

**United States House of Representatives
Committee on Foreign Affairs**

Hearing on “Reclaiming Congressional War Powers”

March 23, 2021

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

In recent years Congress has on some dimensions been actively involved in exercising its constitutional powers related to war.¹ On other dimensions, however, it has lost significant control of its constitutional war powers. This testimony offers my views on why and how it lost control, and why and how it should reclaim control through reform of the post-9/11 authorizations to use military force (“AUMFs”) and the War Powers Resolution (“WPR”).²

How Congress Lost Control

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

A. Article II.

The executive branch has interpreted Article II of the Constitution to authorize the president to deploy “light-footprint” military force — air strikes (drone and manned), cruise missiles, cyberattacks, and actions by special operations forces — in any situation that serves “the national interest.”³ It construes the “national interest” very broadly to include protection of or assistance to allies, preserving regional stability, preventing humanitarian disaster, supporting the United Nations, and self-defense (which includes defense against distant, non-realized threats).⁴

This interpretation of Article II, in light of modern technological developments, means that the executive branch, without congressional authorization, can project significant U.S. military force around the globe for long periods of time in any context where it would plausibly want to do so.⁵ The executive branch has also interpreted Article II to permit introduction of large numbers of ground troops in foreign theaters in many situations without congressional authorization.⁶ Some executive branch opinions go even further than these permissive interpretations of Article II.⁷ And finally, the executive branch has expanded its effective authority to use force simply by applying the traditional unit or soldier self-defense rationale to troops — especially special operations forces — widely deployed around the globe.⁸

B. The WPR

The WPR aimed to curb unilateral presidential uses of military force. It failed. The executive branch has interpreted the sixty-day window before it needs to secure congressional authorization as recognition of independent presidential power to use force within that window.⁹ It has also interpreted the “hostilities” trigger for requiring congressional authorization to cover only extended engagements of U.S. troops that pose a serious risk of U.S. casualties and escalation.¹⁰ And its broad interpretations of congressional force authorizations, discussed below, render the WPR irrelevant in those contexts. Congress has acquiesced in the executive branch’s emasculation of the WPR. As a result, the WPR today poses practically no obstacle to presidential unilateralism.

C. The AUMFs.

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

Why Congress Lost Control

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

And yet Congress has significant authority to control war power should it choose to exercise it. As early as 1804, the Supreme Court upheld congressional restrictions on the circumstances in which the U.S. Navy could seize enemy ships during the Quasi-War with France. And as the Justice Department’s Office of Legal Counsel (“OLC”) has acknowledged, unilateral uses of force “cannot be sustained over time without the acquiescence, indeed the approval, of Congress, for it is Congress that must appropriate the money to fight a war or a police action.”¹¹ In 1983 and 1993, Congress forced presidents to change missions (in Lebanon and Somalia, respectively) through the use of conditional funding restrictions. Congress’s funding restrictions were also a major contribution to the end of the Vietnam War.

There are indications that Congress has renewed interest in reclaiming more of its traditional role in war powers. This hearing is an encouraging example. Another example is Congress’s unprecedented effort last year under Section 5(c) of the WPR to terminate any presidential use of force against Iran except in strictly limited circumstances.¹²

AUMF Reform

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

A. 2001 AUMF

The 2001 AUMF authorized the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons. . . .”¹³ Congress clearly aimed here to authorize force against at least al Qaeda and Afghanistan (which was then governed by the Taliban). But it enacted the 2001 AUMF before it had full clarity on who was responsible for the 9/11 attacks, and so it described the enemy in broad, general terms and did not impose a temporal or geographical limitation. Presidents subsequently interpreted the 2001 AUMF to include forces “associated” with al Qaeda or the Taliban, broadly conceived, and to include the Islamic State, which is not associated with either of those entities. They have relied on the 2001 AUMF to use force in many nations in addition to Afghanistan.

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

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

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

1. *Specify the Enemy*

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

2. *Future Associated Forces*

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

a definition of “associated forces,” and too little congressional oversight, give the president too much discretion to shape the war.

To address these challenges, Congress should expressly authorize force against associated forces using the basic definition that guided the last three administrations: An associated force is one that “has entered the fight alongside” and “is a cobelligerent with” al Qaeda, the Taliban, or the Islamic State “in hostilities against the United States or its coalition partners.”¹⁵ It should also add congressional notice and review to the identification of new associated forces, as contemplated in a bipartisan 2018 Senate proposal.¹⁶ That bill authorizes the president to identify new groups of associated forces, but it also requires him or her to notify Congress of the designation within forty-eight hours. It then provides for an expedited review mechanism by Congress and guaranteed congressional debate on whether the designation should be repealed.

3. A Sunset Provision

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

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

4. Detention Authority

If Congress repeals and replaces the 2001 AUMF, it will need to pay attention to the legal basis for continued military detention at the facility at Guantanamo Bay, Cuba. Should Congress wish detention there to continue, the replacement AUMF would need to make clear that the authorities provided by the 2001 AUMF, and by the 2011 detention statute that references the AUMF,¹⁷ continue under the replacement AUMF.

B. 2002 AUMF

In 2002 Congress authorized the president “to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to . . . defend the national security of

the United States against the continuing threat posed by Iraq.”¹⁸ The authorization aimed at the threat posed by Iraq’s past aggression, international law violations, and the supposed threat of weapons of mass destruction. But the language of the authorization swept more broadly and has been construed by the executive branch as authorization to use force unrelated to the threat actually posed by Iraq. For example, the Obama administration invoked it as one basis for using force against the Islamic State in Iraq.¹⁹ And the Trump administration used it as one basis for targeting Qasem Soleimani in Iraq.²⁰

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

C. The AUMFs and the Forever Wars

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

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

Broader War Powers Reform

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

I have outlined my views on how to reform the WPR in my recent book with Bob Bauer.²¹ In brief: Congress should expressly authorize the president to use military force under all the circumstances needed to protect U.S. national security, with an emphasis on an express authorization for a precisely defined self-defense power. Congress should prohibit presidential uses of force that fall outside this justification, and in particular ban humanitarian intervention without congressional authorization. The revised WPR would require more demanding consultation with and reporting to Congress than the current WPR, and would take more robust steps than the

current WPR to bar unauthorized uses of forces. And it would bar the executive from spending funds in ways inconsistent with these provisions.

¹ Two examples are cyberoperations and special operations forces. On the former, see, for example, 10 U.S.C. § 394 note (2018) (Active Defense Against the Russian Federation, People’s Republic of China, Democratic People’s Republic of Korea, and Islamic Republic of Iran Attacks in Cyberspace) (authorizing the Secretary of Defense to “take appropriate and proportional action in foreign cyberspace” in response to cyberattacks from Russia, China, North Korea, and Iran); Robert Chesney, *The Domestic Legal Framework for US Military Cyber Operations* 1 (Hoover Inst., Aegis Paper Series No. 2003, 2020) (explaining in detail the “recurring and constructive congressional engagement” with the executive branch over past decade “to build a legal architecture for military cyber operations”). On the latter, see 10 U.S.C. § 127e (2018), *amended by* National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 1041, 133 Stat. 1198, 1585 (2019) (authorizing the Secretary of Defense to expend up to \$100,000,000 each fiscal year to support foreign entities “engaged in supporting or facilitating authorized ongoing military operations by United States special operations forces to combat terrorism”); National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1202, 131 Stat. 1283, 1639 (2017), *amended by* National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 1207, 133 Stat. 1198, 1624 (2019) (authorizing the Secretary of Defense to expend \$10,000,000 each fiscal year until 2023 to support foreign entities “engaged in supporting or facilitating ongoing and authorized irregular warfare operations by United States Special Operations Forces”); 10 U.S.C. § 333 (2018) (authorizing the Secretary of Defense to conduct programs providing training and equipment to build the capacity of foreign security forces to conduct, *inter alia*, operations determined to be “in the national interest of the United States”).

² Large parts of this testimony draw on my book *After Trump: Reconstructing the Presidency* (2020), co-authored with Bob Bauer. Though many elements of that book respond primarily to the Trump presidency, its views on conventional war powers do not. As the book makes plain, “Trump has not been as aggressive as his two predecessors in expanding available unilateral presidential war powers,” and “the most dangerous expansions of presidential [war] power took place prior to Trump.” BOB BAUER & JACK GOLDSMITH, *AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY* 1, 281 (2020).

³ The most recently published Office of Legal Counsel opinions that support this proposition are April 2018 Airstrike Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. (May 31, 2018) [hereinafter 2018 Syria Opinion]; Targeted Airstrikes Against the Islamic State of Iraq and the Levant, 38 Op. O.L.C. 82 (2014) [hereinafter 2014 ISIL Opinion]; Authority to Use Military Force in Libya, 35 Op. O.L.C. 20 (2011) [hereinafter 2011 Libya Opinion]. I should note that I wrote an opinion when I was head of the Office of Legal Counsel that is cited in two of these later opinions. See *Deployment of United States Armed Forces to Haiti*, 28 Op. O.L.C. 30 (2004) (concluding that Article II authorized President George W. Bush to deploy marines to Haiti in order, among other reasons, to protect the U.S. embassy and U.S. persons in light of domestic unrest there).

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

⁵ The only acknowledged constraint on the use of light-footprint warfare in the OLC opinions is that the executive branch says it may need congressional authorization in situations that pose significant and immediate risk to American personnel or of escalation. OLC has concluded that this situation will likely arise only in “prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period.” 2018 Syria Opinion, *supra* note 3, at 9 (quoting 2011 Libya Opinion, *supra* note 3, at 31). This is not a meaningful constraint. It did not prevent President Obama from conducting the 2011 Libya operation, which lasted seven months, reportedly involved Central Intelligence Agency personnel on the ground, and resulted in at least many hundreds (and probably thousands) of air sorties including a substantial percentage of targeting sorties. Nor did it prevent President Trump from ordering the lethal targeted strike against General Qasem Soleimani in 2019, which many at the time feared would lead to significant escalation of hostilities with Iran.

⁶ See, e.g., 2018 Syria Opinion, *supra* note 3, at 19–20.

⁷ See The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, 25 Op. O.L.C. 188 (2001); Authority of the President Under Domestic and International Law to Use Military Force Against Iraq, 26 Op. O.L.C. 143 (2002).

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

⁹ See, e.g., 2011 Libya Opinion, *supra* note 3, at 30–31.

¹⁰ See MATTHEW C. WEED, CONG. RESEARCH SERV., R42699, THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICE 42–44, 47 n.101 (2019).

¹¹ 2018 Syria opinion, *supra* note 3, at 8 (quoting Presidential Power Concerning Diplomatic Agents and Staff of the Iranian Mission, 4A Op. O.L.C., 174, 188 (1980)).

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

¹³ 50 U.S.C. 1541 note (2018) (Authorization for Use of Military Force Against September 11 Terrorists).

¹⁴ Congress supplemented the detention authority under the 2001 AUMF in Section 2021 of the National Defense Authorization Act for 2012 (NDAA). National Defense Authorization Act for Fiscal Year 2012 § 1021, 10 U.S.C. § 801 note (2018) (Detention Authority and Procedures Transfer Certifications and Prosecution Consultation Requirement) [hereinafter 2012 NDAA].

¹⁵ See, e.g., Jeh Charles Johnson, *National Security Law, Lawyers, and Lawyering in the Obama Administration*, 31 YALE L. & POL’Y REV. 141, 146 (2012).

¹⁶ S.J. Res. 59, 115th Cong. § 5(a) (2018).

¹⁷ See 2012 NDAA, *supra* note 14.

¹⁸ 50 U.S.C. 1541 note (2018) (Authorization for Use of Military Force Against Iraq Resolution of 2002).

¹⁹ THE OFFICE OF THE PRESIDENT OF THE UNITED STATES, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 15 (2016).

²⁰ THE OFFICE OF THE PRESIDENT OF THE UNITED STATES, NOTICE ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 2 (2020).

²¹ See BAUER & GOLDSMITH, *supra* note 2, ch. 12.