

THE CONSTITUTION PROJECT



Safeguarding Liberty, Justice & the Rule of Law

July 24, 2017

Rep. Ed Royce
U.S. House of Representatives
2310 Rayburn House Office Building
Washington, DC 20515

Rep. Eliot Engel
U.S. House of Representatives
2462 Rayburn House Office Building
Washington, DC 20515

Re: Constitution Project Statement for the Record, House Foreign Affairs Committee Hearing on “Authorization for the Use of Military Force and Current Terrorist Threats”

Dear Chairman Royce, Ranking Member Engel, and Members of the Foreign Affairs Committee:

Thank you for holding this hearing. The Constitution Project does not take a position on whether or when the United States should use military force, but we are deeply committed to restoring the division of war powers set out in the Constitution, which makes clear that Congress is the branch of government vested with the power and responsibility to decide on war. Your hearing is a welcome step toward that end.

As a threshold matter, if Congress disagrees that U.S. service men and woman should be engaged in battle, those men and women should come home. If, however, Congress believes that there are specific entities against which the use of force is necessary and appropriate, it is Members’ constitutional duty to say so. Of course, *how* Congress says so matters tremendously.

We write now to underscore some war powers first principles, and to suggest what fidelity to those principles demands in any effort to revise the 2001 Authorization for Use of Military Force (AUMF), or to craft a new one.

We are concerned that many recent AUMF proposals seem to be written on the assumption that Congress needs to figure out how best to provide the executive branch with greater flexibility to use force, particularly for counterterrorism purposes. But given the context in which Members would be legislating (described below), the problem is not that Congress has tied the president’s hands too tightly in this area. The problem is that Congress has failed to tie the President’s hands tightly enough.

Why the Framers assigned Congress the war power

The Constitution could have given the President primacy in deciding whether to take the country to war. Save for a narrow set of defensive circumstances (i.e., to repel a sudden or actually imminent attack), it does not. Congress was assigned that power. The reasons why are important.

First, human nature compels our constitutional separation of war powers. As James Madison cautioned, if those powers were accumulated in the executive branch, “the temptation would be too great for any one man.” Second, it is central to our democracy that Members be politically accountable when the government sends young Americans into harm’s way. Third, collective judgment about whether and when the United States should use force—fashioned through a full, serious and transparent debate among our elected representatives—is superior to that of any one person.

All of these reasons share the same animating principle: constraint. Our system of checks and balances was designed to guard against war; to ensure it is the carefully limited exception, peace the rule.

Important context for the current AUMF debate

If Congress decides to weigh in—to address pre-existing war authorities, pass a new one, or both—it will not be doing so in a vacuum. In order to meaningfully fulfill their constitutional obligation, Members must be clear-eyed about the backdrop against which they would be legislating. The following three factors, in particular, should weigh heavily in Members’ decision-making:

Both Presidents Obama and Trump have stretched the 2001 AUMF far beyond its breaking point

There is a growing acknowledgment that the United States cannot, or at least should not, rest the legal authority for so many military engagements—the ISIS war in particular—on a 15-year-old statute that was intended specifically to target those responsible for the September 11, 2001 terrorist attacks. We agree. Through the concepts of “associated forces” and “successor entities,” first President Obama and now President Trump have stretched the 2001 AUMF—which nowhere mentions “associated forces” or “successor entities”—beyond its breaking point. Indeed, the 60-word statute is the purported legal basis for current military operations against some groups that had no role in 9/11, and against others that did not even exist on 9/11. Had the 2001 AUMF been drafted more clearly, specifically, and narrowly, it might very well have precluded the interpretive gymnastics necessary to grounding those operations in that law.

The executive branch has become increasingly hostile towards congressional oversight, and Congress has largely failed to push back

This is neither a partisan phenomenon, nor one confined to a particular subject area. In the aftermath of 9/11, President George W. Bush's administration argued that Congress could not regulate the President's actions *at all* when he was acting pursuant to the Commander-in-Chief power. President Obama took the United States to war in Libya in 2011, without prior congressional approval, and in the process claimed unilateral authority to send up to 20,000 troops into battle on the theory that doing so would not constitute "war" in the constitutional sense. President Obama also presided over the expansion of the 2001 AUMF beyond any plausible reading of its text, a legal and policy decision that President Trump has continued.

In the oversight context more generally, the executive branch has over time come to treat Congress less and less as a co-equal branch of government. For example, the Justice Department has taken the position that neither the House nor the Senate has the constitutional authority to enforce a subpoena against an executive branch official through criminal or inherent contempt proceedings, even if there is no claim of executive privilege. The practical result of that stance is to deny Congress timely access to the information it needs to do its job, and to incentive agency obstructionism when responding to congressional requests for information.

For its part, the Trump administration has explicitly told federal agencies not to respond to oversight requests from Members of the minority. That instruction was accompanied by a May 1, 2017 Office of Legal Counsel opinion concluding that "such requests do not trigger any obligation to accommodate congressional needs and are not legally enforceable through a subpoena or contempt proceedings."

The Trump administration has delegated significant war making authority to national security agencies

Shortly after taking office, President Trump reportedly restored CIA authority to conduct lethal drone strikes. In March, the press reported that the administration is considering weakening current policy standards for the use of force in counterterrorism operations. In April, the President delegated to Secretary of Defense James Mattis the authority to set troop levels in Iraq and Syria. In June, he gave Mattis the same authority for Afghanistan.

Entrusting these kinds of decisions solely to the warfighters—and intelligence personnel who have come to perceive themselves as such—carries serious risk of unchecked escalation. The absence of clear, congressionally-imposed limits on where and when force can be used heightens the risk.

How Members should approach revising the 2001 AUMF or crafting a new one

There is no shortage of current proposals—most of them drafted by Members of Congress—for a new statute that would authorize force against (at least) ISIS, and in some cases also address one or both of the 2001 AUMF and the 2002 Iraq AUMF. Unfortunately, as noted at the outset, many of the proposals accommodate a degree of executive unilateralism that the Constitution was designed explicitly to reject. This is especially troubling given the context described above, coupled with technological advances that have drastically reduced the barriers to the United States waging global war.

On July 24, a coalition of human rights, civil liberties, and faith groups sent a letter to Committee Members “urging you to ensure ... that any new AUMF is clear, specific, tailored to the particular situation for which force is being authorized, and comports with the international law obligations of the United States.” The signatories then set out a list of provisions we all believe would help Congress achieve clarity, specificity, and narrow tailoring if and when it next authorizes force.

Congress should view this list as a floor, not a ceiling. Members legislating in today’s environment need to prioritize strict limits and robust oversight for executive branch uses of force. In other words, they need to rein the executive branch back in. By doing so, Members can meaningfully fulfill the role that Article I, Section 8, of the Constitution envisions for them.

Sincerely,

/S/ Scott Roehm

Vice President for Programs and Policy