think that probably virtually guarantees that all Presidents are going to say that secrecy demands it, and you are going to fall back right where we are with after-the-fact consultation.

So what I am trying to propose in this basket of what I think are, you know, a low-hanging-fruit basket of reforms, is that, if there is that backstop of that cutoff and if the 60-day clock is shortened, that consultation will have to occur beforehand. The President just sees it coming, and so it is a given that that has to occur.

But I also think it is important to keep in mind what you are mentioning about, you know, what does the world look like today in situations short of the use of force as we know it? So what we are talking about here in this basket of reforms, you know, they

apply to situations where it looks like there is going to be a use of force that is imminent or where we are already in some sort of hostilities. These are ways to bring Congress into that discussion.

But, when we are talking about all these other situations, I think you are absolutely right that Congress has to be involved in understanding the day to day. Committees of jurisdiction over some of these areas already are and there have been some reporting requirements that have been required to put the Congress on notice when you have these kinds of activities. Some of them lie in the covert action realm, and the President is indeed supposed to notify Congress before engaging in covert action. There are some exceptions to that. There are, you know, additional things that we can do to ensure that those consultations are more meaningful, again, through those committees of jurisdiction legislating it.

But, for the purposes of this discussion and for the purposes of war powers reform, I think the kind of structural reform that we have talked about incentivizes that consultation much more than anything else you could write into a statute. And then also strengthening that reporting once it has happened. So a President going silent after a 48-hour report for up to 6 months following it just makes no sense, right? There needs to be regular reporting of meaningful information, including access to threat information that has to be, you know, a regular drumbeat, at least once a week, I would say.

And the executive branch has this information. The executive branch is discussing this information. All we are saying is bring Congress into that conversation.

So I think you are right to focus on that and that, if we look at it in situations short of force, we can see what is coming ahead, and that is part of your responsibility as well.

The CHAIRMAN. Thank you.

Mr. MORELLE. I am not sure I see much in the way of low-hanging fruit pass the Congress in the last couple years, but who knows. You know, hope springs eternal.

But, Mr. Chairman, thank you so much. I yield back.

The CHAIRMAN. Ms. Ross.

Ms. ROSS. Thank you, Mr. Chairman, and thank you, Ranking Member Cole.

This is such an important time, and it is going to be, I think, a unique moment in history to address an issue that Congress has not addressed for way, way too long.

As Mr. Morelle said, most of the questions have been asked and answered ably. My last question actually picks up on the last point that Mr. Morelle raised about meaningful reporting and transparency and, you know, setting up a way of doing that, and then a way of correcting the record.

I mean, it comes to mind that, the last time there was an authorization of force, it was based on having weapons of mass destruction that we found out later we didn't—did not exist. And had that information been correct in the first place, there might have been a different decision from Congress.

And so I would like you to comment on, you know, Congress needs to be much more robust in what it—how it exercises its powers, but Congress can only do what it does with accurate informa-

tion, and how we can set up a situation to have more accurate information and the correction of inaccurate information as soon as possible? And any comments would be appreciated.

Dr. BRIDGEMAN. I could start with some data, if that would be helpful, because I have just had the pleasure and the pain of looking at every single unclassified 48-hour report ever filed for the purposes of building this database at NYU's RCLS, and it is searchable and filterable, and you can look at all the Presidents since 1973, all the different types of missions they have reported, and you can click through and look at the individual reports.

And I will affirm exactly what you are saying, that there is a boilerplate that is used for two out of the three of the required categories. So the War Powers Resolution requires three things: the circumstances necessitating introduction, the legislative and constitutional authority, and the estimated scope and duration of the activity.

And, for those latter two, for the legal authority and for the estimated scope and duration, you can almost see cut and pastes. There are a couple of versions of that language, and it is partly because Congress hasn't pushed back and asked for more, and it is partly because there is an understandable executive branch practice of only saying so much as you absolutely need to satisfy a reporting requirement, lest you set a precedent that more information is revealed.

So I go through it in detail in my written testimony. I won't bore you with it today. I think there is a whole series of other kinds of information that Congress should be asking for in those 48-hour reports that should not be considered too onerous because the executive branch does have that information before authorizing an operation.

But, to your point about changes, I think we all recognize that then going silent after those 48-hour reports is an unacceptable state of affairs, and I think one of the easiest ways to get at that is, if you require more meaningful information on the front end and then you require it to be updated on a regular basis, to include any change in the factual situation, any change in the threat reporting, any change in the information prior—you know, reported to Congress in prior notifications, then there is that duty on the executive branch to notify you of any changes, whether they be by error or mistake, whether they were by omission, but that duty is then placed on the executive branch to do that updated reporting.

And so—and that is something that I think you should also consider adding in the costs because it is something your constituents care about, I think, something we all care about that adds up over time that currently is obscured. It is not in the reporting at all.

So I think there is a couple of easy ways that you can get more meaningful reporting on the front end and then require it to be updated regularly once that initial 48-hour report has come in.

Mr. BELLINGER. Can I actually agree and disagree?

The—having signed off on every war powers report for 8 years in the Bush administration—and, Tess, you have been there, so I am a little surprised you are making that recommendation—it is a mad scramble to try to get a report drafted and signed by the President within 48 hours. We are down often to minutes chasing

the President wherever he, she happens to be to get that 48-hour report signed and approved by the Defense Department, Justice Department, the State Department, and up through the White House to the President.

So this is why they are short. So I would not support a recommendation to try to require a longer 48-hour report, or it is just never going to get to Congress within 48 hours. You know, in general, I think we actually ought to do away with the 48-hour reporting, but I would not try to force the President to put more in the 48-hour report.

That said, the part where I will agree is that Congress should have the background on a use of force. And, frankly, if more needs to be done in a classified setting, the better. The—you know, we don't have to get a lot into the Soleimani strike right now, but I think that was troublesome to, you know, people on both sides of the aisle, Republican or Democratic, when the administration obviously, you know, shifted position by first saying that there was an imminent threat, and then, well, maybe there wasn't an imminent threat, and that, you know, that Soleimani was just a bad guy.

But I do think that it is important, to your point, that the executive branch, you know, brief as quickly as possible, and correct things since, you know, all of us who have been in the executive branch, but also in Congress, you know, the first reports of information can turn out to be inaccurate, and executive branch officials may misstate things, and then information comes in, and it needs to then be corrected.

But I agree with you. There needs to be a regular—and that is something Congress should insist on. All these other things, you know, changes in law, cutting off of funding, you know, the one thing Congress really ought to do is demand that executive branch officials come up, brief—brief in a closed setting, and then come up again—you are right—if something needs to be corrected.

Dr. BRIDGEMAN. Can I just add one clarification to that, which is that the reports did use to be longer. So, before your time or mine, John—and I suffered through many of these—they were—the action was taken on a Friday night, and we had to report it by a Sunday, and it is never fun.

But, when you look back, it is—in particular, some of the more controversial uses of force, in the Clinton era, for example, Bosnia, Kosovo, the reports are much longer, and they go into much more detail about the factual circumstances, the threats at issue, what our allies were going to be doing, whether or not we were going to be acting alone, what the U.N. Security Council had or hadn't said in the weeks prior.

It is that kind of information that the government already has at its fingertips that I think is fair to request. But I hear you on the crunch.

Prof. INGBER. I will just add to all of that, that this goes back to a discussion we had earlier, that if Congress takes more responsibility to authorize these actions and engages more regularly with the President on these issues, Members of Congress but also congressional staff are going to build expertise and not just expertise but also a sensibility about what the evidence that the President is giving to them means, where the holes are, what is the informa-

tion they are not actually getting. It is about knowing the questions to ask and where to push back.

I think those of us who worked in the executive branch gained a sort of spidey sense: okay, you are telling me this, but what is the actual evidence that is underlying that statement? This individual is a fighter. Okay, but where is the evidence that you put together that that tells me that that individual is a fighter, for example. And that is a sensibility, an expertise that can be built up.

And so I think that some of the questions that should be included once you have reset the balance so that the status quo shifts and so that the President is making a case to you, not just merely sending you off some boilerplate but making a case to ask you to authorize force, that there is no reason not to ask questions like, "what is your plan not just for why you need to go in, but how you are going to win this war, and what is your plan for the end game?"

And those are questions that people will feel more confident asking as your staff builds that expertise. And I don't think there is any reason not to ask those questions. The fact that the President may be the Commander in Chief does not mean that, when you are making the decision at the outset to authorize force, you shouldn't know how the President is planning to exercise that Commander in Chief authority.

Ms. ROSS. Thank you very much for all of those answers. Hopefully the Foreign Affairs Committee will ask the same kinds of question.

And, with that, Mr. Chairman, I yield back.

The CHAIRMAN. Well, thank you very much.

But I think we have the better hearing, so I want to state that for the record. But, before I would yield to Mr. Cole for any closing remarks he has, and then I will make some closing remarks, but I do want to thank the staff on both sides, but on the majority side, Kim Corbin, Caitlin Hodgkins, Allie Neill, Lori Ismail, Liz Pardue, Cindy Buhl, and Don Sisson. I want to thank them for all of their help in getting this together.

And, Mr. Cole, I don't know if you want to add closing thoughts before I close?

Mr. COLE. Yeah. Just quickly, if I may, Mr. Chairman. First of all, let me start by thanking you again. I think this was a really important hearing, really productive hearing.

I want to thank all of our witnesses. I thought you were all extraordinary and very, very helpful to us. And, frankly, your real-life experience and academic backgrounds has shed a great deal of insight.

I do think, Mr. Chairman, you made a key point in your opening remarks when you said that maybe we have caught lightning in a bottle. I think your eloquent phrasing is probably right. We have a unique opportunity in front of us, I know one that you have labored long and hard to create. And a lot of us have been supportive at different stages along the way, but I don't think anybody has worked harder than you in the Congress of the United States to try and get us to this point.

And I would be remiss not to give a shout-out to the administration as well, as you did again in your remarks, for opening this

door and saying, hey, this is something we ought to look at. And I think Mr. Bellinger made a wise and cautionary warning: Let's not overplay our hand here.

And, Mr. Bellinger, for your benefit, I think it is very unlikely a Democratic House and a Democratic Senate, or an evenly divided Senate, however you want to look at it, is likely to send a Democratic President something he is not willing to sign. So I don't think that is a serious danger, but I do take your bigger point, which is we need to work with the executive branch in this.

But it is refreshing to see an executive branch—and I have seen them in both parties—that actually wants to work to restore the balance of power that has been lost here. And that is to the President's credit, and may well be because, as I my friend, the chairman, suggested, he has been on the other side wrestling with these questions as a Member of the United States Senate for many years.

But, for whatever reason, it is a unique and fleeting opportunity, and I think we would really be remiss not to act on it. And I think we can act on it in a bipartisan way.

You certainly, Mr. Chairman, ticked off a number of areas where all our witnesses were in agreement at the beginning of the testimony, such as repealing the 1991 and 2001 AUMFs and—actually, yeah, two AUMFs, reforming the 2001, looking seriously at the war power.

There is broad agreement here amongst the people that we have who are people that, again, have experienced these problems in real time and I think very broad agreement in the Congress as well or at least the potential for that right now and, strangely enough, again, an opportunity to work with as opposed to against the executive branch to achieve this outcome. So shame on us if we don't take advantage of this very unique opportunity.

So, with that, I will just conclude and say I look forward to working with you on that. This is a matter we have worked on together in the past, but it is an area where I think you in particular have shown a great deal of tenacity and distinction and foresight over many, many years and, I would be remiss not to say, administrations of both parties. You have been very consistent in your viewpoint here, and I think that is going to serve this committee and serve the Congress very well going forward because I do think you have a unique credibility here built on your previous actions.

And so, again, thank you to our witnesses.

Thank you to our members. I thought the questions were good and showed a real effort to get to the heart of the matter and see if we could find some core principles legislatively that we could work together on and move something forward. I am sure the discussion in the Foreign Affairs Committee, while clearly not as robust and brilliant and as helpful as the one you led, Mr. Chairman, will be motivated by the same kind of spirit.

So, again, very, very productive hearing, Mr. Chairman, and thank you for making it.

So thank you to all the staff, again, as you pointed out. Excellent work on all sides, and so I am hopeful that this can actually generate some productive legislative activity going forward.

With that, I yield back to my friend.

The CHAIRMAN. Well, I thank my colleague and my friend from Oklahoma for his kind words, and also, you know, for his involvement in this hearing. He, too, has cared deeply about these issues.

And, you know, to the witnesses, I mean, the Rules Committee, we have to deal with everything, and sometimes things are contentious. Sometimes it is—you know, we can't even agree on what to have for lunch.

But, you know, we have come together—we come together on some really important issues. And, on this issue, I mean, there is common ground. I mean, you don't have to agree on everything to agree on something. And, if there is something we agree on, we ought to move forward.

And so I appreciate Mr. Cole's comments.

I appreciate all the members of the committee for their questions. You know, one of the blessings and the curses of the Rules Committee—well, the curse is that we don't have any time limits, right? I mean, we kind of, you know—but that is also a blessing sometimes because you get to have substantive conversations and be able—and are able to flesh out some ideas that you might not always be able to do under a strict 5-minute rule. But I really do appreciate all the members' questions here. I think they were all very thoughtful.

You know, President Teddy Roosevelt once said nothing worth having comes easy. You know, we have more work to do to find a path forward to reform the way our government and the way Congress handles questions of war and peace. I am not saying it is going to be easy.

But, to my colleagues, I say this: Ensuring that the American people have a say in the ways in which our Nation goes into war and exits one, to reestablish communication and consultation between the Congress and the President on issues of life and death is certainly worth it.

And I just want to say one final thing. You know, we get very caught up in policy and procedure and in constitutional authorities, but these are decisions—I know the witnesses know this, but these are decisions that have real-world consequences. The stakes are really life and death, you know, blood and treasure, not abstractions. They are about whether and when and for what purpose we will send our uniformed men and women into harm's way. We will be directing them to sacrifice their lives. We will be telling their families that this sacrifice is necessary.

So we need to be sure that how we make these decisions and who makes these decisions and for how long these decisions will persist—we need to make sure that that is balanced and clear and done in a way that it respects, you know, the incredible men and women who serve our country and also respects the Constitution.

So I thank everybody for such a serious and informative discussion, and we will certainly be in touch with you as we move forward on this.

So, with that, the Rules Committee is adjourned.

[Whereupon, at 2:34 p.m., the committee was adjourned.]

Rebecca Ingber, an expert in international and national security law, bureaucracy, and presidential power, joined the Cardozo faculty in 2020 from BU Law. She is a senior fellow at the Reiss Center on Law and Security at NYU School of Law, and she previously served in the Office of the Legal Adviser at the US Department of State.

Ingber received her BA from Yale University, her JD from Harvard Law School, and she clerked for Judge Robert P. Patterson, Jr., of the Southern District of New York. Her work has been published in the *Virginia Law Review*, the *Texas Law Review*, the *Iowa Law Review*, the *American Journal of International Law*, the *Harvard International Law Journal, and* the *Yale Journal of International Law,* among others, and has been selected for presentation regularly at peer-reviewed colloquia, including the NYU/Nottingham/Melbourne Junior Faculty Forum for International Law, the Administrative Law New Scholarship Roundtable, and the Stanford/Harvard/Yale Junior Faculty Forum. She is a co-recipient of the Dean's Award for Scholarship (BU Law, 2019), and of the inaugural Mike Lewis Prize for National Security Law Scholarship for her article, "Co-Belligerency" (2017). Ingber testified before the Senate Judiciary Committee during the 2018 Supreme Court nomination hearing, and was a co-chair of the 2019 Annual Meeting of the American Society of International Law. She has held fellowships at the Council on Foreign Relations and at Columbia Law School. She currently serves on the editorial board of the *Journal of National Security Law and Policy* and on the Executive Council of the American Society of International Law, and is a contributor to *Lawfare*, *Just Security*, and other legal blogs.

Truth in Testimony Disclosure Form

In accordance with Rule XI, clause 2(g)(5)* of the *Rules of the House of Representatives*, witnesses are asked to disclose the following information. Please complete this form electronically by filling in the provided blanks.

Committee: Rules

Subcommittee:

Hearing Date: 03/23/2021

Hearing Title :

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

Witness Name: Rebecca Ingber

Position/Title: Professor of Law

Witness Type: ◎ Governmental ○ Non-governmental

Are you representing yourself or an organization? ◎ Self ○ Organization

If you are representing an organization, please list what entity or entities you are representing:

n/a

FOR WITNESSES APPEARING IN A NON-GOVERNMENTAL CAPACITY

Please complete the following fields. If necessary, attach additional sheet(s) to provide more information.

Are you a fiduciary—including, but not limited to, a director, officer, advisor, or resident agent—of any organization or entity that has an interest in the subject matter of the hearing? If so, please list the name of the organization(s) or entities.

no

Please list any federal grants or contracts (including subgrants or subcontracts) related to the hearing's subject matter that you or the organization(s) you represent have received in the past thirty-six months from the date of the hearing. Include the source and amount of each grant or contract.

none

Please list any contracts, grants, or payments originating with a foreign government and related to the hearing's subject that you or the organization(s) you represent have received in the past thirty-six months from the date of the hearing. Include the amount and country of origin of each contract or payment.

none

Please complete the following fields. If necessary, attach additional sheet(s) to provide more information.

☑ I have attached a written statement of proposed testimony.

☑ I have attached my curriculum vitae or biography.

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(B) In the case of a witness appearing in a non-governmental capacity, a written statement of proposed testimony shall include—(i) a curriculum vitae; (ii) a disclosure of any Federal grants or contracts, or contracts, grants, or payments originating with a foreign government, received during the past 36 months by the witness or by an entity represented by the witness and related to the subject matter of the hearing; and (iii) a disclosure of whether the witness is a fiduciary (including, but not limited to, a director, officer, advisor, or resident agent) of any organization or entity that has an interest in the subject matter of the hearing.

(C) The disclosure referred to in subdivision (B)(ii) shall include— (i) the amount and source of each Federal grant (or subgrant thereof) or contract (or subcontract thereof) related to the subject matter of the hearing; and (ii) the amount and country of origin of any payment or contract related to the subject matter of the hearing originating with a foreign government.

(D) Such statements, with appropriate redactions to protect the privacy or security of the witness, shall be made publicly available in electronic form 24 hours before the witness appears to the extent practicable, but not later than one day after the witness appears.

John B. Bellinger III

John B. Bellinger III is a partner at Arnold & Porter in Washington, DC, and co-head of the firm's Global Law and Policy Practice. He is also Adjunct Senior Fellow in International and National Security Law at the Council on Foreign Relations.

Mr. Bellinger served as The Legal Adviser for the U.S. Department of State under Secretary of State Condoleezza Rice from April 2005 to January 2009. He previously managed Secretary Rice's Senate confirmation and co-directed her State Department transition team. Mr. Bellinger represented the United States before the International Court of Justice in *Mexico v. United States* (Medellin) and the Iran-U.S. Claims Tribunal and negotiated a number of treaties and international agreements, including the Third Additional Protocol to the Geneva Conventions. He received the Secretary of State's Distinguished Service Award in 2009.

Mr. Bellinger served from 2001 to 2005 as Senior Associate Counsel to the President and Legal Adviser to the National Security Council at the White House, where he was the principal lawyer for the National Security Adviser and the NSC staff. He previously served as Counsel for National Security Matters in the Criminal Division of the Justice Department (1997-2001), as Special Counsel to the Senate Select Committee on Intelligence (1996), and as Special Assistant to Director of Central Intelligence William Webster (1988-1991).

He is a member of the Secretary of State's Advisory Committee on International Law. From 2005-2019, he served as one of four U.S. Members of the Permanent Court of Arbitration in The Hague and a member of the U.S. "National Group," which nominates judges to the International Court of Justice. He is also a member of the Council on Foreign Relations, the Executive Council of the American Law Institute, and the boards of the Stimson Center, the Salzburg Global Seminar, the American Ditchley Foundation, and *Foreign Affairs* magazine. Mr. Bellinger testifies regularly before Congress, has lectured at numerous U.S. and foreign universities and law schools, and is the author of many articles and op-eds on international law issues. He is a senior contributor to the *Lawfare* blog.

Mr. Bellinger received his A.B. from Princeton University's Woodrow Wilson School of Public and International Affairs, his J.D. from Harvard Law School, and an M.A. in Foreign Affairs from the University of Virginia.

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Subcommittee: _____

Hearing Date: _____

Hearing :

Witness Name: _____

Position/Title: _____

Witness Type: O Governmental O Non-governmental

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None

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Tess Bridgeman is Co-Editor-in-Chief of *Just Security* and Senior Fellow and Visiting Scholar at NYU Law's Reiss Center on Law and Security where she created the War Powers Resolution Reporting Project. She served as Special Assistant to President Obama, Associate Counsel to the President, and Deputy Legal Adviser to the National Security Council, where she advised on the full range of issues relating to the national security and foreign policy of the United States. She lectures at Stanford University and Berkeley Law, writes analysis and opinion pieces on a range of legal and policy issues, and has appeared frequently in podcasts and as a guest on MSNBC.

Bridgeman previously served in the U.S. Department of State's Office of the Legal Adviser, where she was Special Assistant to the Legal Adviser. Prior to that role, she served as an Attorney Adviser in the Office of Political-Military Affairs, where she focused on the law of armed conflict. Earlier in her career, Bridgeman clerked for Judge Thomas L. Ambro of the Third Circuit Court of Appeals; served at the U.S. Senate Judiciary Committee; worked as a consultant for the World Bank Inspection Panel; and co-founded a community health and development non-profit in Oaxaca, Mexico.

A Rhodes Scholar and Truman Scholar, Bridgeman has a DPhil in International Relations from Oxford University; a JD from NYU Law School, *magna cum laude* and Order of the Coif, which she attended as a Root-Tilden-Kern and Institute for International Law and Justice Scholar; and a BA from Stanford University. Bridgeman is an affiliate at Stanford University's Center for International Security and Cooperation and serves on the Strategic Initiatives Committee of the American Society for International Law (ASIL). Follow her on Twitter @bridgewriter.

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In accordance with Rule XI, clause 2(g)(5)* of the *Rules of the House of Representatives*, witnesses are asked to disclose the following information. Please complete this form electronically by filling in the provided blanks.

Committee: Rules

Subcommittee:

Hearing Date: March 23, 2021

Hearing Title :

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

Witness Name: Dr. Tess Bridgeman

Position/Title: Co-Editor-in-Chief, Just Security; Sr. Fellow & Visiting Scholar, NYU Law RCLS

Witness Type: ○ Governmental ● Non-governmental

Are you representing yourself or an organization? ● Self ○ Organization

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