Written Statement

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"War Powers and the Effects of Unauthorized Military Engagements on Federal Spending"

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I. INTRODUCTION

Chairman Paul, Ranking Member Peters, and members of the Subcommittee, my name is Jonathan Turley and I am a law professor at The George Washington University, where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law. It is a distinct honor to appear before you today to discuss one of the most important powers contained in our Constitution: the declaration of war by the Legislative Branch.

I come to this question as both an academic and a litigator in the field. My past writings address the separation of powers, war powers, and the military.[1] I am also the former lead counsel for both Democratic and

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[1] *See, e.g.*, Jonathan Turley, *Madisonian Tectonics: How Form Follows Function in Constitutional and Architectural Interpretation*, 83 GEO. WASH. L. REV. 305 (2015); Jonathan Turley, *A Fox in the Hedges: Vermeule's Vision of Optimized Constitutionalism in a Suboptimal World*, 82 U. CHI. L. REV. 517 (2015); Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. REV. 1523 (2013); Jonathan Turley, *The Rise of the Fourth Branch of Government*, WASH. POST (May 24, 2013); *see also* Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 WIS. L. REV. 965 (2013); Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance, 71 George Washington Law Review 1-90 (2003); The

Republican members in challenging the undeclared war in Libya under the Obama Administration. My prior litigation also includes representing the United States House of Representatives in its successful challenge to the unauthorized use of federal funds in Obamacare. I am admittedly an unrepentant Madisonian scholar and, as such, I tend to favor a robust and active role for Congress. I have previously testified against the encroachment of the Executive Branch and the growing imbalance in our tripartite system of governance. The rise of an uber presidency has threatened the stability of our system. Much of this imbalance is due to the acquiescence of Congress in yielding greater and greater authority to the Chief Executive. The legislation under consideration today is one of the most chilling examples of this acquiescence and the danger that it presents for future generations.

There can be no weightier issue for Congress than the conditions under which this nation goes to war. The costs of such decisions are real, immediate, and often catastrophic for many families. If there is a sacred article in the Constitution, it is Article One, Section Eight. It is not merely a constitutional but a moral responsibility. Indeed, the words "Congress shall have power to ... declare War," fails to capture the moral imperative. It is not simply a power but rather an obligation that was meant to adhere to every member upon taking the office of office. Unfortunately, from the earliest stages of our Republic, members have struggled to avoid the responsibility for declarations of war. Regrettably, the new Authorization for the Use of Military Force, S.J. Res. 59, is the inevitable result of this long history of avoidance. Despite some improvements, the thrust of the proposed legislation is to give members a statutory shield from their constitutional obligations over war making.

The new AUMF amounts to a statutory revision of one of the most defining elements of the United States Constitution. Putting aside the constitutionality of such a change absent a formal amendment, the proposed legislation completes a long history of this body abdicating its core responsibilities over the declaration of war. Indeed, Columbia Professor Matthew Waxman recently offered what appears to be a collective shrug to the obvious negation of the original design and intent of the Framers. In speaking of the lack of a finite period of authorization in this legislation,

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Military Pocket Republic, 97 Northwestern University Law Review 1-134 (2002); Tribunals and Tribulations: The Antithetical Elements of the Military Justice System in a Madisonian Democracy, 70 George Washington Law Review 649-769 (2002).

Waxman observed that "We'll be engaged in an indefinite war either way."[2] If anything Waxman was understated. We are engaged in indefinite, *undeclared* war – the very menace that the Framers sought to prevent with express constitutional language requiring congressional declarations of war. We find ourselves at this ignoble point not by accident but through decades of concerted effort by Congress to evade the responsibility for the most important decisions committed to it by the Framers. Yet, due to the artificially narrow standing rules created by the federal courts, the unconstitutionality of such a change may never be subjected to judicial review.[3] Thus, this legislation could prove not only unconstitutional but unreviewable – an absurd position that would have mortified the Framers. What we will be left with is indefinite undeclared war.

As discussed below, the new legislation would discard not just the obligation to declare wars but even the obligation to secure prior authorization for specific wars. If Congress implements this new system, Article I, Section 8 will be left as little more than a husk of its original

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[2] *Congress Wrestles With New War On Terror Authorization*, NBC News, April 16, 2018.

[3] I have previously testified on the impact of narrow (and in my view unwarranted) standing rules that often place glaring unconstitutional acts beyond the reach of judicial review. See, e.g., United States House of Representatives, House Committee on Science, Space, and Technology, "*Affirming Congress' Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas*," September 14, 2016; United States House of Representatives, House Judiciary Committee, Regulatory Reform, Commercial and Antitrust Law, *"Examining The Allegations of Misconduct of IRS Commissioner John Koskinen"* June 22, 2016; United States Senate, Committee on Homeland Security and Governmental Affairs, "*The Administrative State: An Examination of Federal Rulemaking,*" April 20, 2016; United States House of Representatives, House Judiciary Committee, Regulatory Reform, Commercial and Antitrust Law, "*The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies*," March 15, 2016; United States Senate, *Confirmation Hearing For Attorney General Nominee Loretta Lynch*, United States Senate Committee on the Judiciary, January 29, 2015; United States House of Representatives, *"Authorization to Initiate Litigation for Actions by the President Inconsistent with His Duties Under the Constitution of The United States"* Before the H. Comm. On Rules, 113th Cong., July 16, 2014; United States House of Representatives, *"Enforcing the President's Constitutional Duty to Faithfully Execute the Laws" Before the H. Comm. on the Judiciary*, 113th Cong., February 26, 2014; United States House of Representatives, The President's Constitutional Duty to Faithfully Execute the Laws *Before the H. Comm. on the Judiciary*, 113th Cong., December 2, 2013; United States House of Representatives, Committee on the Judiciary, "Executive Overreach: The President's Unprecedented "Recess" Appointments," February 15, 2012.

design. Worse yet, the country will be left with a constitutional provision that gives citizens a false assurance of a check on war powers. The provision speaks loudly and clearly to Congress. However, the new AUMF would reduce it to what Macbeth described as voices "full of sound and fury, Signifying nothing."[4]

II. A Brief Historical Overview

In both the constitutional and ratifying conventions, the Framers carried out passionate and detailed debates over the role of the "Chief Magistrate," including whether the presidency should actually be a committee of three to avoid the concentration of powers in the hands of one person. The overwhelming sentiment was that a president could not be trusted with the sole authority to go to war. That was evident at the Constitutional Convention when Pierce Butler proposed "vesting the power in the President, who will have all the requisite qualities, and will not make war but when the nation will support it."[5] He did not even receive a second to the motion.

The deep suspicion over the role of chief executive was captured in the warning of Edmund Randolph that the creation of a single executive would be the very "foetus of monarchy."[6] The compromise for such delegates was to deny the president certain powers like the power of the purse or the unilateral appointments of senior officials. However, the most prominent concern was the ability of a president to commit the country to war. This led to one of the most defining provisions of the Madisonian system: to leave the decision to go to war with Congress rather than the president. After framers like James Wilson voiced fears of an elected monarch, their colleagues responded by denying the president the power most associated with absolute rulers in the declaration of war. In the Pennsylvania Ratifying Convention, Wilson assured his colleagues that the greatest danger of a chief executive had been blunted through the declaration requirement:

> "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

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[4] WILLIAM SHAKESPEARE, MACBETH, act 5, sc. 5 (Barbara A. Mowat & Paul Werstine eds. 1992)

[5] 2 The Records of the Federal Convention of 1787 318-19 (Max Farrand ed., rev. ed. 1966).

[6] 1 The Records of the Federal Convention of 1787 65-66 (Max Farrand ed., rev. ed. 1966).

> of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large: this declaration must be made with the concurrence of the House of Representatives: from this circumstance we may draw a certain conclusion that nothing but our interest can draw us into war."[7]

The framers saw presidents as the most likely to engage in foreign military excursions. James Madison said it most succinctly in a letter to Jefferson: "The constitution supposes, what the History of all … [Governments] demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care, vested the question of war in the Legislature."[8] This key division of authority was celebrated as the solution to the intractable problem of the predisposition of chief executives toward war. Wilson proclaimed that "this system will not hurry us into war … It will not be in the power of a single man … to involve us in such distress . . . " Jefferson stated in a letter to Madison that the Framers had achieved an "effectual check to the Dog of war."[9] Even Alexander Hamilton, an advocate for a strong chief executive, heralded the key limitation on presidents in Federalist #69, stating that a president

> "would be nominally the same with that of the King of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy; while that of the British king extends to the declaring of war, and to the raising and regulating of fleets and armies; all which by the constitution under consideration would appertain to the Legislature."[10]

What is most striking about these and other accounts is that the Framers believed that Article I, Section 8 was one of the greatest triumphs of the convention where they had established clear and undeniable obligations for Congress. As Madison proclaimed in 1793, "the simple, the received and

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[7] 2 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787, at 528 (1836).

[8] Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), in 6 The Writings of James Madison 311, 312 (Gaillard Hunt ed., 1906).

[9] Letter from Thomas Jefferson to James Madison (Sept 6, 1789), in Julian P. Boyd, ed, 15 The Papers of Thomas Jefferson 392, 397 (Princeton 1958).

[10] THE FEDERALIST No. 69, *supra*, at 448 (Alexander Hamilton)

the fundamental doctrine of the constitution, that the power to declare war … is fully and exclusively vested in the legislature; that the executive has no right, in any case to decide the question, whether there is or is not cause for declaring war ...."[11]

These assumptions were quickly undone by the political impulse of members to avoid responsibility over costly and unpredictable wars. The compromise would become a rule honored almost exclusively in the breach. In our roughly 250-year history, our country has been in dozens of large-scale military campaigns or wars. Yet, Congress has "declared war" only five times - the War of 1812, the Mexican-American War, the Spanish-American War, World War I, and World War II. There have been a total of eleven declarations issued against different countries in the five declared wars. Political convenience has trumped constitutional principle.

We did not even make it out of the eighteenth century before Congress found an alternative to a declaration. In 1798, it passed *An Act Further To Protect The Commerce of the United States*, which was then used by John Adams to launch the Quasi-War with France. That legislation would be a harbinger of the gradual erasure of the declaration provision. Faced with the seizure of ships and other acts of war, Congress decided to pass a generally worded measure "more effectually to protect the Commerce and Coasts of the United States," which authorized the President to instruct military commanders to act against any "armed vessel" committing "depredations on the vessels" belonging to United States citizens.[12] It further authorized the retaking of seized ships and later was amended to allow commanders to "subdue, seize and take any armed French vessel which shall be found within the jurisdictional limits of the United States, or elsewhere, on the high seas . . . "[13] The legislation authorized acts of war without formally declaring one, though this would be far more specific than later resolutions. This practice allows members a degree of political cover in passing legislation ostensibly to protect things like shipping while really giving a president the right to wage war. Not only did Congress fail to adhere to the language of the Constitution but the Supreme Court also failed to maintain the clear lines of the Constitution in requiring a declaration. Once Congress was allowed to avoid responsibility for a declaration, this

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[11] JAMES MADISON, *Letters of Helvidius* (Aug.-Sept. 1793), *in*6 THE WRITINGS OF JAMES MADISON 174 (Gaillard Hunt ed., 1906).

[12] An Act More Effectively To Protect The Commerce and Coasts of the United States, ch. 48, 1 Stat. 561 (1798).

[13] *Id.*

approach yielded more and more generally worded authorizations that gave members plausible deniability if wars went badly.

In 1812, James Madison, as president, went to Congress to demand that members carry out their express obligations under Article I. He reminded Congress that declarations are not simply a bulwark against the concentration of power in the hands of a single person. They are a vital declaration of a free people before taking the most extreme measure as a nation:

> "Whether the United States shall continue passive under these progressive usurpations and these accumulating wrongs, or, opposing force to force in defense of their national rights, shall commit a just cause into the hands of the Almighty Disposer of Events … is a solemn question which the Constitution wisely confides to the legislative department of the Government. In recommending it to their early deliberations I am happy in the assurance that the decision will be worthy the enlightened and patriotic councils of a virtuous, a free, and a powerful nation."[14]

A declaration therefore serves to rally a nation to speak as one in a clear and informed voice. Such collective judgments are not always easy to secure. They were not supposed to be. The Framers largely abhorred war and its costs. They wanted to make it difficult by imposing an obligatory condition on Congress. A nation needs clarity and consensus before unleashing, as Jefferson puts, the "dogs of war."

Yet, it is precisely that clarity and burden that politicians abhor. It comes at a cost that has become easier and easier to evade. Our last declaration of war was in 1942. Since that time, we have engaged in open warfare in dozens of countries with hundreds of major military operations. Presidents now have precisely the authority that the Framers sought to deny them under the express language of our Constitution. Our current use of AUMFs flies in the face of both the language and intent of the Framers. Indeed, it makes a mockery of the statement of George Washington in 1793 that "The Constitution vests the power of declaring war in Congress; therefore no offensive expedition of importance can be undertaken until after

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[14] James Madison, Message to the Senate and House of Representatives (June 1, 1812), in 2 A Compilation of the Messages and Papers of the Presidents 484, 489-90 (James D. Richardson ed., 1897)

they have deliberated upon the subject and authorized such a measure."[15] On a weekly basis, we see "offensive expedition[s] of importance" undertaken under the ambiguous authorizations of Congress.

III. THE AUMF, CONSTITUTIONAL AVOIDANCE, AND THE CONSTRUCTIVE REPEAL OF ARTICLE ONE, SECTION EIGHT

The path to our current state of indefinite war was a long but straight progression from a requirement of a clear declaration to open-ended AUMFs. This path took the country through the infamous Gulf of Tonkin incident on August 4, 1964 – an alleged attack on the USS Maddox that became the pretext for the Vietnam War. If Congress believed that the attack was genuine, it was an act of war but again members did not want to take the responsibility for a formal declaration. Instead, it passed a resolution on August 7, 1964, stating "Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression." It was a flagrant circumvention of the Constitution by members of this institution that would costs the lives of tens of thousands of American military personnel and ultimately shatter the lives of millions. Nevertheless, it was the political costs that Congress sought to avoid and members simply externalized the real and tragic costs to families throughout this nation.

After allowing this nation to go into an undeclared war of dubious origins, Congress was faced with a backlash from the public. It then became popular to limit authority. However, rather than default back to the express language of the Constitution, Congress passed the War Powers Act.[16] The

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[15] Letter from President George Washington to Gov. William Moultrie (Aug. 28, 1793), in 33 The Writings of George Washington 73, 73 (John C. Fitzpatrick ed., 1940).

[16] The continued failure of self-professed textualists in Congress to follow the language of Article I, Section 8 remains a long-standing glaring and troublesome conflict. I have written about this disconnect for years. *See* Jonathan Turley, *How Presidents Start Wars* Military History Magazine (Cover feature story), July/August 2007, at 1; *see also* Jonathan Turley, *Textualists and Originalists Are Again AWOL in Wars on Syria and Yemen*, The Hill, April 1, 2017; Jonathan Turley, *War – What it is Good For*, USA Today, February 15, 2007, at 13A; Jonathan Turley, *Can Congress Stop the War?,* USA Today, January 18, 2007, at 13A Jonathan Turley, *A Check on Wartime Power,* The National Law Journal, March 7, 2005, at 34; Jonathan Turley, *A War Powers Quandary,* The Los Angeles Times, December 21, 2001, at A19; Jonathan Turley, *Cries of "War" Stumble Over the Law,* The Los Angeles Times, Sept. 13, 2001, at A2l.

Act allowed a President to use U.S. forces in combat in the event of "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." However, it required the Executive Branch to report to Congress within 48 hours of such a military action, and required Congress to approve or reject the military action. Notably, such approval reflects an ongoing military campaign. Yet, Congress would not require prior approval or a formal declaration. Nevertheless, the resolution was an effort to require congressional involvement. It was a sad reflection of how far Congress had pushed itself into institutional obsolescence. It was passing a resolution to try to remain relevant to war making.

Passed on September 14, 2001, the AUMF continues this ignoble record in authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." While some of us opposed the language as wildly ambiguous and an effective blank check of undeclared wars, members eagerly passed it. It notably went as far as to approve "all necessary force" with no termination date. Not surprisingly, it was then used to launch extended military operations in Afghanistan, Pakistan, Yemen, Somalia, Syria, Iraq, and Libya. This included ground forces, drone strikes, and the detention of thousands, including the establishment of the detention center at Guantanamo Bay. It allowed the targeting of groups loosely defined as connected to Al Qaeda, including ISIL and other groups that have attacked Al Qaeda and its allies. According to the Congressional Research Service, this broad authority has been used 37 times in 14 countries for acts of war.

The 2001 AUMF embodies the key motivations behind the circumvention of Article I. First, it avoids the personal accountability for members to declare war and, second, it allows plausible deniability after wars go wrong. After it was shown that the Bush Administration had launched the war in Iraq on false representations of weapons of mass destruction, various members (particularly presidential candidates) blamed the Administration for the war and its costs. They cited the general language and insisted that they never intended a war with these costs and duration.

The new AUMF reflects many of these same flaws while adding new and disturbing elements. Admittedly, some of the flaws in this legislation existed in some form in prior AUMF. The new measure would repeal the 2002 AUMF and partially repeal the 2001 AUMF. However, a number of

prior flaws – and new flaws – are evident in the new legislation, which would not materially alter the scope or unilateral character of current military campaigns. Indeed, it could make it far, far worse.

Before addressing some of these inherent dangers, it is important to make a threshold objection to this and prior AUMF debates. There is a certain path dependence that is evident in war powers debates. After decades of open-ended resolutions, it is easy to confine the debate to simply one of scope and standards rather than the original threshold constitutional question. However, the original question remains. The Constitution allows ample leeway for presidents to respond to attacks on this country. A president has never been denied the right to respond to imminent attacks on the United States. Absent such an imminent threat, the Constitution requires a declaration of war. That requires a Congress to identify the enemy and the reason for going to war. Many insist that the realities of modern war simply do not allow for such clear determinations. In other words, we need to be in continual war in too many places to seek individual authorizations. Yet, the modern history of war making in the United States only shows the wisdom of the Framers. Since breaking away from the clarity of Article I, we have found ourselves in endless war where the targets are not even widely known by the public. The United States is now at war in places like Yemen and Somalia where we are simply seeking to degrade military capabilities of terrorist groups as opposed to responding to a specific threat against the United States.

If we did not have an AUMF, it is indeed possible that we would not have the range of military operations that we have today. We have never had that debate. As a result, citizens have no idea of the full range of countries where we are currently engaged in combat. We no longer require presidents to make that case and no longer require members to assume that responsibility. The assumption that AUMFs are now essential components to modern governance is hardly self-evident but, more importantly, it is inconsistent with the express language of our Constitution.

For civil libertarians, the most glaring element to this debate is that the long failure of Congress to assert its constitutional authority has led the Executive Branch to claim a type of expanded authority by default. The Office of Legal Counsel of the Department of Justice (OLC) previously advised President Obama that he had the authority to attack Libya without either an imminent threat to the United States or express authority from Congress. It argued that Article I could now be interpreted through a "historical gloss" of past unilateral military actions and the absence of congressional opposition. A second OLC memorandum issued on May 31,

2018 built on this "historical gloss" and said that President Donald Trump could also launch attacks on Syria without involving Congress. These opinions seek to make congressional acquiescence into a critical element of constitutional interpretation.

With that threshold reservation, I would like to address what I consider the most serious flaws in the current legislation.[17]

A. "New Foreign Countries"

The new legislation uses rather opaque means to convey authority to continue military operations against various states – wars that have never been fully debated, let alone declared, by Congress. Buried in the legislation is the following definition in Section 5 (c) that works as an effective authorization:

> "In this resolution, the term ''new foreign country'' means a foreign country other than Afghanistan, Iraq, Syria, Somalia, Yemen, or Libya not previously reported to Congress pursuant to this paragraph."

Accordingly, we will "by definition" still be at war in these countries without the President having to come to Congress to make the case for wars in six foreign countries. Members can authorize large-scale ground, air, and naval operations through this innocuous section. We have gone from a required vote of declaration to the adoption of a definition.

As for truly new countries, we have yet again a post hoc process for inclusion:

> "NEW FOREIGN COUNTRIES.—Not later than 48 hours after the use of military force in a new foreign country pursuant to this joint resolution, the President shall submit an updated report required by

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[17] My testimony focuses on the separation of powers issues and Article 1, Section 8 implications of the new AUMF. There are, however, additional serious flaws in the legislation, including the potential for tremendous abuse in the detention of both citizens and non-citizens. Section 10, entitled "Conforming Amendment," would by effect expand the scope of the National Defense Authorization Act for Fiscal Year 2012 (NDAA). This includes the NDAA's controversial indefinite detention provision. There is a real question as to whether the sweeping language of this AUMF in combination if the NDAA could be used to hold citizens indefinitely, though such an abuse would hopefully trigger a challenge in the courts.

this paragraph and consult with the appropriate congressional committees and leadership. Authorization for use of military force pursuant to this joint resolution in a new foreign country is contingent upon the reporting to Congress pursuant to this paragraph."

Congress is again left with the option of a joint resolution countermanding the inclusion of a new country. This, however, is less than what the Framers gave Congress: the right (and obligation) to affirmatively approve such wars. Congress *may* act on a question that it is required to act on under Article I, Section 8. That is not a codification but a substitution with less power and responsibility for members.

B. "Associated Forces"

One of the greatest concerns after 9-11 has been the apparent license given to the United States to attack groups anywhere in the world under the loosely defined conditions of prior AUMFs. The new legislation would leave in place the authorization of "necessary and appropriate force" against certain non-state groups and departs from the past open-ended authorization for war against "nations" deemed to be harboring targeted groups. Under the new authorization, targeted groups would not include a "sovereign state." The specificity however is illusory. For example, a president can include new "associated forces" as well as new countries unless Congress passes a bill to specifically prevent it. The bill essentially places a specific list of authorized targets in a sea of ambiguity. Take Section Five. It appears to offer a concrete list of designated forces including (a) Al Qaeda in the Arabian Peninsula, (b) Al Shabaab, (c) Al Qaeda in Syria (including Al Nusrah Front), (d) the Haqqani Network, and (e) Al Qaeda in the Islamic Mahgreb (AQIM). That would seem to correct the endlessly expanding list of groups under the prior AUMFs. However, the Congress would then add the following:

"(2) DESIGNATION.—Not later than 30 calendar days after the date of the enactment of this joint resolution, the President shall designate all organizations, persons, or forces other than those listed in paragraph (1) that the President has determined are associated forces covered by the authorization for use of military force provided by section 3(a) of this joint resolution by submitting to the appropriate congressional committees and leadership a report listing all such associated forces."

Thus, the list constitutes only the initial designations on a list to be supplemented unilaterally by the President. What is curious is that the window for the initial expansion is just 30 days after enactment. Why? Rather than demand a full initial list to be submitted, the law allows a shorter list to be voted on with the ability to then expand the list after the matter is removed from the public debate. However, that is not nearly as worrisome as what follows:

> "(3) NEW ASSOCIATED FORCE.—Not later than 48 hours after the President determines that a new organization, person, or force is an associated force covered by the authorization for use of military force provided by section 3(a) of this joint resolution, the President shall designate such organization, person, or force as an associated force by submitting a report to the appropriate congressional committees and leadership."

Thus, the initial listing is largely irrelevant as a guarantee of specific authorizations. It leaves the appearance of specific authorizations but then allows the President to unilaterally add new groups to the list. As discussed below, this misleading structure is then coupled to an ex postprovision allowing for congressional action if they disagree with the President. Given the ever changing movement of these groups, the initial list is likely to be meaningless. Moreover, past administrations have shown little restraint in adding groups to the list of targets under the most tangential connections to stated AUMF conditions. This law removes the need for pretense in past efforts to tie groups to Al Qaeda or other authorized targets. The President may simply add the groups to the list knowing that few politicians will have the temerity to question the inclusion of an alleged terrorist group.

The proposed AUMF codifies the rule that it is better to ask for forgiveness than permission. It is highly unlikely that politicians will vote to specifically remove the name of an alleged terrorist group from an authorization list. Even without adding new foreign states to the list, the AUMF still allows for attacks on foreign territory of "associated forces" located within those countries. Under international law, such attacks committed with the approval of a sovereign nation is considered an act of war absent narrow exceptions. The protections therefore are practically meaningless. Congress and the White House have previously shown a disinclination to declare wars against other nations in favor of basing attacks on groups within the territory of those nations.

C. The Shift From Ex Ante To Ex Post Action

The most disturbing element in the new AUMF is the authority of a president to add new targets or expand the scope of the AUMF at his sole discretion – requiring Congress to pass a bill later if it wants to preserve the original scope passed in the AUMF. It is the final abandonment of the structure expressly set into place in the Constitution by the Framers. The Congress first abandoned the express requirement of a declaration of war. It then abandoned the need for specific authorizations of force in favor of broad categories of possible enemies. Now it is dispensing with the need for any prior authorizations to attack specific targets. The constitutional requirement for a declaration would be substituted with a requirement that a president inform Congress after the fact:

> "(B) NEW FOREIGN COUNTRIES.—Not later than 48 hours after the use of military force in a new foreign country pursuant to this joint resolution, the President shall submit an updated report required by this paragraph and consult with the appropriate congressional committees and leadership. Authorization for use of military force pursuant to this joint resolution in a new foreign country is contingent upon the reporting to Congress pursuant to this paragraph."

Members are fully aware that, even if a majority of members could be found to oppose a war in another country, it is highly unlikely that they could muster a veto-proof majority. The Corker-Kaine proposal achieves the long-sought goal of members to remove themselves from responsibility over war. These belated votes allow for members to register what are effectively symbolic votes while being able to claim that they had little real voice – or responsibility – in a war that goes badly. It would not only constructively repeal the War Powers Resolution but also Article I, Section 8. In so doing, it allows for endless war and zero accountability.

This adoption of an ex post role for Congress is made all the more serious by realities of modern budget practices. It is now routine for Congress to approve billions of largely unrestricted funds (beyond broad purposes of defense) to the Defense Department and other agencies. Indeed, when I represented both Democratic and Republican members challenging the Libyan War, we showed how the Administration funded an entire military campaign by shifting billions in money and equipment without the need to ask Congress for a dollar. It was a war essentially funded from loose

change owing to the failure of Congress to fully carry out its constitutional duties over appropriations. President Obama not only said that he alone would define what constitutes a war but unilaterally funded the war as just another discretionary expense. Federal appropriations have become so fluid and discretionary spending so lax that presidents are now more insulated than ever before from the threat of de-funding. Thus, Congress combined a failure to shoulder its duties over the declaration of war with a failure to shoulder its burden over appropriations. It has given presidents both a blank check to launch wars with an actual blank check to fund them.

Clearly, the power of the purse can still be used effectively as a check on the Executive Branch if Congress were to be inclined to exercise its inherent authority. Congress needs to be more specific on the use of funds and reduce the degree to which funds are given for discretionary uses, particularly during periods of circumvention and tension. However, the historic failure to exercise greater control over appropriations only magnifies the dangers over the failure to exercise control over war making. Indeed it may be inaccurate to call this a "blank check." Checks usually state the purpose and require some verification. This is more like constitutional cash.

D. Lack of A Sunset Provision

The new AUMF would also dispense with even the need to reauthorize these sweeping powers. Indeed, members would succeed in this legislation from having to take any vote at all – a total abandonment of the role expressly dictated in Article I. Section 4 states:

> "(a) PRESIDENTIAL SUBMISSION.—On January 20, 2022, and again every 4 years thereafter, the President shall submit to Congress a report regarding the use of military force pursuant to this joint resolution, which shall include a proposal to repeal, modify, or leave in place this joint resolution.
> (b) EXPEDITED CONGRESSIONAL RECONSIDERATION.—During the 60-calendar day period beginning on January 20, 2022, and again every 4 years thereafter, a qualifying resolution to repeal or modify this joint resolution shall be entitled to expedited consideration pursuant to section 9 of this joint resolution."

Thus, rather than simply placing a sunset date that requires affirmative congressional approval, the legislation would allow for literally endless wars without congressional action. The onus would be on the President every

four years to seek changes that he or she would prefer. Otherwise, the Congress is relegated to the right to act every four years or during the 60-day period starting on January 20, 2022. The new legislation would literally put our endless war on autopilot. It is final proof that Madison may have been wrong in his faith that members would fight jealously to protect their constitutional authority. While Madison hoped in *Federalist No. 51* that "ambition must . . . counteract ambition," members have shown little institutional fidelity as they worked toward their own institutional obsolescence.

IV. CONCLUSION

The new AUMF would codify the long-sought desire of Congress to be a mere pedestrian to the prosecution of wars by the United States. Rather than seek to amend the Constitution to affirmatively surrender its institutional authority, members are constructively rewriting Article I, Section 8 in a more user-friendly form that does not require express declarations or even reauthorizations. It would combine this abdication of authority with its long-standing failure to limit the use of appropriated funds. This blank check therefore will have not only an unstated purpose but an unstated amount. Under those conditions, we have already had roughly 17 years of war and could just as well have170 more.

I have had the honor of testifying many times in both houses of Congress. Today, however, I took two of my four children out of school to come to this hearing. My sons Aidan and Jack are sitting behind me. I felt that they should be here to watch part of this process because they could well be asked to pay the ultimate price for wars started under this sweeping authority. If called, I know that they would do their duty as did their grandfather, great grandfather, and prior generations of our family in our wars. The question is whether members of this body will do their duty as laid out in our Constitution and reject this proposed AUMF.

I thank you again for the honor of appearing today and I am happy to answer any questions that you might have.

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