STATEMENT OF

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For a Hearing on:

"War Powers and the Effects of Unauthorized Military Engagements on Federal Spending"

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Chairman Paul, Ranking Member Peters, and members of the Subcommittee, on behalf of the American Civil Liberties Union, I would like to express our appreciation for the Subcommittee holding this hearing on "War Powers and the Effect of Unauthorized Military Engagements on Federal Spending." No decision by government is graver or more consequential than the decision to go to war. Over the course of the nearly seventeen years since Congress passed the Authorization for Use of Military Force (AUMF) of 2001, the ACLU has dedicated considerable resources to defending civil liberties and human rights that have been jeopardized in an ongoing and increasingly global use of military force predicated on often, at best, tenuous claims of the 2001 AUMF as legal authority. It is long past time for Congress to step in and assert its will as the branch of government with the exclusive constitutional authority to declare war.

In the nearly half century since the ACLU urged the end of the United States role in the war in Southeast Asia after, at that time, more than a decade of violations of civil liberties and human rights, the ACLU has not take a position on whether military force should be used against or in any specific country, or against any specific force. However, we have been steadfast in insisting during those five decades, from Vietnam through Afghanistan through both wars in Iraq and up to military action in countries such as Libya, Yemen, and Syria, that decisions on whether to use military force require Congress's specific, advance authorization.

Absent a sudden attack on the United States that requires the President to take immediate action to repel the attack, the President does not have the power under the Constitution to decide unilaterally to take the United States into war. Such power belongs solely to the Congress. We have repeatedly urged Congress not to cede its constitutional authority on the question of war authorization.

Congress's power over decisions involving the use of military force derives from the Constitution. Article I, Section 8 provides that only the Congress has the power "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," among other war powers.

As Thomas Jefferson once wrote, this allocation of war power to Congress provides an "effectual check to the Dog of war" by "transferring the power of letting him loose from the Executive to the Legislative body . . . ." Letter from Jefferson to Madison (Sept. 6, 1789). Congress alone has the authority to say yes or no on whether the President can use military force against another nation or against any group.

The structure of the Constitution reflects the framers' mistrust of concentrations of power and their consequent separation of those powers into the three branches of our government. The framers well understood the danger of combining powers into the hands of a single person, even one who is elected, particularly a person given command of the armed forces. In order to prevent such an accumulation of power in times of war or emergency, the framers split the war powers between the Executive and Legislative branches, giving the Congress the power to declare war, i.e., make the decision whether

to initiate hostilities, while putting the armed forces under the command of the president.

After nearly seventeen years of war, the now burgeoning plans for even more military strikes and more military troops in even more countries and against even more groups exacerbates the longstanding problem of an Executive Branch that has invoked the 2001 AUMF, while usurping the authority of Congress. An AUMF drafted and passed by Congress to squarely focus on those who planned and carried out the 9/11 attacks and those who harbored them has been invoked 37 times for conflicts occurring in 14 countries, according to a 2016 Congressional Research Service report. The 2001 AUMF is the claimed authority for the use of force even against groups that did not exist on 9/11 and are at odds with core al Qaeda.

President Trump has now joined his two immediate predecessors in substituting the judgment of the president alone for the judgment of a Congress charged by the Constitution with the sole authority to decide whether, where, and against whom to go to war. While the most frequent claim of domestic legal authority for the use of military force is the 2001 AUMF, Presidents Bush, Obama, and Trump have either added claims of Article II authority in certain military actions also predicated on the 2001 AUMF, or have taken significant military action based on Article II claims alone. Among the most significant of those claims based on Article II authority alone have been the 2011 United States air campaign against the Qadafi regime in Libya, and the 2018 United States air strikes against Syrian targets in response to Syrian use of chemical weapons.

The unauthorized use of military force has imposed terrible costs on America and the world. Beyond the obvious and tragic costs of war in the lives and treasure of Americans and other countries' citizens, this country has a long and painful history of civil liberties and human rights being jeopardized during war. Over these past nearly seventeen years, claims of war authority have been cited as legal justification for wrongs ranging from the drone killing of persons far from any battlefield, including American citizens, to the broad surveillance of phone calls and emails of Americans, to secret prisons where suspects were subjected to torture, and to indefinite detention without charge or trial, even of an American citizen apprehended in the United States. We strongly urge Congress to reflect back on lessons from the past nearly seventeen years—and consider all of the implications of going to war, including effects on civil liberties and human rights—in deciding next steps in deciding the scope of war authority, if any.

While it would be impossible in one Congress to undo the damage of nearly seventeen years of presidential overreach and congressional negligence or complicity on war authority, the ACLU strongly urges you to take the following three steps to help restore constitutional separation of powers and the rule of law:

STEP ONE: <u>Oppose S.J. Res. 59, the Corker-Kaine Proposed AUMF</u>

Applying to Congress a first principle of medical care—first do no harm—the top priority for this Congress must be to ensure that S.J. Res. 59, the proposed "Authorization for Use

of Military Force of 2018," introduced this year by Senators Bob Corker and Timothy Kaine, does not become law. The ACLU recognizes the leadership of Chairman Paul in opposing the Corker-Kaine AUMF, and strongly urges all other senators to oppose it.

It would be hard to overstate the depth and breadth of the dangers to the Constitution, civil liberties, and human rights that the Corker-Kaine AUMF would cause. Not only would it almost irretrievably cede to the Executive Branch the most fundamental power that Congress has under Article I of the Constitution—the power to declare war—but it also would give the current president and all future presidents authority from Congress to engage in worldwide war, sending American troops to countries where we are not now at war and against groups that the President alone decides are enemies.

In their baffling explanation of their intent in introducing their proposed AUMF, Senators Corker and Kaine claim that it does the exact opposite of what it actually does. Both senators justifiably lament that our three most recent presidents have cited the 2001 and 2002 AUMFs as authority for the use of force in places, and against persons, far removed from the purpose and language of those AUMFs. But the proposed Corker-Kaine AUMF, rather than repealing or paring back the current AUMFs, is far broader and more dangerous than current law. To correct Executive Branch overreach, it oddly would provide the president with far more authority than the president currently has—and more than the Constitution allows.

The Corker-Kaine AUMF would authorize force, without operational limitations, against eight groups in six countries---and then allow the Executive Branch authority to add to both lists, as long as the president reports the expansion to Congress. The president would have unilateral authority to add additional countries—*including the United States itself*—to the list of countries where Congress is authorizing war, as well as additional enemies, including groups that do not even exist on the date of enactment. In a strange provision, the legislation provides that the president can also designate a "person" as an associated force, thereby expanding the AUMF to authorize military force against a presidentially designated "person," again without prior authorization from Congress.

The American military could be sent into battle in countries such as Libya, Somalia, or Yemen to fight groups that most Americans have never even heard of. Worse, countries and groups that Congress has not found warrant American troops fighting could be added to the list without specific congressional authorization. The result could be the immediate deployment of tens of thousands, or even hundreds of thousands, of American military service members to fight if Congress passes and the president signs the Corker-Kaine AUMF.

Although Congress could bar an expansion to additional countries or additional groups, such action would effectively require a two-thirds majority of both houses, given that the president presumably would veto legislation to curtail an expansion that the president ordered. This aspect of the legislation would upend, in perpetuity, the Constitution's specific process for the United States to go to war. Article I of the Constitution provides that Congress can authorize war with a majority vote and the signature of the president.

By contrast, the Corker-Kaine AUMF would authorize the resident to go to war with the stroke of a pen, and Congress would effectively need two-thirds of both houses to stop the president from unilaterally starting a new war.

The Corker-Kaine AUMF would have no operational restrictions and no definitive sunset. President Trump---and his successors for the coming decades---would effectively be able to claim for the Executive Branch the power that the Constitution gave to Congress exclusively, and do so with virtually no limitations on how, where, when, why, or against whom war is carried out.

The Corker-Kaine AUMF would cause colossal harm to the Constitution's checks and balances, would jeopardize civil liberties and human rights at home and abroad, would lead to a breathtakingly broad expansion of war without meaningful oversight, and would represent a sharp break from adherence to international law, including the United Nations Charter. If enacted, a Corker-Kaine AUMF could cause fundamental damage to the Constitution, civil liberties, and human rights for a generation or longer.

A sleeper provision, with the innocuous title, "Sec. 10 Conforming Amendment," greatly expands the scope of the National Defense Authorization Act for Fiscal Year 2012 (NDAA) indefinite detention provision. In its single sentence, Section 10 of the Corker-Kaine AUMF would expand the NDAA indefinite detention authority by adding the new AUMF as a basis for the military to capture and imprison, and under some circumstances, imprison suspects indefinitely without charge or trial.

The Corker-Kaine AUMF, like the NDAA detention provision itself, has no statutory prohibition against locking up American citizens or anyone picked up even in the United States itself. While we continue to believe it would still be unlawful for a president to try indefinite detention of an American citizen in the United States (again), there is no reason for Congress to risk it.

When Congress considered the NDAA detention provision in 2011, hundreds of thousands of activists from the ACLU joined allies from across the political and ideological spectrum in calling and meeting with members of Congress to urge its defeat. It narrowly passed, and President Obama signed it — with a promise not to use it against American citizens, but without denying that a president could have the power to order military detention. The Corker-Kaine AUMF would make the NDAA detention provision an even greater threat to civil liberties and human rights.

While we share the frustration of many senators with expansive presidential claims of war authority based on the 2001 AUMF and the 2002 AUMF, the proposed Corker-Kaine AUMF would cause far greater problems, and unless the courts would invalidate it as unconstitutional, it would be exceedingly difficult to curtail its damage. The ACLU strongly urges all senators to oppose the legislation.

STEP TWO: <u>Invalidate the Unlawful Claims of Article II Authority to Engage the American Military in Conflict Without Advance Congressional Authorization</u>

Beyond the expansive claims of authority under the existing 2001 AUMF, the Executive Branch claim of inherent Article II authority to use military force may prove to be even more corrosive to the Constitution, and an even greater threat to civil liberties and human rights. The Executive Branch, dating back almost back to the immediate aftermath of 9/11, has asserted claims of inherent authority under Article II of the Constitution, for the president, as commander in chief, to use military force. While this claim of authority was often in addition to statutory claims of authority, including under the 2001 or 2002 AUMFs, it also sometimes has stood alone. In perhaps the two most significant military actions taken outside any claim of authority under the existing AUMFs—the air campaign against the Qadafi regime in Libya in 2011, and the air attacks on Syrian targets after Syrian chemical attacks in 2018—the Obama and Trump administrations, respectively, publicly released legal analyses with breathtakingly broad claims of Article II authority to use military force without congressional authorization. Congress must use its own authority to invalidate these claims.

Shortly after President Obama ordered the start of military action in Libya in 2011, the Office of Legal Counsel of the Department of Justice (OLC) wrote a memorandum, dated April 1, 2011, advising that the President had the constitutional authority to use military force in Libya, even in the absence of any congressional authorization, based on the vague and undefined assertion of "national interest." The principal argument in the OLC memo is that Congress's Article I authority to declare war must be reviewed with the "historical gloss" of what OLC claims is a series of presidentially-ordered military actions that were neither authorized nor stopped by Congress. Remarkably, the April 2011 OLC memo claims that up to 20,000 ground soldiers can be put potentially in harm's way, or an extensive air-based bombing campaign can be run, without congressional authorization, and in the absence of any imminent threat.

Last week, an OLC memorandum, dated May 31, 2018, goes even further than the OLC Libya opinion, in asserting broad Article II authority to use military force. The new OLC opinion explains President Trump's authority for the air strikes he ordered against Syrian targets in response to Syrian use of chemical weapons. The OLC Syria opinion relies in large part on the OLC Libya opinion, but makes even broader claims of inherent constitutional authority, with even more tenuous explanations of the United States' interest and a cramped definition of "war." When read together, the OLC Libya and Syria opinions raise the question of whether the Executive Branch would recognize any legal requirement for a president ever to obtain advance congressional authorization for the use of military force.

While Congress should ultimately use legislation to invalidate these legal opinions and prohibit Executive Branch reliance on the opinions or their reasoning, this Subcommittee and other oversight committees should most immediately exercise oversight over departments and officials requesting, producing, and relying on these legal opinions. An underlying theme in these OLC opinions is congressional inaction has resulted in a loss of Congress' constitutional authority. It is up to Congress to prove this argument wrong by taking action, beginning with oversight and ending with enacting legislation to invalidate the opinions and prohibit reliance on them.

STEP THREE: <u>Repeal 2001 and 2002 AUMFs; Ensure that Any New AUMF Specifically Identifies the Enemy, the Scope of the Conflict, and Clear Objectives—and Is Actually Needed for the Defense of the United States; Defund Any Use of Military Force Not Specifically Authorized by Congress</u>

After seeing the never ending expansion of the use of military force under the 2001 AUMF, from a focused initial operation in Afghanistan to a broad campaign through multiple continents and against groups whose names are not even given to most members of Congress, it is clear that Congress should not expect any president to limit himself or herself in claiming 2001 AUMF authority for new military engagements. Congress ultimately will have to repeal the 2001 and 2002 AUMFs, decide whether to enact any new specific AUMF if warranted, and defund any use of military force not specifically authorized by Congress.

The 2001 and 2002 AUMFs have long outlived their purposes. The United States has now been at war longer than in any other period in American history. The objectives of both AUMFs were accomplished long ago, as those who planned and carried out the 9/11 attacks were killed or captured years ago, and Saddam Hussein and his regime are long gone. The AUMFs that authorized those objectives have been repurposed to fighting enemies unknown to the American people and even most of Congress, in countries most Americans could not point out on a map, and to achieve an objective that seems to have little or nothing to do with how most Americans would define national defense. Congress should repeal both AUMFs.

If Congress decides that there is a need to send the military to war, we strongly urge that any declaration of war specify the countries or organizations against whom the use of force is authorized, the scope of the conflict, and clear objectives for the use of force. Only with such specificity can Congress fulfill its constitutional role as a check on the Executive Branch. Specificity helps ensure that all Americans can understand the consequences of any war decision and participate in the debate over that decision. Congress can assert its role as a check on the president, by providing a standard against which to measure the progress of a war, and hold the president accountable for his actions. Specifying clear objectives for the use of force is important because, once the clear objectives are met, the authorization will no longer have effect.

Senator Merkley has introduced a sharply focused Authorization for Use of Military Force against al Qaeda and the Taliban in Afghanistan and against ISIS in Iraq. The hallmark of a war authorization that is consistent with the Constitution is specificity in defining why and where the United States will go to war, and against whom. The Merkley AUMF meets this standard. To be clear, the ACLU does not take a position on whether military force should be used against the groups or in the countries listed in the Merkley AUMF, but in contrast to the Corker-Kaine AUMF, Senator Merkley has introduced an AUMF that reflects a deep awareness of both the framework of the Constitution and the gravity of the decision to go to war.

Historically, the most certain route to Congress claiming its constitutional authority and asserting its will is to use its power of the purse. Eliminating funds for unauthorized military and covert engagements, and prohibiting any rebudgeting of existing funds, cuts off the activity. If done consistently, defunding should dissuade a president from taking similar action, and helps restore the role of Congress in deciding whether to take the country to war. Congress should use the power of the purse to defund unauthorized military engagements.

Again, the ACLU greatly appreciates the opportunity to present this testimony, commends the Subcommittee for holding the hearing, and we are grateful for the leadership of Chairman Paul on these important constitutional questions. We look forward to working with you and other members of Congress and staff in Congress reclaiming its exclusive constitutional authority to decide whether to use military force.