

Emerging Constitutional Issues for the Trump Presidency

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Ryan Goodman Transcript

So, I'm Ryan Goodman. I'm a professor here, and one of my main areas is use of force rules. When can one state use force against another state? And law of armed conflict rules—what are the rules that apply during that use of force or hostilities? And I want to try to raise certain kind of constitutional questions that I think might come up during the Trump administration. And some of them are, I think, actually counterintuitive. The one area that I thought might be most worth our while thinking about is the relationship between what currently exists—congressional statutory authorization for the Executive Branch to use force—(pause).

So, I thought what I would highlight is basically kind of a challenge between what currently exists—the status quo of a congressional authorization for the Executive Branch to use force against Al Qaeda and its associated forces—versus the president's Article II powers to use force without congressional authority, on his own terms. And I think the danger that lurks is that a Trump administration might begin to use force against new enemies—new groups that it identifies as national security threats to the United States or the same groups in new countries. So, opening up new fronts without there being sufficient democratic dialogue or the nation's other political representatives that Congress involved in that kind of a question.

But the strange place that I find myself is that I think of the status quo as unacceptable, which is an authorization to use force that doesn't easily apply to ISIL and these other groups, versus changes that could be made to the status quo that would be even more unacceptable. And, so, what I mean by that is that the Obama White House has been operating now for quite some time under the authorization that Congress passed in September of 2001 to deal with 9/11, and has applied that to the fight against the Islamic State. And that is legally dubious. So, before I served in the government, I'd actually written about how much of a stretch it is to apply the authorization from September 2001 to an organization, ISIL, that didn't exist on September 1. It had then come into existence with Al Qaeda but then split from Al Qaeda and is currently a mortal foe, combat, of Al Qaeda. The two groups fight each other inside Syria, for example. So, to think of them as part of the same battle is legally dubious.

To think that that authorization from September 2001 applies to 2017—and where do you go from there? If it applies to that kind of a group, the so-called successor theory that they carry the mantle of Osama bin Laden and other groups could also pop up in the future. Now, the strongest proponent of the idea that the status quo is unacceptable because the president is acting unconstitutionally happens to be [Senator] Tim Kaine on the Hill. So, Tim Kaine made this—has come the closest to arguing—that the president's current use—President Obama's use of force against ISIL is not congressionally authorized, and therefore it requires Congress to pass an

ISIL- specific authorization of use of military force. One of the things I found most curious is after the election, Senator Kaine on his first speech that he gave in the Senate was on this issue. So, he's actually still on it, knowing that the next administration will be a Trump administration. And the hearings of some of the nominees raised the question of, "Do you want as a next administration to have Congress pass an authorization for the use of military force?"

So, the status quo might be unacceptable, but the changes that Congress would make, I think, could be more unacceptable. In the sense that it used to be thought that we wanted Congress to pass an authorization to constrain the Executive Branch and the Obama administration and the potential Hilary Clinton administration. But now you have to start rethinking, "Well, what would be the way to repair this constitutional gap?" Because one of the most important aspects of the authorization of use of military force is the idea that it would be ISIL-specific. Tim Kaine has drafted authorization legislation that would be ISIL-specific. Most of them were. But I think everything is up for grabs over the next four years. Especially over the next—after the next midterm elections when there're probably gonna be more Republican senators. And I don't think [National Security Adviser Michael] Flynn is gonna ask for an ISIL-specific authorization. It'll be much more open-ended against terrorist organizations.

Secondly, the current authorization to try to stretch it to ISIL is one way of stretching the rubber band to try to stretch it to ISIL's associated forces so those groups that then align with ISIL is maybe a stretch too far if you're dealing with the 2001 authorization. But if you're dealing with a 2017 authorization, it wouldn't be as much of a stretch. So, the idea is that if you got that kind of congressional authorization for policy reasons that might end up into more of a slippery slope—of daisy-chaining. Like ISIL and its associated groups and the associated groups of the associated groups of ISIL.

Lastly, the 2001 authorization has been read by the Supreme Court to incorporate international legal constraints. So, my, you know, main area of international law—targeting rules and the like, detention rules—are read in to what Congress intended in 2001 to constrain the Executive. Some of the drafts that have been proposed on the Hill in the last year, year and a half, don't have that constraint. I highly doubt that we can count on that constraint being in a 2017 AUMF. And there's been other discussion by other groups about having that authorization. I worry about those kinds of risks.

The last point I thought I'd make on this particular issue is detention. So, the one area that I think about a lot is Gitmo. Gitmo is open for service again and if the Trump administration even takes one individual in custody and takes them on to Guantanamo just as a symbolic move, to demonstrate that it's still open for business, that actually might raise this as a constitutional question before the courts. So, I think a habeas petition by that individual as a member of ISIL is gonna raise the AUMF question of whether or not the 2001 AUMF can apply to ISIL as a group.

And in some ways, that might even be kinda the strange upside of Guantanamo. If you were to choose where those individuals are detained for constitutional protections rule of law values, you might actually prefer that they end up on Guantanamo than that they end up in something the equivalent of the Bagram Air Force Base, which federal courts have said there is no jurisdiction over that. Or in the hands on non-state actors or other foreign partners, outside of US custody, and there'd be no review of that. So, there's a strange quality of where these individuals end up without the AUMF that actually might be a reason that there would be pressure on Congress to decrease the legal risks to the Executive Branch to pass an AUMF. At the same time that they obviously, there's sentiment on the Hill, to keep Guantanamo open. I think those are some of the main issues or challenges and complexities that I'm thinking about when I think about some of the constitutional questions, use of force, and detention.