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Committee on Foreign Affairs

Hearing on “Reclaiming Congressional War Powers”

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

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

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

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

However one views this messy form of constitutional politics—as a “dance” or a “struggle”—this appears to be a moment in time for bipartisan congressional action in cooperation with a willing executive. And it appears that the goals in view are reforms of the 2001 and 2002 Authorizations to Use Military Force. While there are other issues, such as the revision at long last of the War Powers Resolution, that should continue to command congressional attention, AUMF reform (along with congressional pressure for the withdrawal of related Office of Legal Opinions issued in 2001 and 2002) seem clearly the right priorities.

In the “complicated dance” around war powers issues, Congress should take particular care to protect against presidents’ attempts to stretch the boundaries of congressional authorizations for the use of force in one particular setting, responding to one set of specific circumstances, and claim authorization for different or prolonged engagements that Congress did not intend to approve. Of course, presidents may also decide to stake their assertion of authority on the basis of inherent Article II powers, a position that raises a host of other issues, as I will note shortly. But Congress should resist presidential claims that Congress has somehow authorized what it plainly did not. This is a critical element of the concern with constitutional accountability for the “forever war”—that presidents can publicly maintain the fiction that in pursuing prolonged military engagements, they are not acting alone but in a fully authorized partnership with the Congress. Only through AUMF reform can Congress address this fundamental accountability issue.

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

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

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