

**Testimony to the Committee on the Judiciary  
United States Senate  
February 9, 2022**

**Hearing on  
Targeted Killing and the Rule of Law: The Legal and Human Costs  
of 20 Years of U.S. Drone Strikes**

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Mr. Chairman, Ranking Member Grassley and members of the Committee, thank you for inviting me to testify today about the United States' use of force in countering terrorism and more broadly as a tool of U.S. foreign policy. It is a privilege to be speaking before this distinguished committee.

I am currently the Chief of Policy for the International Crisis Group, an international non-governmental organization dedicated to conflict prevention; we currently cover more than 50 conflict situations around the world. From 2002 until 2017, I worked for the U.S. government in a variety of roles including as the Senior Director for Multilateral Affairs and Human Rights at the National Security Council, where I helped to develop U.S. policy with respect to civilian casualties, and as the Assistant Legal Adviser for Political-Military Affairs at the Department of State, where my focus was on international and domestic law regulating the use of force and the law of armed conflict.

My testimony today will argue that recent revelations about civilian casualties in U.S. counterterrorism operations should prompt an examination of how the United States came to be involved in a temporally and geographically unbounded twenty-year conflict with an undisclosed and evolving list of terrorist groups. It will explore why it is problematic that the executive branch has been permitted such broad discretion about how to define the scope of this conflict and the legal and structural factors that contributed to the status quo. My principal recommendation will be to reinvigorate Congress's constitutional role with respect to decision-making on matters of war and peace. This will require legislative reform – in particular amending and updating the 2001 Authorization for Use of Military Force (“2001 AUMF”) and 1973 War Powers Resolution (“1973 WPR”) – to increase checks and balances on the use of military force as an instrument of foreign policy.

### **A Problematic Status Quo**

In September 2021, President Biden told the United Nations that “I stand here today for the first time in 20 years, with the United States not at war. We’ve turned the page.”<sup>2</sup> But in fact the United States is still very much waging war. While last year marked the withdrawal of U.S. forces from Afghanistan, it did not mark the end of the conflict in which they fought. That conflict continues on, for the most part conducted under the 2001 AUMF. The enemy is an amalgamation of groups that includes al-Qaeda, certain affiliates known as “associated forces,” and ISIS. It is colloquially referred to as the “war on terror,” which is how I will refer to it today.

Much about the war on terror is hidden. We hear about it when there is a big success, as with the raid that led to the death of ISIS leader Abu Ibrahim al-Hashimi al-Quraishi in Idlib, Syria last week. We also sometimes hear when something goes terribly wrong, as with the deaths of four

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<sup>2</sup> Remarks by President Biden Before the 76th Session of the United Nations General Assembly, September 21, 2021.

U.S. servicemembers at Tongo Tongo, Niger, in 2017, or when stories emerge in the media about previously undisclosed mass civilian casualties.<sup>3</sup>

But much of the time we do not hear about it at all. We do not know exactly who the U.S is fighting or where.<sup>4</sup> We do not know what success in this conflict is supposed to look like. We do not have a reliable sense of who is being killed or why they are being killed. This is in part for operational reasons: counter-terrorism has come to mean light foot-print operations in remote locations that evade easy monitoring.

There is also an institutional explanation, however. The development, prosecution and oversight of this war has largely been handed over to the executive branch. Successive administrations have developed legal and policy doctrines that allow them to expand the scope of the conflict unilaterally. Rather than seek authority from Congress, they turn to their own lawyers to seek interpretations of pre-existing statutes that Congress never contemplated. They decide what sorts of safeguards are appropriate to guard against civilian casualties and too often fail to apply them rigorously.

This approach is problematic. From the rule of law perspective, it is problematic because it has been characterized by a lack of transparency and seemingly ad-hoc rule-making in the absence of effective checks and balances. From the humanitarian perspective, it is problematic because it may unnecessarily expose innocent civilians to harm. From a strategic perspective, it raises the question of whether the United States is over-extended militarily at a time when it faces so many global and strategic challenges. And from the perspective of wanting to turn the page, it is

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<sup>3</sup>See, eg, Azmat Khan and Anand Gopal, “The Uncounted,” *New York Times Magazine*, Nov. 16, 2017; Christopher Koettl, Evan Hill, Matthie Aikins, Eric Schmitt, Ainara Tiefertaler, and Drew Jordan, “How a U.S. Drone Strike Killed the Wrong Person,” *New York Times*, Sep. 10, 2021; Alex Horton, Sarah Cahlan, Dalto Bennett, Joyce Sohyun Lee, Meg Kelly and Elyse Samuels, “Examining a ‘Righteous’ Strike,” *The Washington Post*, Sep. 10, 2021; Eric Schmitt, “A Botched Drone Strike in Kabul Started with the Wrong Car,” *New York Times*, Sep. 21, 2021; Helene Cooper and Eric Schmitt, “Video Footage Showed at Least 1 Child Near Site Minutes Before Drone Strike in Kabul,” *New York Times*, Nov. 3, 2021; Dave Phillips and Eric Schmitt, “How the U.S. Hid an Airstrike that Killed Dozens of Civilians in Syria,” *New York Times*, November 13, 2021 (updated November 15, 2021); Dave Phillips, Eric Schmitt, and Mark Mazzetti, “Civilian Deaths Mounted as Secret Unit Pounded ISIS,” *New York Times*, Dec. 12, 2021; Azmat Khan, “The Human Toll of America’s Air Wars,” *New York Times Magazine*, Dec. 19, 2021; Eric Schmitt, “No U.S. Troops Will Be Punished for Deadly Kabul Strike, Pentagon Chief Decides,” *New York Times*, Dec. 13, 2021; Azmat Khan, Haley Willis, Christoph Koettl, Christiaan Triebert and Lila Hassan, “Documents Reveal Basic Flaws in Pentagon Dismissals of Civilian Casualty Claims,” *New York Times*, Dec. 31, 2021; Azmat Khan, “Hidden Pentagon Records Reveal Patterns of Failure in Deadly Airstrikes,” *New York Times*, January 18, 2022; Charlie Savage, Eric Schmitt, Azmat Khan, Evan Hill and Christoph Koettl, “Newly Declassified Video Shows U.S. Killing of 10 Civilians in Drone Strike,” *New York Times*, Jan. 19, 2020; Dave Phillips, Azmat Khan, and Eric Schmitt, “A Dam in Syria Was on ‘No-Strike’ List. The U.S. Bombed It Anyway,” *New York Times*, Jan. 20, 2022. See also, Robert Malley and Stephen Pomper, “An Accounting for the Uncounted,” *The Atlantic*, December 16, 2017.

<sup>4</sup> Brian Finucane, Putting AUMF Repeal in Context, *Just Security*, June 24, 2021 (“The full list of groups and individuals covered by the 2001 AUMF is currently secret. In its April 2021 Report on the Legal and Policy Frameworks for the United States’ Use of Military Force and Related National Security Operations, the Biden Administration states that information regarding the application of the 2001 AUMF to specific groups is in a classified annex.”)

problematic because it has allowed the executive branch substantial latitude to perpetuate and expand the present war without a robust discussion of its costs.<sup>5</sup>

## A Three-part Problem

### 1. *An elastic legal framework*

While there is an extensive body of law that governs the use of force by the executive branch, it has been aggressively interpreted by successive administrations to the point where it is now far easier for the executive branch unilaterally to start or expand a war than it is for Congress to end one.

Although Article I of the Constitution vests in Congress the power to declare war, the executive branch takes a very broad view of the President's unilateral war-making powers under Article II's Commander-in-Chief clause. According to the Department of Justice's Office of Legal Counsel (OLC), there are certain checks on this power. Namely, the president must be able to establish that a unilateral use of force serves a "national interest" and that the "nature, scope and duration" of the anticipated hostilities will not rise to the level of "war in the constitutional sense".<sup>6</sup> The national interest test, however, has been deemed to include everything from an expansive conception of self-defense to regional stabilization, leading a growing chorus of experts to characterize it as nearly meaningless.<sup>7</sup> For its part, the "nature, scope and duration" test is both pliant and unevenly applied. In the run-up to the Afghanistan and Iraq conflicts, for example, OLC issued opinions that President George W. Bush would have the unilateral authority to launch those hugely consequential wars even in the absence of congressional authorization.<sup>8</sup> Despite the urging of scholars and former senior government lawyers from both parties, these opinions remain on the books.<sup>9</sup>

Second, the 1973 WPR has largely been gutted as a constraint on presidential powers. Although intended to reinvigorate Congress' role on matters of war and peace, a combination of executive branch interpretation, court decisions and congressional acquiescence have left it all but ineffective as a mechanism for regulating executive war-making. To be sure, the statute still notionally requires the president to withdraw U.S. forces introduced into "hostilities" within 60 days (or 90 under certain circumstances) absent congressional authorization to keep fighting. But since 1975, successive administrations have read the term "hostilities" very narrowly and also

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<sup>5</sup> Rebecca Ingber, *Legally Sliding into War*, *Just Security*, March 15, 2021.

<sup>6</sup> See, eg, Department of Justice Office of Legal Counsel, "April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities," May 31, 2018.

<sup>7</sup> See, eg, Curtis Bradley and Jack Goldsmith, "OLC's Meaningless 'National Interests' Test for the Legality of Presidential Uses of Force," *Lawfare*, June 5, 2018.

<sup>8</sup> John Yoo, Deputy Assistant Attorney General Office of Legal Counsel, "The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them," September 25, 2001; Jay Bybee, Assistant Attorney General Office of Legal Counsel, "Authority of the President Under Domestic and International Law to Use Military Force Against Iraq," October 23, 2002.

<sup>9</sup> See, eg, Bob Bauer and Jack Goldsmith, *After Trump: Reconstructing the Presidency*, 2020; Written Statement of Bob Bauer, Hearing on "Reclaiming Congressional War Powers," U.S. House of Representatives Committee on Foreign Affairs, March 23, 2021; Written Statement of Jack Goldsmith, Hearing on "Reclaiming Congressional War Powers," U.S. House of Representatives Committee on Foreign Affairs, March 23, 2021.

developed counting methods that delay reaching the 60-day threshold.<sup>10</sup> Even the notification provisions under the 1973 WPR, which have historically been fairly effective, have become less functional.<sup>11</sup>

The Supreme Court's 1983 *INS v Chadha* decision has also cast constitutional doubt over the capacity of Congress to order the withdrawal of troops through a concurrent resolution, as originally contemplated by the 1973 WPR. This leaves Congress without a reliable way to end a war through simple majority vote. While in theory it can deny funding to a war already in progress, or override a presidential veto to enact a joint resolution of disapproval, the practical and political obstacles are forbidding.

Third, beyond the president's constitutional powers, the 2001 AUMF has been transformed into a deep well of unilateral authority for the executive branch. While on its face, the 2001 AUMF approves the use of force against groups the president determines to have "planned, authorized, committed or aided" the September 11 attacks (as well as those who harbored such groups or persons) successive administrations of both parties have looked past the statutory language requiring a connection to those events. Through the executive branch's interpretive gloss, groups can be unilaterally deemed targetable under the AUMF if they constitute "associated forces" of al-Qaeda because they are viewed as having entered the war alongside it.<sup>12</sup> In 2014, the executive branch also deemed ISIS to be targetable under the AUMF even though ISIS leaders had broken with al-Qaeda and were, in certain instances, in direct conflict.

Finally, the United States' approach to international law renders it a less than fully reliable constraint on executive action. International law is widely understood to require that in order for a state to use force on another state's territory, it must act with the territorial sovereign's consent, a UN Security Council authorization, or in self-defense. But the United States' approach to anticipatory self-defense and its reliance on the contested "unwilling or unable" test create significant operational latitude for the executive branch and can be applied in a way that brings the United States into potential conflict with other nation states.<sup>13</sup> In some instances, administrations of both parties have simply dispensed with an international legal justification for the threat or use of force – as the Clinton administration did with respect to operations in Kosovo

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<sup>10</sup> Todd Buchwald, "Anticipating the President's Way around the War Powers Resolution on Iran: Lessons of the 1980s Tanker Wars," *Just Security*, June 28, 2019.

<sup>11</sup> Brian Finucane, "Failure to Warn: War Powers Reporting and the 'War on Terror' in Africa," *Just Security*, October 4, 2021. For general background on the history of executive branch reporting under the 1973 WPR, see Tess Bridgeman and Rachel Goldbrenner, "New Online Resource: War Powers and Presidential Practice," *Just Security*, February 24, 2020.

<sup>12</sup> Congress subsequently affirmed the president's detention authority with respect to associated forces in the National Defense Authorization Act for Fiscal Year 2012. Federal courts did so as well. See, for example, *Ali v. Obama*, 736 F.3d 542, 544 (D.C. Cir. 2013). "This Court has stated that the AUMF authorizes the President to detain enemy combatants, which includes (among others) individuals who are part of al-Qaeda, the Taliban or associated forces. As this Court has explained in prior cases, the President may also detain individuals who substantially support al-Qaeda, the Taliban, or associated forces in the war."

<sup>13</sup> See Curtis A. Bradley and Jack L. Goldsmith, "Obama's AUMF Legacy," 110 *American Journal of International Law* 628-645 (2016) ("The Obama administration relied on the [unwilling/unable] theory to conduct attacks on AUMF-authorized targets in Pakistan and Syria, and possibly in other countries as well. The theory was not a new one for the United States, but it lies on the aggressive end of available theories to address threats from terrorist groups in sovereign states, and it remains controversial.")

(1999), the Obama administration did in threatening to use force against Syria (2013) and the Trump administration did in the context of its Syria strikes (2017 and 2018).

## 2. *A permissive legal culture*

The normalization of war as a tool by which the United States advances its counterterrorism policies has placed an enormous weight on the shoulders of the U.S. government's national security lawyers, who are generally required to vet proposals that reach the president's or the cabinet secretaries' desks. As a former State Department lawyer, I have deep respect and admiration for the government's national security legal corps. At the same time, however, there are sometimes misperceptions about the decision space in which those lawyers operate. It tends to be narrow. While national security lawyers can and do say "no" when they cannot see a legal justification for a proposed operation, the U.S. approach to national security lawyering creates an expectation that the lawyers will exercise significant creativity in offering what is generally unreviewable legal advice, often making them an agent for the expansion of executive powers rather than a bulwark against it.<sup>14</sup>

To begin with, executive branch lawyers are for the most part not required (with the exception of OLC under its guidelines) to confine their advice to the best understanding of what the law requires. Instead, without explicit standards for rendering legal advice, lawyers across the government often default to whether a position is "legally available." This can in some instances mean taking positions that are contrary to the weight of authority, scholarly opinion, or even the United States' own prior positions.

Some reports suggest, for example, that the Obama administration reached the conclusion that the 2001 AUMF authorizes military force against ISIS – a group that fits neither within the plain language of the 2001 AUMF nor the definition of associated forces developed by the executive branch – even though none of the senior lawyers involved regarded this to constitute the best interpretation of the statute.<sup>15</sup> The point here is not that the United States should not have used force against ISIS. Rather, it is that the executive branch was able to launch a military campaign this consequential based on a contested legal theory about what was even then a more than ten-year-old statute—rather than obtaining prior authorization from Congress consistent with its constitutional role.

The need to justify events that have already happened, can be another driver of expansive executive branch lawyering. For an operating agency, the implications of conceding error – for example by determining that lives have been unlawfully taken – are potentially profound from the perspective of reputation, morale and legal liability. In some cases, reporting suggests, accounts of problematic activities become buried in the system. But other times lawyers in Washington are asked to justify facts on the ground. Under those circumstances, there can be significant pressure to adopt new and expansive legal positions.

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<sup>14</sup> Brian Finucane and Stephen Pomper, "Crossing Back Over: Time to Reform Legal Culture and Legal Practice of the 'War on Terror'," *Just Security*, Sep. 10, 2021.

<sup>15</sup> *Id.*

Perhaps the most salient example of this kind of retrospective national security lawyering arises in the context of the Guantanamo detainee litigation. Much of the doctrine relating to U.S. operations in the war on terror can trace its roots to positions that the U.S. government took to justify the detention of “enemy combatants” seized both on and off the battlefield in the early years of the conflict. Indeed the U.S. government’s interpretation that the AUMF extends to “associated forces” with no nexus to the September 11 attacks appears to have at least partly developed out of the need to retrospectively justify – first to the Combatant Status Review Tribunals that reviewed the legality of detentions during the George W. Bush administration and ultimately to the federal courts – why the United States was entitled to capture and hold members of groups other than al-Qaeda.<sup>16</sup> Successive administrations then applied that definition prospectively to open new fronts in the war on terror against groups that did not exist on the day of the September 11 attacks and on battlefields far from Afghanistan.<sup>17</sup>

Finally, there are limits to how much strong executive branch process can be relied on to counter these drivers of expansive legal doctrine. While bringing together lawyers from across the national security community in a “lawyers group” to discuss important issues is a valuable exercise, and can help ensure that diverse viewpoints are aired, those gatherings are generally convened with a view toward getting to “yes” on a proposed campaign or operation.<sup>18</sup> In these circumstances, dissenting voices may find themselves focusing on how they can maintain points of principle, even as they are yielding to operational preferences as a practical matter.<sup>19</sup>

### 3. *Flexible safeguards*

Through several administrations, the executive branch has committed to the protection of civilians through safeguards that it views as exceeding legal requirements imposed by the law of war. Yet the evidence suggests that the safeguards are flexible, the technical capacity to implement them is unreliable, and the U.S. government’s internal systems for tracking and correcting its own failures in this area are lacking. This hearing is in many respects framed by a series of reported system failures in Afghanistan and Syria that surfaced only because journalists uncovered them and brought them to the attention of the public.<sup>20</sup>

Why, after 20 years of war using systems designed for precision, under safeguards intended to minimize risks to civilians and encourage operational transparency, are incidents like this still surfacing? Part of the answer to the first question surely lies in General Frank McKenzie’s explanation that “combat ... is an inherently messy, imprecise, bloody business.”<sup>21</sup> If a country goes to war, it must expect that there will be civilian casualties. Part of the problem may also relate to the specific circumstances of some of the strikes – whether the United States has a

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<sup>16</sup> Rebecca Ingber, “Co-Belligerency”, Yale Journal of International Law, vol. 42 (2017)

<sup>17</sup> International Crisis Group, “Overkill: Reforming the Legal Basis for the U.S. War on Terror,” United States Report N°5, September 17, 2021.

<sup>18</sup> Oona Hathaway, “National Security Lawyering in the Post-War Era: Can Law Constrain Power?” UCLA Law Review 68 (2020)

<sup>19</sup> Rebecca Ingber, “Good Governance Paper No. 17: How to Use the Bureaucracy to Govern Well,” Just Security, October 31, 2020.

<sup>20</sup> See footnote 3 and accompanying text.

<sup>21</sup> Nick Schiffrin and Ali Rogin, “How negligence, systemic issues lead to civilian casualties from U.S. airstrikes,” *PBS NewsHour*, December 14, 2021.

ground presence to help guide targeting, or the depth of its intelligence base in a particular locale. But it is hard to imagine that the pliancy of the safeguards that the United States has relied on to prevent civilian harm is not also a factor.

Perhaps most important, the ultimate guardrail for the protection of civilians in the U.S. system is adherence to the law of war, which requires the parties to a conflict to distinguish between civilians, who enjoy immunity from targeting, and combatants, who can be killed or detained based on their status. But law of war protections still allow for civilian casualties – provided they are not excessive in relation to the concrete and direct military advantage anticipated – meaning that simple adherence to these standards can lead to situations where significant numbers of civilians are killed, even knowingly, in combat.

Moreover, in the context of a non-international armed conflict with a non-state actor such as ISIS or al Qaeda, at least some parts of the U.S. government have taken a relatively flexible approach as to who qualifies as a combatant. The Defense Department’s Law of War Manual offers illustrative examples of what constitutes “formal” and “functional” membership in an armed group – which it regards as the equivalent of combatancy – without articulating meaningful limits on who can fall within these terms.<sup>22</sup> Further, unlike many partner militaries, the Pentagon’s manual does not contain a presumption that individuals are civilians in cases of doubt.<sup>23</sup> In addition, whereas other militaries commit to take “*all feasible*” precautions to protect civilians to be part of their international legal commitments, the U.S. only commits to take “feasible precautions.”<sup>24</sup>

While the U.S. has created coordination and consultation requirements for the war on terror that are intended to create an additional layer of safeguard, there are loopholes. Reports of the 2019 Baghuz strike that appears to have led to mass casualties suggest that operators could skirt these safeguards through the dubious invocation of “self-defense”.<sup>25</sup> U.S. operators in Somalia have also reportedly long considered “collective self-defense” strikes in support of partner forces to lie beyond the reach of normal coordination and consultation requirements.<sup>26</sup>

Systems for reporting civilian casualty incidents, learning lessons and ensuring they are incorporated into the military’s approach to future operations also appear to be lacking. As noted, many of the major civilian casualty incidents to be reported over the course of the war on terror, have been reported not by the U.S. government, but by journalists and civil society organizations.

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<sup>22</sup> Office of the General Counsel Department of Defense, Department of Defense Law of War Manual, June 2015 (updated December 2016), 158.

<sup>23</sup> *Id.* at 200.

<sup>24</sup> Tess Bridgeman and Ryan Goodman, The Al-Qurayshi Operation and Minimization of Civilian Casualties, *Just Security*, February 3, 2022

<sup>25</sup> See, eg, Dave Phillips and Eric Schmitt, “How the U.S. Hid an Airstrike that Killed Dozens of Civilians in Syria,” *New York Times*, November 13, 2021 (updated November 15, 2021).

<sup>26</sup> International Crisis Group, Overkill: Reforming the Legal Basis for the U.S. War on Terror, United States Report N°5, September 17, 2021 (quoting a former official saying that “Collective self-defense is really close air support [of partnered forces] without authorization.”).



In recent weeks, the administration has given signals that it will make an effort to correct some of these problems. Secretary of Defense Lloyd Austin’s memo of January 27 mandates a “Civilian Harm Mitigation and Response Plan” within 90 days. The administration has suggested that it conducted last week’s special operations raid that killed the top ISIS leader in Idlib, Syria with particular attention to mitigating the risk to civilians.<sup>27</sup> But the depth and durability of any reforms remains to be seen. As one commentator recently observed, U.S. mitigation efforts in the war on terror have followed a “cycle of learning and forgetting.”<sup>28</sup>

## **Restoring Congress’s Constitutional Role in War and Peace**

For the reasons I have described, the legal and prudential safeguards meant to constrain both the scope and the conduct of the war on terror are insufficient. While it is important to pursue reforms that can help preserve innocent life that could be lost as a consequence of U.S. operations, it is also important to address the risk that this twenty-year-old war persists indefinitely without sufficient examination of its costs and effectiveness, and to begin restoring balance between the political branches with respect to matters of war and peace.

As concerns civilian casualties, the Department of Defense has long been urged by scholars and civil society to adjust its “feasible precautions” standard to match the “all feasible precautions” benchmark that many U.S. allies regard as a requirement of international law. It should do so, while also tightening its definition of who is targetable, and adjusting its protocols so that there is more reliable reporting and investigation of civilian casualty incidents. Because of the institutional challenges the Pentagon has faced in the latter task, it should consider bringing in experts from outside the chain of command – even from outside the executive branch – to ensure the work is rigorously done.

But changes like these are no surrogate for a broader inquiry about the war itself, and about the executive branch’s war-making powers. That will require Congress to reassert its Constitutional prerogatives on matters of war and peace. The Framers invested this body with the Declare War power for a reason: It is the most representative of the three branches of government and, because of its deliberative nature, the most apt to place a brake on imprudent war. Congress should begin to reclaim this role with two mutually reinforcing steps.

First, Congress should debate and decide the extent to which the U.S. must remain on a war-footing in order to meet the terrorist threats that it faces. Depending on the outcome of that discussion, it should replace the 2001 AUMF with a more narrowly targeted law that identifies the specific groups Congress authorizes war against, the locations where that war may be conducted, and the mission that the war is seeking to achieve. The revised statute should remove the capacity of the executive branch to change the scope of the war by adding new “associated” or “successor” forces without first obtaining congressional permission. To ensure that elected officials are required to examine whether the conflict is actually achieving its stated objectives, it

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<sup>27</sup> Tess Bridgeman and Ryan Goodman, “The Al-Qurayshi Operation and Minimization of Civilian Casualties,” *Just Security*, February 3, 2022

<sup>28</sup> Sarah (Holewinski) Yager, “Lost Innocents,” *Foreign Affairs*, Jan. 25, 2022.

should include a date no more than two or three years into the future by which the statute will lapse absent reauthorization.<sup>29</sup>

Second, taking the longer view, Congress should replace the 1973 WPR with a revised statute that narrows the executive branch's discretion to wage unilateral war to the realm of true self-defense. The bipartisan draft National Security Powers Act introduced over the summer by Senators Lee, Murphy and Sanders would be a good place to start. In addition to common sense changes (such as changing the 60-day withdrawal clock to a 20-day clock that would be more difficult to manipulate), the Act would clearly define "hostilities," effectively narrow the realm for unilateral executive branch war-making to true self-defense, require much more robust reporting of conflicts once underway, and deny funding should the executive branch seek to wage war without Congress's approval.<sup>30</sup>

One overdue step that the executive branch should take in support of this reform effort would be to review the inventory of OLC opinions that relate to unilateral executive branch war-making authorities and revoke those that stand out as extreme. The two above-referenced opinions from 2001 and 2002 would be a good place to start.<sup>31</sup>

## **Conclusion**

Legal reforms that require Congress and the executive branch to agree on the scope of the current and future wars are the only way to ensure the kind of public airing that these conflicts deserve, remove the power to decide the contours of the nation's wars from unelected lawyers and policymakers, and place responsibility with the elected officials who are accountable to the nation's voters. There is no guarantee that structural changes requiring greater cooperation between the two political branches on matters of war and peace will lead to more of the latter than the former. The U.S. Congress did, after all, authorize the Vietnam, Afghanistan and Iraq wars. But if U.S. elected officials are to fully learn the lessons of those wars, and put them into practice, then they must have a vehicle for doing so. Policy formed in the insular world of the executive branch is unlikely to be such a vehicle. Inter-branch debate – in view of the public, and subject to democratic accountability – is more likely to serve the interests of the United States and the ends of global peace and security.

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<sup>29</sup> Tess Bridgeman, Ryan Goodman, Stephen Pomper, and Steve Vladeck, "Principles for a 2021 Authorization for the Use of Military Force," *Just Security*, March 5, 2021.

<sup>30</sup> Tess Bridgeman and Stephen Pomper, A Giant Step Forward for War Powers Reform, *Just Security*, July 20, 2021.

<sup>31</sup> See footnote 9 and accompanying text.