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THE LAW OF ARMED CONFLICT, THE USE OF MILITARY FORCE, AND THE 2001 AUTHORIZATION FOR USE OF MILITARY FORCE

HEARING

BEFORE THE

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

MAY 16, 2013

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THE LAW OF ARMED CONFLICT, THE USE OF MILITARY FORCE, AND THE 2001 AUTHORIZATION FOR USE OF MILITARY FORCE

THURSDAY, MAY 16, 2013

U.S. SENATE,
COMMITTEE ON ARMED SERVICES,
Washington, DC.

The committee met, pursuant to notice, at 9:36 a.m. in room SD–106, Dirksen Senate Office Building, Senator Carl Levin (chairman) presiding.

Committee members present: Senators Levin, Reed, Udall, Gillibrand, Blumenthal, Donnelly, Kaine, King, Inhofe, McCain, Wicker, Ayotte, and Graham.

Committee staff members present: Peter K. Levine, staff director; and Leah C. Brewer, nominations and hearings clerk.

Majority staff members present: Michael J. Kuiken, professional staff member; William G.P. Monahan, counsel; Michael J. Noblet, professional staff member; and Russell L. Shaffer, counsel.

Minority staff members present: John A. Bonsell, minority staff director; William S. Castle, minority general counsel; Thomas W. Goffus, professional staff member; and Natalie M. Nicolas, minority staff assistant.

Staff assistants present: Daniel J. Harder and Jennifer R. Knowles.

Committee members' assistants present: Carolyn Chuhta, assistant to Senator Reed; Casey Howard, assistant to Senator Udall; Moran Banai and Brooke Jamison, assistants to Senator Gillibrand; Ethan Saxon, assistant to Senator Blumenthal; Marta McLellan Ross, assistant to Senator Donnelly; Karen Courington, assistant to Senator Kaine; Steve Smith, assistant to Senator King; Joel Starr, assistant to Senator Inhofe; Christian Brose, assistant to Senator McCain; Lenwood Landrum, assistant to Senator Sessions; Todd Harmer, assistant to Senator Chambliss; Joseph Lai, assistant to Senator Wicker; Brad Bowman, assistant to Senator Ayotte; Craig Abele, assistant to Senator Graham; and Charles Prosch, assistant to Senator Blunt.

OPENING STATEMENT OF SENATOR CARL LEVIN, CHAIRMAN

Chairman LEVIN. Good morning, everybody.

The committee meets today to receive testimony on the law of armed conflict and the use of military force, including the status of the 2001 Authorization for the Use of Military Force (AUMF).

I would like to welcome our witnesses and thank them for their willingness to participate in a public discussion of a particularly complex, contested set of issues.

We have two panels. First, we are going to hear from the Department of Defense (DOD) witnesses, including Michael Sheehan, Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict; Robert Taylor, the Acting General Counsel of DOD; Major General Michael Nagata, the Deputy Director of the Joint Staff for Special Operations and Counterterrorism; and Brigadier General Richard Gross, the Legal Advisor to the Chairman of the Joint Chiefs of Staff.

We will then hear from a panel of legal experts holding a variety of views from outside the Government.

On September 18, 2001, Congress enacted a joint resolution authorizing 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." Again, this authority is referred to as the AUMF.

Almost 12 years later now, the war in Afghanistan is winding down as we prepare to hand over security responsibility to Afghan forces, and it appears that that country no longer serves as a safe haven for al Qaeda attacks against the United States. Osama bin Laden is dead. Khalid Sheikh Mohammed is in captivity. The ranks of the al Qaeda leaders who planned and carried out the September 11 attacks have been severely degraded.

We are planning to keep a force of perhaps 6,000 to 12,000 after 2014 when all combat forces are to be out of Afghanistan. Also, we continue to hold detainees at Guantanamo Bay and at Bagram in Afghanistan, and our fight against al Qaeda continues not only in Afghanistan, but also in Pakistan, Yemen, and Somalia. This fight occasionally takes the form of targeted strikes against operational leaders of al Qaeda and associated forces, groups like al Qaeda in the Arabian Peninsula (AQAP) and al Shabaab in Somalia, many of which strikes are reportedly conducted by remotely piloted aircraft, or "drones". Also, there have been a number of terrorist attacks and attempted terrorist attacks against the United States that have not been conducted by groups affiliated with al Qaeda and that are presumably then not covered by the AUMF.

Against this background, today's hearing will examine the legal basis for the use of military force in accordance with the law of armed conflict, including the use of drones. We have asked our witnesses to help us consider a number of questions including:

What is the continuing vitality of the 2001 AUMF a dozen years after its enactment?

How will we know when the current conflict is over?

Does the AUMF extend to organizations which played no active role in the September 11 attacks and may not have even existed in 2001?

Should the AUMF be extended or modified by legislation to cover groups not associated with al Qaeda?

What is the legal basis for military action in countries like Yemen and Somalia which are far away from Afghanistan where the September 1 attacks were planned?

What is the legal basis for drone strikes and should drone strikes be treated any differently than other uses of lethal military force?

To what extent is it appropriate for U.S. Government entities, other than the U.S. Armed Forces, to use lethal force against al Qaeda and other terrorist organizations?

Does the Law of Armed Conflict and/or the AUMF apply to any such use of force, for instance, by the Central Intelligence Agency (CIA)?

Are the issues different if the individual or individuals being targeted are U.S. citizens who have joined an enemy force?

What if that U.S. citizen is part of an armed attack from inside the United States, for instance, against a U.S. military facility?

What is the role of Congress in overseeing the use of lethal force?

How can the process be made more transparent without compromising sensitive national security information?

These and related matters raise challenging questions and there is a wide range of views on the answers.

For example, some believe that the AUMF does not authorize the use of force against groups like AQAP and al Shabaab which may have had little or nothing to do with the September 11, 2001, attacks, while others believe that these groups are properly considered, "legal targets by virtue of their association with al Qaeda."

Some believe that the AUMF is no longer valid and should be repealed, while others believe that it should be reaffirmed or expanded to authorize a worldwide conflict with a broad range of terrorist groups.

Some believe that drone strikes are akin to extrajudicial killings, while others believe they are a type of legitimate military force governed by the same rules and principles as any other military force.

Some, including this Senator, believe that U.S. citizens who join a foreign group to attack the United States can be treated as enemy combatants subject to the law of armed conflict; others do not.

A public discussion of difficult legal and policy issues like these is important to the functioning of our democracy and can help provide a broader understanding of the legal basis for ongoing military actions around the world.

Again, I welcome all of our witnesses today and look forward to your testimony on these important issues and call now on Senator Inhofe.

STATEMENT OF SENATOR JAMES M. INHOFE

Senator INHOFE. Thank you, Mr. Chairman.

Since the attacks on September 11, the AUMF has provided a strong legal basis for our counterterrorism efforts around the world. It has been used by the Supreme Court as a primary justification for its rulings, permitting the holding of detainees at Guantanamo Bay and the military detention of American citizens who have joined al Qaeda.

There is also consensus among the three branches of government that the AUMF continues to provide adequate authorization for military force against al Qaeda and its affiliates. After 10 years, a court battle is in rigorous debate. Here in Congress, I believe many

would argue that AUMF has been and continues to be an effective tool in our efforts to keep America safe.

As former General Counsel of DOD, Jeh Johnson said just a year ago, "10 years later, the AUMF remains on the books and is still a viable authorization today." I have no reason to disagree with him. That is why I am greatly concerned that changes to the AUMF could have significant, unintended consequences and undermine our counterterrorism efforts.

As this committee has heard from our most distinguished military and civilian leaders in recent months, al Qaeda continues to prove resilient. They are expanding their areas of operation in places like North Africa and the Middle East where they remain intent on attacking Americans.

I know there are members that feel the way that I do, that the AUMF is an important resource and we need to at least maintain this baseline authority which underpins our ability to keep America safe, and because I know they value this resource, I look forward to hearing the arguments regarding this.

This is my view. This is one of the rare times in my career that I come to a hearing where I am not convinced on either side, and maybe we are doing the right thing right now.

I do worry about the unintended consequences. I think once you open it up, there may be members that have their own agenda that we might not agree with and might not prove best for America that would take advantage of the fact that it has opened up. We have a saying in Oklahoma that "if it ain't broke, don't fix it." I do not think it is broke, but maybe we will find out today that it is.

Thank you, Mr. Chairman.

Chairman LEVIN. Thank you very much, Senator Inhofe.

We will now call on our first panel. I believe the administration has a single statement, which is going to be presented by two witnesses. So, Secretary Sheehan, do you want to begin?

Mr. SHEEHAN. Yes, Chairman Levin. We have one statement for the record by myself and the acting General Counsel, and we will also, both of us, make very short introductory remarks, if that is okay with you, sir.

Chairman LEVIN. Are you speaking for all four witnesses, or are they going to have their own statements?

Mr. SHEEHAN. No. We will just have two statements, and then we will open it up to questions.

Chairman LEVIN. But you are not necessarily in your statement then speaking for all four? Just for the two of you?

Mr. SHEEHAN. Yes, all four. Yes, sir.

Chairman LEVIN. Thank you.

Mr. SHEEHAN. Absolutely.

Chairman LEVIN. If our other two witnesses later on want to differ with any part of it, I hope they will feel free to do that.

Mr. SHEEHAN. Absolutely.

Chairman LEVIN. Thank you, Secretary Sheehan.

STATEMENT OF HON. MICHAEL A. SHEEHAN, ASSISTANT SECRETARY OF DEFENSE FOR SPECIAL OPERATIONS/LOW–INTENSITY CONFLICT, DEPARTMENT OF DEFENSE; ACCOMPANIED BY MG MICHAEL K. NAGATA, USA, DEPUTY DIRECTOR FOR SPECIAL OPERATIONS/COUNTERTERRORISM, J–37, JOINT STAFF; AND BG RICHARD C. GROSS, JAGC, USA, LEGAL COUNSEL, CHAIRMAN OF THE JOINT CHIEFS OF STAFF

Mr. SHEEHAN. Chairman Levin, Ranking Member Inhofe, and members of the committee, thank you for the opportunity to testify about the legal framework for the U.S. military operations to defend our Nation. This hearing is intended to focus on the laws of war specifically related to our counterterrorism policy.

With me today are Acting General Counsel of DOD, Mr. Robert Taylor; Legal Counsel to the Chairman of the Joint Chiefs of Staff, Brigadier General Rich Gross; and J–37, Major General Mike Nagata.

The panel discussed basically three things: first, the legal framework governing the use of military force; second, the law governing whom the U.S. military may target with military force in the current conflict against al Qaeda and associated forces; third, a process of review that informs the legal, policy, and military decisions regarding targeting and the administration's continued commitment to transparency.

We have provided a longer statement for the record, as I mentioned. We will have some brief remarks and we will get to your questions. Mr. Taylor will focus primarily on the legal framework, and I would like to begin by describing the process by which we make decisions regarding targeting in the current armed conflict against al Qaeda and associated forces.

As our statement describes more fully, when determining whom we may target in this war, we conduct a careful, fact-intensive assessment to identify the individuals and groups that pose a threat to the United States. Subsequently, we do a thorough review to determine whether these individuals and groups are appropriately targetable for operations outside of Afghanistan. This review continues up the chain of command through the four-star combatant commander and all the way to the Secretary of Defense.

Before the Secretary makes a decision, the proposal is reviewed by senior military and civilian advisors, including the Chairman of the Joint Chiefs and the General Counsel of DOD. The Secretary also receives input from senior officials and other departments and agencies before approving or requesting that the President approve a use of military force against al Qaeda, the Taliban, or an associated force outside of Afghanistan. Military orders implementing a final decision are then transmitted down through the military chain of command to the relevant forces that carry out such operations. This process includes rigorous safeguards to protect innocent civilians.

In closing, I would like to note that this hearing is open and unclassified and, as a result, there will necessarily be some questions that we must take for the record to be answered in a classified setting. This administration has made significant efforts to increase transparency, but the public release of certain information such as

intelligence-specific tactics and deliberate procedures could enable the enemy to avoid or manipulate our application of military force. Ultimately, we must maintain a delicate balance between transparency and protecting information from public disclosure for security reasons.

Mr. Chairman, Ranking Member Inhofe, committee members, thank you for the opportunity to appear before you today to testify, and I will turn over the microphone to my colleague, Acting General Counsel Robert Taylor, for his remarks.

Chairman LEVIN. Thank you very much, Secretary Sheehan.

Mr. Taylor?

STATEMENT OF MR. ROBERT S. TAYLOR, ACTING GENERAL COUNSEL, DEPARTMENT OF DEFENSE

Mr. TAYLOR. Thank you, Chairman Levin, Ranking Member Inhofe, and members of the committee for this opportunity to testify about the legal framework for U.S. military operations to defend the country.

As Assistant Secretary of Defense Sheehan stated, first I will give an overview of the legal framework governing the use of military force. Second, I will discuss the law governing whom the U.S. military may target with military force in the current conflict against al Qaeda and associated forces.

The administration has outlined the legal framework for the current conflict in numerous public speeches, including speeches by Attorney General Holder and former DOD General Counsel Jeh Johnson, which should give some sense of the extraordinary care with which the U.S. military ensures that its efforts to address the threat posed by al Qaeda and its associated forces follow all applicable law in its military operations. That means that U.S. military operations must comply with both U.S. domestic law and international law.

The United States remains in a state of armed conflict against al Qaeda, the Taliban, and associated forces. As the September 11, 2001, attack showed, these organizations are determined to kill U.S. citizens, and their actions since that time show that we continue to use military force to defend our Nation against this enemy.

As a matter of domestic law, all three branches of our Government have recognized that the President may use military force in order to prosecute the conflict against al Qaeda, the Taliban, and associated forces. The AUMF, enacted 1 week after the attacks of September 11, explicitly authorizes the President to direct the use of military force in defending the Nation. In the AUMF, Congress 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." Some have questioned whether we may continue to rely on the AUMF nearly 12 years after its enactment.

As a matter of international law, the United States may use force in accordance with the Law of Armed Conflict in order to prosecute its armed conflict against al Qaeda, the Taliban, and associated forces in response to the September 11, 2001, attacks, and

the United States may also use force consistent with our inherent right of national self-defense.

We believe that there will eventually come a point when our enemy in this armed conflict, al Qaeda, the Taliban, and associated forces, is defeated and we are no longer in an armed conflict. At that point, the law enforcement and intelligence professionals will have the lead in our counterterrorism efforts against individuals who are the scattered remnants of al Qaeda or who are part of groups unaffiliated with al Qaeda with military tools available in reserve to defend the Nation against imminent terrorist attacks.

But that is a point we have not yet reached. For now, the careful use of military force, alongside other counterterrorism tools, remains necessary and appropriate to disrupt, dismantle, and ensure a lasting defeat of al Qaeda, the Taliban, and associated forces.

I believe that existing authorities are adequate for this armed conflict. Should a new group threaten us, the United States can, under both U.S. domestic and international law, respond as necessary. At that point, we would consult with Congress to determine whether additional tools have become necessary or appropriate.

Some have also questioned the geographic scope of this conflict. The enemy in this conflict has not confined itself to the geographic boundaries of any one country. U.S. military operations on the territory of another state must comply with international law rules, including respect for another state's sovereignty. This does not prevent us from using force against our enemies outside an active battlefield, at least when the country involved consents or is unable or unwilling to take action against a serious threat.

Now I would like to discuss whom we may target in this war against al Qaeda, the Taliban, an associated forces. We are in an armed conflict, and the Law of Armed Conflict applies to our operations. In this unconventional war, we apply conventional, well-established legal principles reflected in treaties and customary international law.

The United States is not at war with an idea, a religion, or a tactic. Instead, we are at war against al Qaeda, the Taliban, and associated forces. Former DOD General Counsel Jeh Johnson has previously explained publicly the meaning of the phrase "associated force." A group is an associated force if, first, it is an organized, armed group that has entered the fight alongside al Qaeda, and second, it is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners. Individuals who are part of this recognized enemy may be lawful military targets. Under the law of armed conflict, it is well-established that a state may target the enemy, including known, individual members of the enemy force.

Some among the ranks of al Qaeda, the Taliban, and their associated forces are U.S. citizens planning attacks against their own country from abroad. Longstanding legal principles and court decisions confirm that being a U.S. citizen does not immunize a member of the enemy from attack. Nonetheless, if we know in advance that the object of our attack is a U.S. citizen, we assume the constitutional rights, including the Fifth Amendment's Due Process Clause, attach to a U.S. citizen even while he is abroad and we

consider those rights in assessing whether that individual may be targeted.

With respect to such a military operation, the due process requirements under the Fifth Amendment are satisfied at least when three criteria are met. First, an informed high-level official of the U.S. Government determines that the individual poses an imminent threat of violent attack against the United States. Whether a threat is imminent incorporates consideration of the relevant window of opportunity to act and the possible harm that missing that window would cause. Second, capture must be infeasible, and the United States will continue to monitor whether capture becomes feasible prior to any strike. This is a fact-specific inquiry that considers the relevant window of opportunity, whether the particular country would consent to a capture operation, and other factors such as the risk to U.S. personnel. Third, the operation must be conducted in a manner consistent with applicable law of armed conflict principles. We take extraordinary care to ensure that all military operations, not just the exceptional cases of those against U.S. citizens, are conducted in a manner consistent with well-established law of armed conflict principles, including: humanity, which forbids the unnecessary infliction of suffering, injury, or destruction; distinction, which requires that only lawful targets such as combatants and other military objectives, may be intentionally targeted; military necessity, which requires that the use of military force, including all measures needed to defeat the enemy as quickly and efficiently as possible, which are not themselves forbidden by the law of war, be directed at accomplishing a valid military purpose; and proportionality, which requires that the anticipated collateral damage of an attack not be excessive in relation to the anticipated concrete and direct military advantage from the attack.

These well-established rules that govern the use of force in armed conflict apply regardless of the type of weapon system used. From a legal standpoint, the use of remotely piloted aircraft for lethal operations against identified individuals presents the same issues as similar operations using manned aircraft. However, advanced precision technology gives us a greater ability to observe and wait until the enemy is away from innocent civilians before launching a strike, and this minimizes the risk to innocent civilians. As Assistant Secretary Sheehan mentioned, before military force is used against members of al Qaeda, the Taliban, and associated forces, there is a robust review process that includes rigorous safeguards to protect innocent civilians.

Thank you, I look forward to answering your questions along with my colleagues.

[The joint prepared statement of Mr. Taylor, Mr. Sheehan, General Nagata, and General Gross follows:]

JOINT PREPARED STATEMENT BY MR. ROBERT S. TAYLOR, HON. MICHAEL A. SHEEHAN, MG MICHAEL K. NAGATA, USA, AND BG RICHARD C. GROSS, JAGC, USA

Thank you, Chairman Levin, Ranking Member Inhofe, and members of the committee, for this opportunity to testify about the legal framework for U.S. military operations to defend our Nation.

First, we will give an overview of the legal framework governing the use of military force. Second, we will discuss the law governing whom the U.S. military may target with military force in the current conflict against al Qaeda and associated forces. Third, we will discuss the robust process of review that informs legal, policy,

and military decisions regarding targeting, and the administration's continued commitment to transparency.

I. LEGAL FRAMEWORK FOR U.S. MILITARY OPERATIONS IN THE CURRENT CONFLICT

The administration has outlined the legal framework for the current conflict in numerous public speeches, including speeches by Attorney General Holder and former Department of Defense General Counsel Jeh Johnson, which should give you some sense of the extraordinary care with which the U.S. military ensures that its efforts to address the threat posed by al Qaeda and its associated forces follow all applicable law in its military operations. That means that U.S. military operations must comply with both U.S. domestic law and international law.

Our legal framework recognizes that the United States remains in a state of armed conflict with al Qaeda, the Taliban, and associated forces. As the September 11, 2001 attacks showed, these organizations are determined to kill U.S. citizens, and we continue to use military force to defend our Nation against this enemy.

As a matter of domestic law, all three branches of our Government have recognized that the President may use military force in order to prosecute the conflict against al Qaeda, the Taliban, and its associated forces. The Authorization for the Use of Military Force (AUMF), enacted 1 week after the attacks of September 11, 2001, explicitly authorizes the President to direct the use of military force in defending the Nation. In "the AUMF," as it is often called, Congress 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." With this authorization, President Obama and President Bush before him, as Commanders in Chief, as well as four Secretaries of Defense, have directed military operations against al Qaeda, the Taliban, and associated forces.

The AUMF reflects the recognition that we are in an armed conflict with this enemy. The Supreme Court and the Court of Appeals for the District of Columbia Circuit have also repeatedly recognized in a long string of cases that the United States can use military force in its armed conflict with al Qaeda.

Some have questioned whether we may continue to rely on the AUMF nearly 12 years after its enactment. In the National Defense Authorization Act for Fiscal Year 2012, Congress reaffirmed the AUMF with respect to detention authority. In doing so, it mirrored the administration's interpretation of the AUMF as applying to al Qaeda, the Taliban, and associated forces and implicitly reaffirmed the continued applicability of the armed conflict paradigm that the AUMF represents.

As a matter of international law, the United States may use force in accordance with the laws of war in order to prosecute its armed conflict with al Qaeda, the Taliban, and associated forces, in response to the September 11, 2001 attacks, and the United States may also use force consistent with our inherent right of national self-defense.

Some have also questioned the geographic scope of this conflict. As John Brennan stated in a September 2011 speech, the "United States does not view our authority to use military force against al Qaeda as being restricted solely to 'hot' battlefields like Afghanistan." Indeed, the enemy in this conflict has not confined itself to the geographic boundaries of any one country. To that end, there is nothing in the AUMF that restricts the use of military force against al Qaeda to Afghanistan. Moreover, because "we are engaged in an armed conflict with al Qaeda, the United States takes the legal position that—in accordance with international law—we have the authority to take action against al Qaeda and its associated forces without doing a separate self-defense analysis each time."

Nonetheless, the fact that we are in an armed conflict does not mean that the United States is using military force everywhere the enemy is found. In many countries, we need not contemplate military operations because an al Qaeda presence, once discovered, would be neutralized effectively by the Nation's law enforcement apparatus. In other countries, where al Qaeda's presence is more formidable, the foreign state or the United States might consider military action.

Additionally, U.S. military operations on the territory of another state must comply with international law rules, including respect for another state's sovereignty, which do not prevent us from using force against our enemies outside an active battlefield, at least when the country involved consents or is unable or unwilling to take action against the threat.

We believe that our military operations will ultimately degrade and dismantle the enemy's operational capacity and supporting networks. At that point, law enforcement and intelligence operations will be the primary tools in our counterterrorism efforts—against individuals who are the scattered remnants of al Qaeda, or who are

part of groups unaffiliated with al Qaeda. Military direct action will always be an option for the President to defend the Nation against imminent terrorist attacks.

But that is a point we have not yet reached. For now, the careful use of both unilateral and partnered military force, alongside other counterterrorism tools, remains necessary and appropriate to disrupt, dismantle, and ensure a lasting defeat of al Qaeda, the Taliban, and associated forces. Existing authorities are adequate for this armed conflict.

Should a new group threaten us, the United States can, under both U.S. domestic and international law, respond as necessary. At that point, we would consult with Congress to determine whether additional tools are necessary or appropriate.

II. TARGETING: WHOM DOES THE U.S. MILITARY TARGET AND WHAT LEGAL RULES APPLY?

Now, I would like to discuss whom we may target in this war against al Qaeda, the Taliban, and associated forces. We are in an armed conflict and the law of armed conflict applies to our operations. Al Qaeda is an unconventional enemy that, with blatant disregard for the law of armed conflict, targets innocent civilians. We nonetheless refuse to allow this enemy, with its inhumane tactics, to define the legal framework for waging war. Our efforts remain grounded in the law. In this unconventional war, we apply conventional legal principles—well-established legal principles reflected in treaties and customary international law. We have held fast to our principles, laws, and values, even when facing unconventional threats.

The United States is not at war with an idea, a religion, or a tactic. Instead, we are at war against al Qaeda, the Taliban, and associated forces. The former General Counsel of the Department of Defense, Jeh Johnson, has previously explained publicly the meaning of the phrase "associated force." A group is an associated force, if, first, it is an organized, armed group that has entered the fight alongside al Qaeda; and, second, it is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners. Individuals who are part of this recognized enemy may be lawful military targets.

In applying these principles in this armed conflict, we conduct a careful, fact-intensive assessment to distinguish between, on the one hand, a terrorist who effectively becomes part of al Qaeda, the Taliban, or an associated force by training or co-locating with the group, accepting orders from its leaders, and participating in the group's terrorist plotting, and, on the other hand, the terrorist, who without any direct connection to a member of al Qaeda, embraces extremist ideology found on the internet and self-radicalizes. Both are very dangerous, but the former is part of the congressionally-declared enemy force in a congressionally-authorized armed conflict; the latter, although dangerous, is not part of that enemy force.

Under the law of armed conflict, it is well-established that a State may target the enemy, including known, individual members of the enemy force. For example, during World War II, U.S. Navy forces lawfully shot down the aircraft of Admiral Yamamoto, the commander of the Japanese navy. Today, just as in 1943, the use of lethal force against a particular leader of the enemy force in an ongoing armed conflict is entirely consistent with settled law of armed conflict principles governing who may be the object of attack.

Unfortunately, however, some among the ranks of al Qaeda, the Taliban, and their associated forces are U.S. citizens planning attacks against their own country from abroad. This, too, has historical precedent. In previous conflicts, U.S. citizens have fought in foreign armies against the United States—such as with the Axis countries during World War II. Longstanding legal principles and court decisions confirm that being a U.S. citizen does not immunize a member of the enemy from attack. Nonetheless, if we know in advance that the object of our attack is a U.S. citizen, we assume that constitutional rights—including the Fifth Amendment's Due Process Clause—attach to a U.S. citizen even while he is abroad, and we consider those rights in assessing whether that individual may be targeted.

With regard to the targeting with lethal force of a U.S. citizen in a foreign country who is a senior operational al Qaeda leader actively engaged in planning operations to kill Americans, given the realities of our conflict with al Qaeda and the weight of the government's interest in protecting its citizens from imminent attack, such an operation would be lawful at least when three criteria are met. First, an informed, high-level official of the U.S. Government determines that the individual poses an imminent threat of violent attack against the United States. Whether a threat is "imminent" incorporates consideration of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks against the United States. Second, capture is infeasible, and the United States will continue to monitor whether capture becomes feasible prior to any strike. This is a fact-specific inquiry,

but considers the relevant window of opportunity, whether the particular country would consent to a capture operation, and other factors, such as the risk to U.S. personnel. Finally, the operation is conducted in a manner consistent with applicable law of armed conflict principles.

With respect to this last criterion, we take extraordinary care to ensure that all military operations—not just the exceptional cases of those against U.S. citizens—are conducted in a manner consistent with well-established law of armed conflict principles, including: (1) military necessity, which requires that the use of military force (including all measures needed to defeat the enemy as quickly and efficiently as possible, which are not forbidden by the law of war) be directed at accomplishing a valid military purpose; (2) humanity, which forbids the unnecessary infliction of suffering, injury, or destruction; (3) distinction, which requires that only lawful targets—such as combatants and other military objectives—may be intentionally targeted; and (4) proportionality, which requires that the anticipated collateral damage of an attack not be excessive in relation to the anticipated concrete and direct military advantage from the attack.

These well-established rules that govern the use of force in armed conflict apply regardless of the type of weapon system used. From a legal standpoint, the use of remotely piloted aircraft for lethal operations against identified individuals presents the same issues as similar operations using manned aircraft. However, advanced precision technology gives us a greater ability to observe and wait until the enemy is away from innocent civilians before launching a strike, and thus minimize the risk to innocent civilians.

III. MANAGEMENT AND OVERSIGHT OF MILITARY OPERATIONS

Before military force is used against members of al Qaeda, the Taliban, and associated forces, there is a robust review process, which includes rigorous safeguards to protect innocent civilians. Throughout the military chain of command, senior commanders, advised by trained and experienced staffs—including intelligence officers, operations officers, and judge advocates—review operations for compliance with applicable U.S. domestic and international law, including the law of armed conflict, and for consistency with the policies and orders of superiors in the military chain of command.

For operations outside Afghanistan, this review continues up the chain of command, through the 4-star combatant commander, to the Secretary of Defense. Before the Secretary makes a decision, the proposal is reviewed by senior military and civilian advisors, including the Chairman of the Joint Chiefs of Staff and the General Counsel of the Department of Defense. Department officials also receive input from senior officials in other departments and agencies from across our national security team. Military orders implementing a final decision are then transmitted down that chain of command to the relevant forces that carry out such operations.

Some have expressed concern that the process for managing military operations, no matter how rigorous, is largely confined to the executive branch. This fact reflects related practical and legal considerations. As a practical matter, officials in the military chain of command must often make real-time decisions that balance the need to act, the existence of alternative options, the possibility of collateral damage, and other factors—all of which depend on expertise and immediate access to information that only the executive branch may possess in real time.

As a legal matter, Article II of the Constitution makes the President the Commander in Chief of the Armed Forces. The President is therefore responsible for directing military operations in the prosecution of armed conflict. By U.S. law, the military chain of command runs from the President to the Secretary of Defense and then to combatant commanders. The current process appropriately reflects the President's role in the chain of command; alternatives that some have suggested would present significant constitutional issues.

Congress also plays a critical role in ensuring appropriate oversight of this process. The Department and the Joint Staff regularly brief members and staff of this committee and the House Armed Services Committee on military operations against al Qaeda, the Taliban, and associated forces, both on the prosecution of the conflict generally and specifically on each significant counterterrorism operation conducted outside Afghanistan.

We have also made significant efforts to increase transparency regarding whom the U.S. military targets in the current conflict against al Qaeda, the Taliban, and associated forces and the procedures by which individual targeting decisions are made. Last year, for example, we declassified information about the U.S. military's counterterrorism activities in Yemen and Somalia in a June 2012 War Powers report to Congress. This type of transparency helps preserve public confidence, dispel

misconceptions that the U.S. military targets low-level terrorists who pose no threat to the United States, and address questions raised by our allies and partners abroad. On the other hand, the public release of certain information, such as the intelligence by which current or past targets were identified, could enable the enemy to avoid or manipulate our application of military force. Ultimately, we must maintain a delicate balance between transparency and protecting information from public disclosure for security reasons.

Thank you. We look forward to answering your questions.

Chairman LEVIN. Thank you very much, Mr. Taylor.

We are going to have a 6-minute first round here and there may be the need for a second round. But we have a lot of Senators and a lot of witnesses and a second panel. So we are going to give it a go at 6 minutes for the first round.

Let me start with you, Secretary Sheehan. In the view of the administration, should the AUMF be expanded or modified to cover terrorist groups that are not associated with al Qaeda or for any other reason?

Mr. SHEEHAN. Thank you, Mr. Chairman.

At this point, we are comfortable with the AUMF as it is currently structured. Right now, it does not inhibit us from prosecuting the war against al Qaeda and its affiliates. If we were to find a group or organization that was targeting the United States, first of all, we would have other authorities to deal with that situation. I was in the government prior to September 11 when we conducted strikes against groups before we had the AUMF specific post-September 11 authority. So, we could use other authorities to take on those types of organizations. But for right now, for our war against al Qaeda, the Taliban, and their affiliates, AUMF serves its purpose.

Chairman LEVIN. Now, under the definition of "enemy," do you agree that mere sympathy with al Qaeda is not sufficient to be an associated force for purposes of the AUMF?

Mr. SHEEHAN. Yes, Senator. Sympathy is not enough. As Jeh Johnson and others have mentioned in public, it has to be an organized group, and that group has to be in co-belligerent status with al Qaeda, operating against the United States.

Chairman LEVIN. Is there any good reason why both Congress and the public should not be informed of which organizations and entities the administration has determined to be co-belligerents of al Qaeda and to promptly be informed of any additions or deletions from that list?

Mr. SHEEHAN. Senator, I think that the appropriate role for Congress is in its oversight regarding the designation of groups. A lot of these groups have very murky membership and they also have very murky alliances and shifting alliances. They change their name and they lie and obfuscate their activities. So I think it would be difficult for Congress to get involved in trying to track the designation of which are the affiliate forces. We know when we evaluate these forces what they are up to, and we make that determination based on their co-belligerent status with al Qaeda and make our targeting decisions based on that criteria rather than on the shifting nature of different groups and their affiliations.

Chairman LEVIN. Is there a list now? Is there an existing list of groups that are affiliated with al Qaeda?

Mr. SHEEHAN. Senator, I am not sure there is a list per se. I am very familiar with the organizations that we do right now consider as affiliated with al Qaeda, and I could provide you that list of organizations.

Chairman LEVIN. Would you give us that list?

Mr. SHEEHAN. Yes, sir. We can do that.

[The information referred to follows:]

In response to this request, we provided a classified paper to Senator Levin's staff on al Qaeda, the Taliban, and associated forces.

Chairman LEVIN. When you add or subtract names from that list, would you let us know?

Mr. SHEEHAN. We can do that as well, Mr. Chairman.

Chairman LEVIN. Thank you.

The former General Counsel for the DOD, Jeh Johnson, said that there will come a tipping point at which we are going to be able to determine that the armed conflict with al Qaeda is effectively over. I think you are probably familiar with that speech.

Do you agree with Mr. Johnson's description of an eventual tipping point when the armed conflict with al Qaeda will be essentially over?

Mr. SHEEHAN. I do, Mr. Chairman. I believe that al Qaeda, although its narrative is very powerful among certain groups, ultimately will end up on the ash heap of history, as with other previous groups. But that day, unfortunately, is a long way off.

Chairman LEVIN. So the tipping point that you say would come is a long way off in your judgment.

Mr. SHEEHAN. Yes, sir. I believe it is at least years in advance based on my understanding of the organizational resiliency of al Qaeda and its affiliate forces. It is many years in advance.

Chairman LEVIN. Now, if that point comes and when that point comes, what do you do with people like Khalid Sheikh Mohammed who have proven with deeds that they would, if they are released, attack us again?

Mr. SHEEHAN. Senator, I believe that those folks that we already have under custody that are tried and jailed, hopefully will remain behind bars and not be able to threaten Americans in the future.

Chairman LEVIN. So they must be tried.

Mr. SHEEHAN. Yes, sir. That is our objective.

Chairman LEVIN. In order for them to be detained after the tipping point comes and the war is over.

Mr. SHEEHAN. Yes, sir. That would be the ideal. Yes, sir.

Chairman LEVIN. If they are not tried and they are detained and the tipping point comes, what is the basis for detaining them unless they have been tried and convicted in a military court or a civilian court?

Mr. SHEEHAN. Let me make sure I understand your question, Mr. Chairman. You are talking about after the AUMF is no longer in effect?

Chairman LEVIN. Right.

Mr. SHEEHAN. Again, Mr. Chairman, even prior to the AUMF, we were able to arrest people and try them and bring them back to the United States with great efficacy prior to September 11.

Chairman LEVIN. No. What I am saying is that they need to be tried and convicted for them to continue to be detained if and when the AUMF is no longer in force.

Mr. SHEEHAN. That would be my understanding. Yes, sir. I would defer to Bob Taylor if he wants to verify that.

Chairman LEVIN. Is that correct, Mr. Taylor?

Mr. TAYLOR. There will come a point when our enemy in this armed conflict is defeated or so defeated that there is no longer an ongoing armed conflict. At that point, we will face difficult questions about what to do with those still remaining in military detention without a criminal conviction and sentence. However, I will point out that following World War II, we continued to hold some people for several years as part of a general mopping-up authority.

Chairman LEVIN. Were they being held for war crimes? Were they being held for trial for war crimes?

Mr. TAYLOR. No, sir. They were prisoners of war but who were assessed that they would so disrupt the delicate situation back in Germany and elsewhere that we held them for a few years. We are not talking ad infinitum, but as part of a general mop-up authority.

Chairman LEVIN. Will you, for the record, give us that authority?

Mr. TAYLOR. We will give you the historical——

Chairman LEVIN. No, not just the history, the authority. Would you do that, Mr. Taylor?

Mr. TAYLOR. Yes.

[The information referred to follows:]

The military's authority to detain under the law of war generally ends with the cessation of hostilities. See *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality); National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112–81, § 1021, 125 Stat. 1297, 1562 (2011) (affirming "[d]etention under the law of war without trial until the end of the hostilities authorized by the Authorization for Use of Military Force"). However, the practice of nations under the law of war has reflected, and U.S. courts have accepted, that there is at least a limited authority to detain certain individuals for a period following the end of hostilities. This authority includes, inter alia, the ability to facilitate the safe and orderly transfer or release of detainees and to detain certain individuals to prosecute them for offenses committed during the hostilities. There clearly exists an authority to continue to detain individuals to facilitate their safe and orderly transfer or release. See Oscar M. Uhler et al., Int'l Comm. of the Red Cross, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War: Commentary 515 (JeanS. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958) (Article 133's requirement that "[i]nternment shall cease as soon as possible after the close of hostilities" "does not mean, in spite of the urgent wish thus expressed, that internment can always be brought to an end shortly after the end of active hostilities. . . . The disorganization caused by war may quite possibly involve some delay before the return to normal."); Jean de Preux et al., Int'l Comm. of the Red Cross, III Geneva Convention Relative to the Treatment of Prisoners of War: Commentary 550 (JeanS. Pictet ed., A.P. de Heney trans., 1960) (explaining that the repatriation requirement of article 118 "does not, of course, affect the practical arrangements which must be made so that repatriation may take place in conditions consistent with humanitarian rules and the requirements of the convention. . . "). This authority is necessary to meet the fundamental obligation under the law of war that detainees be humanely treated. For example, the United States continued to detain prisoners of war for a few years after the surrender of the Axis powers in World War II. See, e.g., In re Territo, 156 F.2d 142, 147–48 (9th Cir. 1946). The delay in the repatriation of more than 400,000 enemy prisoners of war held in the United States during World War II resulted from "manpower and transportation shortages, because the war was still being fought against Japan, and because of the inability on the part of the European and Mediterranean theaters to receive prisoners of war from the United States in large numbers." Martin Tollefson, Enemy Prisoners of War, 32 Iowa Law Review 51, 74 (1946). This detention authority also includes the authority to detain enemy persons after the cessation of hostilities when criminal proceedings are pending for offenses

committed during the hostilities. Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, art. 119 ("Prisoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment" even after the cessation of international armed conflict; "[t]he same shall apply to prisoners of war already convicted for an indictable offense."); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, art. 133 ("Internees . . . against whom penal proceedings are pending . . . may be detained until the close of such proceedings and, if circumstances require, until the completion of the penalty. The same shall apply to internees who have been previously sentenced to a punishment depriving them of liberty."). Indeed, the Supreme Court has recognized that some authority to try violations of the law of war must continue after the cessation of hostilities in part because "only after their cessation could the greater number of offenders and the principal ones be apprehended and subjected to trial." In re Yamashita, 327 U.S. 1, 12 (1946); see also *Johnson* v. *Eisentrager,* 339 U.S. 763 (1950) (denying writ of habeas corpus to German citizens taken into custody in China and tried by military commission after the Japanese surrender for providing intelligence to Japanese armed forces after Germany's surrender).

Chairman LEVIN. Thank you.

Senator Inhofe.

Senator INHOFE Thank you, Mr. Chairman.

Mr. Secretary, this committee is consistently briefed by the servicemembers about their operations against al Qaeda and their affiliates. During these briefings, we routinely ask the members of the military what more do they need to carry out their mission whether that is equipment or changes in policy. Over the past 10 years, I have never been told by those who are fighting the war that they lacked the legal authority to conduct their missions.

As Assistant Secretary for Special Operations/Low-Intensity Conflict, have you encountered a situation in the fight against al Qaeda where you believed the special operations community did not have sufficient legal authority to prosecute the war against al Qaeda or its affiliates?

Mr. SHEEHAN. Senator Inhofe, in the year and a half I have been in this job, I have not yet once found that we did not have enough legal authority within DOD to prosecute——

Senator INHOFE. Can you envision a set of circumstances, it is something that is kind of hard to do and deal with the hypotheticals, that we would not have the authority that we need?

Mr. SHEEHAN. You are right, Senator. I would not want to engage in hypotheticals.

But I would say that if a terrorist organization outside of al Qaeda, the Taliban, and associated forces began to present a threat to the United States, did not fit under our current AUMF, then we might have to look at different authorities or extended authority or adjustment to authority to go after that organization. But right now, I do not see that case.

Senator INHOFE. Yes. The two generals who did not give the opening statement, have you ever encountered a situation where the Joint Staff believed it did not have sufficient authority under AUMF to carry out its operations from your perspective against al Qaeda or its affiliates? Both generals.

General NAGATA. Sir, in my position on behalf of the chairman, I monitor the implementation of the various counterterrorism missions, orders, and direction that the combatant commands are given by the Secretary. I have been in this position now for about 18 months, and in this monitoring role that I conduct, I have not

yet encountered a situation where there was insufficient legal authority for the combatant commander to execute the mission or the direction he has been given.

Senator INHOFE. General Gross?

General GROSS. Senator, I would agree with that. Both in my time as the Staff Judge Advocate at Central Command and my time as the Legal Counsel to the Chairman, I have not seen a situation where there was not some legal authority to be able to go after members of al Qaeda or associated forces.

Senator INHOFE. Do both of you agree with the opening statements that were made by the Secretary and Mr. Taylor?

General NAGATA. I do, Senator.

General GROSS. Sir, I do as well.

Senator INHOFE. I have been distressed for a long period of time. I know it is not a popular position to take, but the fact that we have a great resource in Guantanamo Bay that has not been utilized properly. I know the arguments on both sides of this thing, but when something like this comes up or we talk about detention, that is what is in the back of my mind. I do not have a question about that, but I may be asking you some things in writing concerning that.

The chairman quoted Jeh Johnson. Let me quote Jeh Johnson again as I did in my opening statement and ask the four of you if you agree with Jeh Johnson's statement when he said—and this is a quote, he said, "10 years later the AUMF remains on the books and is still a viable authorization today." Do all four of you, one at a time, agree with that statement?

Mr. TAYLOR. Yes, sir.

Mr. SHEEHAN. Yes, sir.

General NAGATA. I do, sir.

General GROSS. I do as well, Senator.

Senator INHOFE. Thank you, Mr. Chairman.

Chairman LEVIN. Thank you very much, Senator Inhofe.

Senator Reed.

Senator REED. Thank you very much.

Secretary Sheehan or Mr. Taylor, I think this echoes one of the questions that the chairman raised. I presume that it is ultimately the President who designates who or what is an associated force of al Qaeda. Is that correct?

Mr. SHEEHAN. Within the AUMF, I believe we do that. Within the Pentagon we designate that, sir.

Senator REED. So within the Pentagon you will designate that group or individual?

Mr. TAYLOR. It might begin at the Pentagon, but it would be considered through the interagency.

Senator REED. But going back, the decision will ultimately be made by the President or made by the interagency?

Mr. TAYLOR. The decision to take military action would be subject to the President.

Senator REED. Obviously.

Mr. TAYLOR. But the legal conclusion that this is an associated force is something that would be a lawyer's judgment. Whether there is any policy consequence of that would be up to the policymakers.

Senator REED. But the reality would be the Secretary of Defense then up to the President would be presented with operational plans, but the decision would already have been made that this group or this individual is in an associated force of al Qaeda. Is that the way it works?

Mr. SHEEHAN. The issue of affiliated force has not gone to the presidential level, Senator. That issue is managed at a much lower level.

Senator REED. Should that issue be shared with Congress, obviously in a classified setting? Should Congress have the ability to confirm or reject?

Mr. SHEEHAN. Yes, sir. The chairman specifically asked me about that, which groups we now consider part of the affiliated force, and I committed to him that I would provide that to him, as well as any changes that we had.

Senator REED. My question is: would it be appropriate for Congress to have a role in not just reviewing, but deciding?

Mr. SHEEHAN. Right, sir. I would think that is a decision better for the executive branch. As I mentioned to the chairman, these organizations right now are quite savvy in regards to how they are perceived overseas, and so they are always shifting their rhetoric, names, and affiliations. I think that is better left to the executive branch.

Senator REED. Thank you.

Let me ask a question. There are operationally military personnel under title 10. There are intelligence personnel under title 50. I presume, at least hypothetically, there could be occasions where both are being used in terms of operations. Does the AUMF give you more flexibility to operate with these different legislative requirements, slightly different for title 10, slightly different in title 50? If AUMF was pulled back, would you have operational problems in terms of what could be done under title 10 versus what could be done under title 50 or what could be done jointly?

Mr. SHEEHAN. That is a good question, Senator.

Go ahead, Bob.

Mr. TAYLOR. The AUMF is our domestic law authority for considering ourselves to be in armed conflict with al Qaeda, the Taliban, and associated forces. So if the AUMF were to be repealed, we would not be in an armed conflict, and it would absolutely affect our title 10 authorities.

Senator REED. It would be significantly affecting title 10.

Some people, for example, have suggested that unmanned aerial strikes be shifted totally to title 10 authority. If AUMF did not exist and you did something like that, operationally that would have an effect on where you could strike and who you could strike. Is that a fair conclusion?

Mr. TAYLOR. Yes, it would.

Senator REED. Thank you.

Let me also raise another question, Mr. Taylor, which I think came up in your testimony. I think you focused your discussion on high-value individual attacks, but there is another type of attack which is described, at least in the press, as a signature attack. As I understand it, there are indications that there is a very high concentration of either al Qaeda or associated forces. Is there a legal

distinction between those two attacks right now, and would there be a legal distinction if the AUMF was altered?

Mr. TAYLOR. Attack against an enemy force is something that is consistent with the law of armed conflict. The law of armed conflict in this is tied to the AUMF. So if the AUMF were repealed, it would absolutely affect our ability to engage in those sorts of attacks. The law of armed conflict provides authority that we have not fully utilized. Our approach is more focused for many policy reasons, but as a legal matter, under the law of armed conflict, it is not necessary to identify particular leaders and we can go after the enemy, the military forces of the enemy, without being focused on the leadership. But we are, indeed, focused on the leadership.

Senator REED. Thank you very much.

Thank you, Mr. Chairman.

Chairman LEVIN. Thank you, Senator Reed.

Senator McCain.

Senator MCCAIN. Just to follow up, Mr. Taylor, we are not talking about the law of armed conflict. We are talking about the role of Congress in authorizing the use of military force by the executive branch. So I appreciate your comments about the law of armed conflict, but that is not what this hearing is about.

This hearing is about a resolution that was passed coming up on 12 years ago, and I think it is important for all of my colleagues to read that again, which says "the President is authorized 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 in order to prevent any future acts of international terrorism against the United States by such nations, organizations." This authorization was about those who planned and orchestrated the attacks of 2001.

Here we are 12 years later and you and the Secretary come before us and tell us that you do not think it needs to be updated. Well, clearly it does, and I would refer you to this morning's Washington Post editorial revising the terms of war, the authorization to use force against al Qaeda should be updated, not discarded. Because it has been so long and General Nagata, you would agree the nature of this conflict has changed dramatically, spread throughout northern Africa and the Maghreb, and penetrated into other nations all throughout the Middle East. The situation has dramatically changed. So for you to come here and say we do not need to change it or revise or update it I think is disturbing.

That is why we have people like Senator Dick Durbin, one of the highly respected individuals, I quote Senator Durbin: "None of us, not one who voted for the AUMF, could have envisioned we were about to give future Presidents the authority to fight terrorism as far flung as Yemen and Somalia."

Mr. Taylor, in your legal opinion, could the 2001 AUMF be read to authorize lethal force against al Qaeda's associated forces in additional countries where they are now present, such as Somalia, Libya, and Syria?

Mr. TAYLOR. As I indicated, we must comply with domestic law——

Senator MCCAIN. I think it is a pretty straightforward question, Mr. Taylor.

Mr. TAYLOR. On the domestic law side, yes, sir.

Senator MCCAIN. You believe that the 2001 AUMF authorizes lethal force against al Qaeda associated forces in Mali, Libya, and Syria. So we can expect drone strikes into Syria if we find al Qaeda there?

Mr. TAYLOR. On the domestic law side, sir. I hate to speculate on a hypothetical, but——

Senator MCCAIN. In your view, the President has the authority to do that.

Mr. TAYLOR. In my view, the AUMF authorizes us to be at war with al Qaeda, the organization behind the September 11, 2001, attacks, and that organization continues and it has associated forces, forces that have joined with that organization. Yes, sir, we are authorized to attack those who have chosen to associate with that organization.

Senator MCCAIN. You rightly say in your statement that the 2012 NDAA reaffirmed the AUMF with respect to the authority to detain al Qaeda, Taliban, and associated forces. Is the authority to detain the same as the authority to kill? Because that was not in the defense bill.

Mr. TAYLOR. It is related. It is not the same.

Senator MCCAIN. Would it not be helpful to DOD and the American people if we updated the AUMF to make it more explicitly consistent with the realities today which are dramatically different from what they were on that fateful day in New York and Washington?

Mr. SHEEHAN. Senator, I think there is a good case to be made that we should review this as the war goes on, and we have reviewed it. As of right now, I believe it suits us very well, and if there comes an opportunity where we need other authorities, we should come forward for those.

I would like to add, though, that the al Qaeda that attacked us on September 11, 2001, was an al Qaeda that previously attacked us from East Africa, from Yemen.

Senator MCCAIN. Yes, but that is not what the authorization states, Mr. Secretary. I know of all those things. So I appreciate that. I have only got 52 seconds left.

We are now killing people in the Haqqani Network, right? Is that correct, Mr. Secretary? The reason why I bring that up, we did not even designate the Haqqani Network as a terrorist organization until 2012. There are published reports, which are not as a result of classified briefings that I have had, that we killed people where their direct association with al Qaeda is tenuous. In fact, there is one story that we killed somebody in return for the Pakistanis to kill somebody.

As you stated, Congress is briefed from time to time, and I appreciate that. But the fact is that this authority, which I just read to you, has grown way out of proportion and is no longer applicable to the conditions that motivated the U.S. Congress to pass the AUMF in 2001.

So I must say I do not blame you because basically you have carte blanche as to what you are doing throughout the world, and

we believe it does not need to be repealed. But it is hard for me to understand why you would oppose a revision of the AUMF in light of the dramatically changed landscape that we have in this war on Islamic extremism, al Qaeda, and others. It needs to be done, and I hope that this committee will address it either in a separate fashion or as part of the annual National Defense Authorization Act (NDAA).

I thank you, Mr. Chairman.

Chairman LEVIN. Thank you, Senator McCain.

Senator Udall.

Senator UDALL. Thank you, Mr. Chairman.

Good morning, gentlemen. I want to start with a question for each of you in turn. It is a yes or no question. Let me lead into it.

In 2011, the House Armed Services Committee included a new AUMF in the NDAA that would have codified the authority to use force against al Qaeda, the Taliban, and associated forces.

The administration, in a Statement of Administration Policy, strongly opposed that proposed new AUMF because it determined that the 2001 AUMF, "enabled us to confront the full range of threats this country faces from those organizations and individuals," and concluded that the new AUMF, "in purporting to affirm the conflict would effectively recharacterize its scope and would risk creating confusion regarding applicable standards."

Do you agree with that Statement of Administrative Policy? I will start with General Nagata.

General NAGATA. Sir, I am unfamiliar with the document you just described. I can only say that as I track the orders and direction the Secretary has given his combatant commanders, I have never encountered a moment where they did not have sufficient legal authority to implement those orders.

Senator UDALL. Mr. Taylor?

Mr. TAYLOR. I agree with the statement in the Statement of Administration Policy.

Senator UDALL. Secretary Sheehan?

Mr. SHEEHAN. Yes, sir, I agree.

General GROSS. Sir, I would agree with General Nagata. From what I have seen in my military practice, the current AUMF has been adequate to meet the enemy we have seen to date so far.

Senator UDALL. Thank you for that.

Let me direct a question to all of you again.

The national counterterrorism strategy states that, "the United States alone cannot eliminate every terrorist or terrorist organization that threatens our safety, security, or interests. Therefore, we must join with key partners and allies to share the burdens of common security."

Do you agree that increased cooperation with security partners versus unilateral action and expanded conflict should be a strategic goal of the United States? I will start with General Nagata again.

General NAGATA. Sir, I do agree. Working with partner nations and allies is crucial.

Senator UDALL. Mr. Taylor?

Mr. TAYLOR. Yes.

Mr. SHEEHAN. Yes, sir. It is specifically part of the 2012 Defense Strategic Guidance.

General GROSS. Yes, sir, I agree as well.

Senator UDALL. Thank you for that.

Secretary Sheehan, let me turn to you. If a negotiated settlement between the Government of Afghanistan and the Taliban were to be signed, would the AUMF still apply to the Taliban? In other words, could we be in a situation in which Afghanistan is no longer at war against Mullah Omar's Taliban, but we still are? Or if we also accept such a negotiated settlement, could we be in a situation in which we are at war with al Qaeda but not the Taliban?

Mr. SHEEHAN. Senator, again, a hypothetical, but if the question you asked, could that be the case, then the answer would be yes, it could be the case.

Senator UDALL. We are certainly dealing with some hypotheticals here.

Mr. SHEEHAN. It could be the case, yes, sir.

Senator UDALL. Mr. Taylor, if I could turn to you. If the United States faces an imminent threat to which Congress could not respond in a timely fashion, does the President of the United States have Article II authority to use military force to repel an imminent threat to the safety of Americans?

Mr. TAYLOR. Yes, sir, he does.

Senator UDALL. Secretary Sheehan, let me turn back to you. In your judgment, what are the potential risks and consequences associated with passing a new AUMF?

Mr. SHEEHAN. Senator, I think the AUMF as currently structured works very well for us. So I guess we would be concerned that any change might restrict our combatant commanders from conducting their operations as they have in the past. So right now, we are comfortable. I think Senator Inhofe said if it ain't broke, don't fix it. I would subscribe to that policy.

Senator UDALL. General Nagata, could I turn back to you and ask you? Do you believe that there are strategic risks associated with passing a new AUMF?

General NAGATA. Sir, I do not know. I do know that the combatant commanders' great familiarity and great confidence in the existing AUMF is also an important part of our assessment, that we have sufficient authority for the current orders and direction from the Secretary.

Senator UDALL. Mr. Taylor, if I could come back to you. To your knowledge, has an AUMF ever been passed by Congress without a specific request from the President?

Mr. TAYLOR. I am not aware of any such history, sir. I believe the answer is no.

Senator UDALL. Gentlemen, thank you for being here today. This is a very important topic, as we all acknowledge. Thank you for your service.

Mr. Chairman, I finished my questions.

Chairman LEVIN. Thank you very much, Senator Udall.

Senator Graham.

Senator GRAHAM. Thank you, Mr. Chairman.

From the President's point of view, does the AUMF in any way restrict his ability to go after terrorist organizations that represent

a national security threat to this country in places outside of Afghanistan that are not within the hierarchy of al Qaeda that existed on September 11, 2001?

Mr. SHEEHAN. Senator, it would not.

Senator GRAHAM. So is there anything the President would like us to do differently than exists today?

Mr. SHEEHAN. Senator, I think the AUMF provides very clear guidance for al Qaeda, the Taliban, and associated forces. He has many other authorities that you are aware of that he could use that he used prior to the enactment of the AUMF to deal with any other threats to our national security.

Senator GRAHAM. Do you agree with me the war against radical Islam or terror, whatever description you would like to provide, will go on after the second term of President Obama?

Mr. SHEEHAN. Senator, in my judgment, this is going to go on for quite a while and, yes, beyond the second term of the President.

Senator GRAHAM. Beyond this term of Congress.

Mr. SHEEHAN. Yes, sir. I think it is at least 10 to 20 years.

Senator GRAHAM. I think you are absolutely right. I think we are involved in a generational struggle. So the lessons of September 11 are always learned the hard way.

So your advice to the committee is to do nothing?

Mr. SHEEHAN. Senator, I think it is appropriate to review a law that was written 12 years ago.

Senator GRAHAM. Doing nothing—Congress could be at the right answer more often than not.

Mr. SHEEHAN. Yes, sir. I think it is an appropriate time to review this, and we are taking this very seriously to review it. But at this time, we do not find that it would improve our ability to conduct our global campaign against these organizations.

Senator GRAHAM. General, do you agree with that?

General GROSS. Senator, I agree that the current AUMF is adequate for us. In the time I have had in Central Command, down at International Security Assistance Force in Afghanistan, and also here on the Joint Staff, we have been able to go after the enemy that fits within the AUMF.

Senator GRAHAM. Do you agree with me, Mr. Secretary, that the inherent authority of the President as commander in chief would give him or her great latitude in terms of pursuing terrorist organizations that represent a threat against the United States apart from Congress?

Mr. SHEEHAN. Yes, sir, I do agree.

Senator GRAHAM. But you also would agree that when Congress, the President, and our courts are all aligned, we are stronger as a nation, when we are all on the same sheet of music?

Mr. SHEEHAN. Yes, sir.

Senator GRAHAM. So the one thing I do believe would be helpful is if Congress does more than just criticize, that we find ways to empower the commander in chief and also in some ways control the power of the executive branch. But I tend to agree that what we have today is working. But we all agree that the enemy of today is different than it was on September 11. Do you agree with that?

Mr. SHEEHAN. Sir, they have changed a bit, but in many ways they have not changed very much at all. They are operating in a

very similar way that they were in 1998, out of traditional strongholds in Yemen and East Africa. They have expanded in North Africa and some other areas, but quite frankly, this has been a global organization since day one.

Senator GRAHAM. But would you agree with me because of the pressure we have placed on the enemy in Afghanistan and Iraq, they are moving?

Mr. SHEEHAN. Yes, sir. They have always moved. Even in 2002, they were very active in North Africa and in parts of the Levant.

Senator GRAHAM. I could not agree with you more. So from your point of view, you have all the authorization and legal authorities necessary to conduct a drone strike against terrorist organizations in Yemen without changing the AUMF.

Mr. SHEEHAN. Yes, sir, I do believe that.

Senator GRAHAM. Do you agree with that, General?

General GROSS. I do, sir.

Senator GRAHAM. General, do you agree with that?

General NAGATA. I do, sir.

Senator GRAHAM. Could we send military members into Yemen to strike against one of these organizations? Does the President have that authority to put boots-on-the-ground in Yemen?

Mr. TAYLOR. As I mentioned before, there is domestic authority and international law authority. At the moment, the basis for putting boots-on-the-ground in Yemen, we respect the sovereignty of Yemen and it would——

Senator GRAHAM. I am not talking about that. I am asking: does he have the legal authority under our law to do that?

Mr. TAYLOR. Under domestic authority, he would have that authority.

Senator GRAHAM. I hope Congress is okay with that. I am okay with that.

Does he have authority to put boots-on-the-ground in the Congo?

Mr. SHEEHAN. Yes, sir, he does.

Senator GRAHAM. Do you agree with me that when it comes to international terrorism, we are talking about a worldwide struggle?

Mr. SHEEHAN. Absolutely, sir.

Senator GRAHAM. Would you agree with me the battlefield is wherever the enemy chooses to make it?

Mr. SHEEHAN. Yes, sir. From Boston to the Federally Administered Tribal Areas in Pakistan.

Senator GRAHAM. I could not agree with you more.

Do you agree with that, General?

General GROSS. Yes, sir. I agree that the enemy decides where the battlefield is.

Senator GRAHAM. It could be any place on the planet and we have to be aware and able to act. Do you have the ability to act and you are aware of the threats?

Mr. SHEEHAN. Yes, sir. We do have the ability to react and we are tracking the threats globally.

Senator GRAHAM. From my point of view, I think your analysis is correct. I appreciate all of your service to our country.

Chairman LEVIN. Thank you, Senator Graham.

Senator Donnelly?

Senator DONNELLY. Thank you, Mr. Chairman.

Would you call the al Nusra Front in Syria an al Qaeda-affiliated terrorist group?

Mr. SHEEHAN. Yes, sir, I would.

Senator DONNELLY. Would you say that the AUMF applies to the al Nusra Front?

Mr. SHEEHAN. That is a legal question.

Mr. TAYLOR. As with many things with Syria, we are looking very hard and very carefully, and I do not have a definitive answer for you at the moment.

Senator DONNELLY. Following up on Senator Graham's question, would we have the ability to act against al Nusra today under the AUMF?

Mr. SHEEHAN. Yes, sir. We would have the ability to act against al Nusra if we felt they were threatening our security. We would have the authority to do that today.

Senator DONNELLY. Do we feel today that al Nusra is threatening our security?

Mr. SHEEHAN. Senator, in this setting, I do not want to get in the decisionmaking we have for how we target different groups and organizations around the world.

Senator DONNELLY. Okay.

If a terrorist group is al Qaeda-affiliated, does that inherently mean that they are threatening the United States?

Mr. SHEEHAN. Yes, sir, although it is a bit murky, I hate to say, because there are groups that have openly professed their affiliations with al Qaeda, yet in fact, as a Government, we have not completely grappled with that as of now. But generally speaking, for AUMF, as we mentioned, it has to be an organized force first, and second that organized force has to be joined to al Qaeda as a co-belligerent to threaten us. So when both of those factors are in place, then we can move forward on AUMF.

Senator DONNELLY. If that al Qaeda-affiliated terrorist group is operating wholly within another country, and their actions to date have involved only that country, does the AUMF still apply to them?

Mr. TAYLOR. Senator, as we indicated, we would do a fact-intensive, careful consideration, and as Secretary Sheehan mentioned, one of the conditions is that they become co-belligerent with al Qaeda in its hostilities against the United States or its coalition partners.

Senator DONNELLY. Is that a call that you make as you see it?

Mr. TAYLOR. Yes, sir, after a very intensive, careful review, careful consideration of the intelligence and threat assessments.

Mr. SHEEHAN. Senator, you ask a good question because when a group aligns itself with al Qaeda and al Qaeda has an express intent to attack Americans at home and abroad, but then does not take the next step to be involved in that co-belligerency, then we have a judgment to make.

Senator DONNELLY. Okay. That is what I am trying to——

Mr. SHEEHAN. Right, I know.

Senator DONNELLY.—where the line is——

Mr. SHEEHAN. Right, I got it. Yes, sir.

Senator DONNELLY. In regards to drone activities, are we reviewing the AUMF in regards to those activities, or do you feel, as we

look at it right now, that it is sufficient to cover all of those various permutations that may occur?

Mr. SHEEHAN. Right now, sir, we believe it is sufficient.

Senator DONNELLY. Okay.

Mr. Chairman, thank you.

Chairman LEVIN. Thank you very much, Senator Donnelly.

Senator Kaine.

Senator KAINE. Thank you, Mr. Chairman.

To the witnesses, I associate myself with comments made by the ranking member about this being a helpful hearing to wrestle through some questions that I have not fully thought through.

I want to start with the President's State of the Union. There were two paragraphs in the State of the Union this year, I will focus on each of them.

"Today the organization that attacked us on September 11 is a shadow of its former self. Different al Qaeda affiliates and extremist groups have emerged from the Arabian Peninsula to Africa. The threat these groups pose is evolving... We will need to help countries like Yemen, Libya, and Somalia provide for their own security and help allies who take the fight to terrorists, as we have in Mali. Where necessary, through a range of capabilities, we will continue to take direct action against those terrorists who pose the gravest threat to Americans."

I want to focus on the notion of groups that have emerged after September 11. Is it the administration's position that groups that emerged after September 11 who had no connection with the attacks on September 11 are, nevertheless, covered by the AUMF?

Mr. TAYLOR. Let me take that. If an armed group becomes an associated force with al Qaeda, that means that it has entered the fight alongside the organization that was responsible for those September 11 attacks and thus we believe they are fully covered by the AUMF. If they have not become an associated force of al Qaeda, then even though they may wish us harm, they are not within the scope of the AUMF. But, as in response to other questions, the President retains authority to utilize the tools that are necessary and appropriate to defend the Nation.

Senator KAINE. So just back to the language of the AUMF that Senator McCain read, authorizing the President, "to use all necessary and appropriate force against all those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001," it is the legal position of the administration that even groups or individuals that had nothing to do with the attacks, once they become associated with al Qaeda 25 years from now, are nevertheless covered by the current language of the AUMF.

Mr. TAYLOR. I do not want to say 25 years from now, but today, yes.

Senator KAINE. I am just using the earlier testimony about the likely length of this. As long as the AUMF is in place, I gather it to be your legal position that individuals who were not born by September 11, 2001, if they become associated with a group that associates with al Qaeda, it is your position that the AUMF would cover them and those organizations. Those, as the President said, different affiliates and extremist groups have emerged.

Mr. TAYLOR. As long as they become an associated force under the legal standard that was set out——

Senator KAINE. Let me ask about that, and I should know the answer to this question and I do not. Has that particular legal rationale, that individual groups who had nothing to do with September 11, are nevertheless covered by the AUMF, has that legal rationale been subject to litigation and decisions by American courts?

Mr. TAYLOR. In the context of detention, I believe the answer is yes.

Senator KAINE. The determination is that even those not associated with the attacks on September 11 are, nevertheless, covered by the scope of the AUMF.

Mr. TAYLOR. That is right. If they are an associated force with al Qaeda, they have become associated with that organization which was responsible and is the target of the AUMF, they have brought themselves within the scope of the AUMF.

Senator KAINE. Does the AUMF expire by presidential declaration, congressional action, or the occurrence of an actual event in the world?

Mr. TAYLOR. It is a statute. We have not determined that the conflict has come to an end. Precisely how that would be written and established is unclear.

Senator KAINE. It is clear that if Congress retracted the AUMF, at that point the authority would come to an end, correct?

Mr. TAYLOR. That is correct.

Senator KAINE. There would still be the international Law of War and other doctrine that the President and Congress could operate under. But aside from Congress retracting the AUMF, whether there is an actual event or could the President take some action that would end the AUMF, that has not yet been determined.

Mr. TAYLOR. That is correct, but if, for example, the President were to issue a declaration stating that the conflict against al Qaeda has been concluded, I would think that that would constitute an end.

Senator KAINE. The second paragraph, just very quickly, in the President's remarks, "As we do so," fight terrorism, "we must enlist our values in the fight... In the months ahead, I will continue to engage with Congress to ensure not only that our targeting, detention, and prosecution of terrorists remains consistent with our laws and system of checks and balances, but that our efforts are even more transparent to the American people and to the world."

This, obviously, is part of that. Does the administration have a current plan for engaging in a public discussion with the American people and the world, or a public discussion with Congress, about these sort of policy and legal architectures surrounding these decisionmaking processes?

Mr. SHEEHAN. Senator, the President has made clear that he wants to move forward in terms of transparency with these programs, and the administration is committed to expanding that dialogue and we will hope to continue to do that in the months ahead.

Senator KAINE. Thank you, Mr. Chairman.

Chairman LEVIN. Thank you very much, Senator Kaine.

Senator King.

Senator KING. Gentlemen, I have only been here 5 months, but this is the most astounding and the most astoundingly disturbing hearing that I have been to since I have been here. You guys have essentially rewritten the Constitution here today. The Constitution, Article I, Section 8, Clause 11 clearly says that Congress has the power to declare war.

This authorization, the AUMF, is very limited, and you keep using the term "associated forces." You used it 13 times in your statement. That is not in the AUMF. You said at one point it suits us very well. I assume it does suit you very well because you are reading it to cover everything and anything.

Then you said at another point, even if the AUMF does not apply, the general law of war applies, and we can take these actions.

So my question is: how do you possibly square this with the requirement of the Constitution that the Congress has the power to declare war? This is one of the most fundamental divisions in our constitutional scheme that Congress has the power to declare war. The President is the Commander in Chief and prosecutes the war. But you are reading this AUMF in such a way as to apply clearly outside of what it says.

Senator McCain was absolutely right. It refers to the people who planned, authorized, committed, or aided the terrorist attacks on September 11. That is a date. It does not go into the future. Then it says, "or harbored such organizations," past tense, "or persons in order to prevent any future acts by such nations, organizations, or persons." It established a date.

I do not disagree that we need to fight terrorism, but we need to do it in a constitutionally sound way. Now, I am just a little old lawyer from Brunswick, ME, but I do not see how you can possibly read this to comport with the Constitution and authorize any acts by the President. You had testified to Senator Graham that you believe that you could put boots-on-the-ground in Yemen under this document. That makes the war powers a nullity. I am sorry to ask such a long question, but what is your response to this? Anybody?

Mr. SHEEHAN. Senator, let me take the first response. I am not a constitutional lawyer or a lawyer of any kind, but let me make a brief statement about al Qaeda and the organization that attacked us on September 11, 2001.

In the 2 years prior to that, Senator King, that organization attacked us in East Africa and killed 17 Americans at our embassy in Nairobi with loosely affiliated groups of people in East Africa. A year prior to September 11, that same organization with its affiliates in Yemen almost sunk a U.S. ship, the USS *Cole*, a billion-dollar warship, killed 17 sailors in the Port of Aden. The organization that attacked us on September 11 already had its tentacles around the world with associated groups. That was the nature of the organization then; it is the nature of the organization now. In order to attack that organization, we have to attack those affiliates that are its operational arm, that have previously attacked and killed Americans and continue to try to do that.

Senator KING. That is fine, but that is not what the AUMF says. What I am saying is we may need new authority, but if you expand

this to the extent that you have, it is meaningless. The limitation in the war power is meaningless.

I am not disagreeing that we need to attack terrorism wherever it comes from and whoever is doing it, but what I am saying is let us do it in a constitutional way, not by putting a gloss on a document that clearly will not support it. It just does not work. I am just reading the words. It is all focused on September 11 and who was involved.

You guys have invented this term "associated forces" that is nowhere in this document. As I mentioned, in your written statement, you use that. That is the key term. You use it 13 times. It is the justification for everything, and it renders the war powers of Congress null and void. I do not understand. I do understand why you are saying we do not need any change. Because of the way you read it, you could do anything.

But why not come back to us and say this is an overbroad reading that renders the war powers of Congress a nullity? Therefore, we need new authorization to respond to the new situation. I do not understand why. I mean, I do understand it because the way you read it, there is no limit, but that is not what the Constitution contemplates.

Mr. Taylor, what do you respond?

Mr. TAYLOR. Well, sir, the organization, al Qaeda, operates as a central organization with very closely related groups that join with it. They become, in a sense, the operating arms of al Qaeda, and the operating arms such as AQAP did not exist on September 11, 2001, but they have joined in with al Qaeda as part of the same belligerency that al Qaeda is conducting against us. We believe that a group like AQAP is certainly within the scope of the AUMF enacted by Congress and that it provides the authority to take the fight to AQAP just as it provides the authority to take the fight to al Qaeda senior leadership.

Senator KING. I guess the definition proves too much because it basically is unlimited. It basically says anybody that is hostile to us is, therefore, aligned with al Qaeda and, therefore, falls under the AUMF and, therefore, does not require any further congressional oversight. According to your reading, we have granted unbelievable powers to the President, and I think it is a very dangerous precedent.

Mr. Chairman, thank you.

Chairman LEVIN. Let me pick up that issue because I think under the law of war, Senator King is wrong, but I am going to have to ask you that question. Let me ask you, Mr. Taylor, whether or not it is true that if the United States is authorized to use force against a foreign country or an organization under domestic and international law, if that authority exists, does that authority automatically extend under the law of armed conflict to co-belligerents.

Mr. TAYLOR. Yes, sir.

Chairman LEVIN. In other words, does it automatically extend without having to be explicit? Does it automatically extend to those who have aligned themselves with the entity and joined the fight against us aligned with them?

Mr. TAYLOR. Yes, sir, it does.

Chairman LEVIN. Now, that is the authority I believe that does exist under the AUMF, Senator King. Now, that is my opinion. I do not claim to be an expert on the subject, but I do believe that that is an accurate statement. Where you are authorized to use force under domestic law, AUMF, and under international law against a foreign country or organization, that the authority automatically extends under the law of armed conflict to a co-belligerent, to some entity that has aligned themselves with the specified entity against us, in the fight against us.

Is that your understanding, Mr. Taylor?

Mr. TAYLOR. That is my understanding. You have expressed it very well.

Chairman LEVIN. Okay. I think we will have to get some further clarification of that because I do not want to claim to be an expert on that subject. But my staff has handed me——

Senator KING. Nor do I, Mr. Chairman. I am just concerned that reading essentially vitiates the congressional power to declare war.

Chairman LEVIN. No, I do not think it does. If Mr. Taylor's answer is correct, and I think it is, then by authorizing an attack against al Qaeda, I believe it automatically includes any co-belligerent with al Qaeda under law of war.

Now, we will find out whether that is true. We have already got one answer from Mr. Taylor who is the counsel for the DOD. We will ask the Attorney General as well as to whether or not that is correct.

Mr. Taylor, you have also indicated a couple times both under domestic law and international law, that one would need to be authorized to move into a country and attack some entity in that country. For instance, I think the countries Senator King used were Syria and Yemen. There is a sovereignty issue under international law. Is that correct?

Mr. TAYLOR. Yes, sir.

Chairman LEVIN. So the AUMF may authorize the President to use force against a co-belligerent of al Qaeda in Yemen under the AUMF, if your reading is correct and my understanding is correct, but it would also have to be legal under international law as well. Is that correct?

Mr. TAYLOR. That is correct.

Chairman LEVIN. That then involves sovereignty issues.

Mr. TAYLOR. Yes, sir.

Chairman LEVIN. Do you want to explain that?

Mr. TAYLOR. We are a sovereign state in a system of sovereign states. We benefit greatly by respect for each nations' sovereignty. We are bound by treaty—that is, the U.N. Charter—to respect the sovereignty of other states. As recognized in the U.N. treaty, there is the inherent right of self-defense. But that is one basis for overcoming a state's sovereignty if it is necessary for us to exercise our inherent right of self-defense.

Another basis is the consent of the host country, and that is a very important basis for our operations outside of Afghanistan.

Chairman LEVIN. The issue has been raised about other entities than the DOD using remotely piloted aircraft strikes. My question is, should the use of these drones be limited to DOD or should

other Government agencies be allowed to use such force as well, for instance, the CIA? Either one of you, Secretary or Mr. Taylor.

Mr. SHEEHAN. Mr. Chairman, the President has indicated that he has a preference for those activities to be conducted under title 10. We are reviewing that right now. But I think we also recognize that type of transition may take quite a while depending on the theater of operation.

Chairman LEVIN. Would you give us your answer to that question after your review? You are saying that is under review.

Mr. SHEEHAN. Yes, sir, absolutely.

[The information referred to follows:]

While the review of responsibilities for the conduct of direct action against terrorist targets continues, we have provided the committee classified briefings and will continue to brief the committee as the review progresses.

Chairman LEVIN. Finally, let me say that I believe every President has exercised authority and claimed authority as commander in chief even without the AUMF by Congress. Is that true?

Mr. SHEEHAN. Yes, sir, absolutely.

Chairman LEVIN. So I presume that this President, like other Presidents, would even, if there were no AUMF, claim certain power under the commander in chief authority of Article II.

Mr. SHEEHAN. Yes, Mr. Chairman.

Chairman LEVIN. Senator Inhofe?

Senator INHOFE. Just a couple of brief things here. I am looking at it, Senator King, as a non-lawyer because I am not a lawyer. But I was here back when it was passed, and I look at the language now. It says, those nations, organizations, or persons he determines planned, authorized, committed or aided terrorist attacks. It is very broad. Maybe at that time, we should have worded it maybe another way.

But on the other hand as we look and observe, if there is an abuse of this, I will be the first one to go and change it, and we can do that. We are a legislative body and we can make sure that authority is not there if that authority, in my estimation, is abused.

It is the most egregious attack on our Homeland in history. At that time, I thought we needed something broad. We had to go after these guys. This is not just an observation because I was around even during World War II. There is not an identifiable enemy out there. There is not a flag that we are against. This is something that is different than anything else, so it required the authority, in my opinion at the time, to do what we had to do to get these guys.

If it should be abused, I am sure I would not be the only one on this panel that would want to make the changes necessary to preclude that abuse from taking place.

That is the only observation I would make, Mr. Chairman.

Chairman LEVIN. Thank you.

I am just going to make part of the record a statement for the record which has been provided to us that says that in World War II, the United States was not just at war with Germany, Italy, and Japan, who we declared war against and was authorized by Congress, but the United States was also at war with their co-belligerents, Bulgaria, Hungary, and Romania, among others. So I will make that part of the record.

[The information referred to follows:]

AFTER THE AUMF

Jennifer Daskal & Stephen I. Vladeck

I. INTRODUCTION

On September 18, 2001, one week after the deadliest terrorist attacks in U.S. history, President George W. Bush signed into law the Authorization for Use of Military Force (AUMF). The 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, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[1]

Although its delegation of power to the President was sweeping, the AUMF in fact reflected a compromise between Congress and the Bush Administration—which had sought an even broader and more open-ended grant of authority. Even as fires continued to burn at Ground Zero, Congress pushed back, only authorizing military force against those who could be tied to the groups directly responsible for the September 11 attacks. Despite widespread misrepresentations to the contrary, Congress pointedly refused to declare a "war on terrorism." Instead, the use of force Congress authorized was to be directed at those who bore responsibility for the 9/11 attacks—namely al Qaeda and the Taliban. It was also for a specific purpose: preventing those "nations, organizations, or persons" responsible for the September 11 attacks from committing future acts of terrorism against the United States.

A dozen years later, the AUMF—which has never been amended—remains the principal source of the U.S. government's domestic legal authority to use military force against al Qaeda and its immediate associates, both on the battlefields of Afghanistan and far beyond. But even as the statutory framework has remained unchanged, the facts on the ground have evolved dramatically: The Taliban regime in Afghanistan—behind which al Qaeda had taken refuge—has been removed from power; those individuals most directly responsible for the September 11 attacks have been incapacitated; and, perhaps most importantly, the "core" of al Qaeda has been "decimated," to quote former Defense Secretary Panetta,[2] such that it no longer poses the threat that it did in the

1. Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (codified at 50 U.S.C. § 1541 note).

2. Hon. Leon Panetta, Sec'y of Def., "The Fight Against Al Qaeda: Today and Tomorrow," Speech Before the Center for a New American Security (Nov. 20, 2012), *available at* http://www.cfr.org/defense-strategy/panettas-speech-al-qaeda-november-2012/p29547.

weeks and months before and after September 11. With the drawdown of U.S. troops in Afghanistan continuing apace, we are getting closer to the day when the AUMF will have served its purpose and the United States will no longer be engaged in an ongoing armed conflict with the Taliban or al Qaeda.

Of course, recent, tragic events in Boston, Algeria, and elsewhere underscore the extent to which terrorists—both self-radicalized individuals and organized groups—continue to present a threat to the United States, both at home and overseas. But in an area of law and policy in which there is seldom deep consensus, the one point upon which all seem to agree is the increasing extent to which those who threaten us the most are *not* those against whom Congress authorized the use of force in September 2001. This has led some to call for a new AUMF.

Perhaps the most widely discussed proposal is that contained in a Hoover Institution white paper by Robert Chesney, Jack Goldsmith, Matthew Waxman, and Benjamin Wittes. Titled "A Statutory Framework for Next-Generation Terrorist Threats," the heart of the proposal is a new statute wherein "Congress sets forth general statutory criteria for presidential uses of force against new terrorist threats but requires the executive branch, through a robust administrative process, to identify particular groups that are covered by that authorization of force."[3] Modeled on the existing process for State Department administrative designation of Foreign Terrorist Organizations (FTOs),[4] the Hoover proposal is for Congress to enact a new blanket framework statute authorizing the use of military force against as-yet-undetermined future terrorist organizations, and to delegate to the Executive Branch the authority to designate those organizations against which such force may be used if and when the time comes.[5] If press reports are accurate, the Hoover paper is but one of a number of competing proposals being circulated for a "new"—or, at least, expanded—AUMF, although the salient details of other efforts in this regard remain to be seen.[6]

3. ROBERT CHESNEY ET AL., HOOVER INST., A STATUTORY FRAMEWORK FOR NEXT-GENERATION TERRORIST THREATS 10 (2013), http://media.hoover.org/sites/default/files/documents/Statutory-Framework-for-Next-Generation-Terrorist-Threats.pdf.

4. *See* 8 U.S.C. § 1189 (2006); *see also* 18 U.S.C. § 2339B (making it a crime to provide material support to a designated FTO).

5. *See also* Greg Miller & Karen DeYoung, *Administration Debates Stretching 9/11 Law To Go After New al-Qaeda Offshoots*, WASH. POST, Mar. 7, 2013, at A1 (summarizing debates within the Obama Administration over the scope of the AUMF).

6. *See, e.g.*, Andrew Rosenthal, *Revisiting Post-9/11 Law*, N.Y. TIMES, May 7, 2013, http://takingnote.blogs.nytimes.com/2013/05/07/revisiting-the-a-u-m-f/; Juana Summers, *Thornberry: Fix Post-9/11 Use of Force Rule*, POLITICO, May 10, 2013; *see also Counterterrorism Policies and Priorities: Addressing the Evolving Threat*, Hearing Before the S. Comm. on Foreign Relations, 113th Cong. (2013).

In this paper, we offer an alternative vision for the future of U.S. counterterrorism policy. We start from the fundamental premise that, as former DOD General Counsel Jeh Johnson put it in a speech last fall, war should "be regarded as a finite, extraordinary and unnatural state of affairs" that "violates the natural order of things." In Johnson's words: "Peace must be regarded as the norm toward which the human race continually strives."[7]

Thus, as we explain in the pages that follow, the future of U.S. counterterrorism policy should be one in which use-of-force authorizations are a last, rather than first, resort. Given the evolving sophistication of our ordinary law enforcement and intelligence-gathering tools over the past decade, along with the President's settled powers under both domestic and international law to use military force in self-defense, the burden should—indeed, *must*—be on those seeking *additional* use-of-force authority to demonstrate why these existing capacities are inadequate. And even then, any use-of-force authority should be enacted by Congress only after public debate and extensive deliberation, carefully calibrated to the specific threat posed by an identifiable group, and limited in scope and duration, so as to avoid making the very mistake that Congress so assiduously sidestepped after September 11.

In short, calls for a new framework statute to replace the AUMF are unnecessary, provocative, and counterproductive—perpetuating war at a time when we should be seeking to end it. Congress certainly may choose, as it did in the AUMF, to authorize the use of military force against specific, organized groups so as to address an established and sustained threat that existing authorities are inadequate to quell. But until and unless the political branches identify a group that poses such a threat, the many other counterterrorism tools at the government's disposal—including law enforcement, intelligence-gathering, capacity-building, and, when necessary, self-defense capabilities provide a much more strategically sound—and legally justifiable—means of addressing the terrorist threat.[8]

In what follows, we provide background on the AUMF and its interpretation over time, explain why the Hoover proposal and other calls for an expanded AUMF are unnecessary and unwise, and outline three alternative approaches for the next generation of U.S. counterterrorism policy.

7. Hon. Jeh Charles Johnson, General Counsel, U.S. Dep't of Def., "The Conflict Against Al Qaeda and its Affiliates: How Will It End?," Speech Before the Oxford Union (Nov. 30, 2012), *available at* http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/.

8. *See, e.g.*, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, Remarks to a Security Council Briefing on Counterterrorism (Mar. 13, 2013), *available at* http://usun.state.gov/briefing/statements/209314.htm (describing the multi-pronged approach to combating terrorism in Africa).

II. BACKGROUND

A. The AUMF, al Qaeda, and the Taliban

As noted above, Congress in the AUMF rejected alternative language proposed by the Bush Administration that would have authorized the broad-scale use of force to both punish those responsible for September 11 *and* "deter and pre-empt *any* future acts of terrorism or aggression against the United States."[9] Instead, Congress chose its words carefully, focusing only on those "nations, organizations, or persons" that the President "determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001."[10] Shortly after he signed the AUMF into law, President Bush confirmed what by then had been widely reported—that convincing evidence identified the responsible parties as al Qaeda and the Taliban.[11]

From its inception, then, the AUMF was not a general counterterrorism statute; it was a specific authorization to use military force only against those entities that attacked the United States on September 11—al Qaeda, the Taliban, and, by interpretation, associated forces fighting against the United States as part of that conflict. Moreover, as the Supreme Court would emphasize in *Hamdi* v. *Rumsfeld* and *Hamdan v. Rumsfeld*, such force was only authorized to the degree it was consistent with the traditional incidents—and international laws—of war.[12]

This understanding has been the driving force behind the past decade of U.S. counterterrorism policy. Thus, regardless of where they have been arrested, terrorism suspects who are *not* part of al Qaeda, the Taliban, or associated forces, have consistently been prosecuted in U.S. courts, transferred to other countries for trial, or

9. *See, e.g.*, David Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 HARV. INT'L L.J. 71, 73 (2002); *see also* 147 CONG. REC. S9950-51 (daily ed., Oct. 1, 2001) (statement of Sen. Byrd) (providing the text of the Administration's initial proposal) (emphasis added); *id.* at S9949 ("[T]he use of force authority granted to the President extends only to the perpetrators of the September 11 attack. It was not the intent of Congress to give the President unbridled authority . . . to wage war against terrorism writ large without the advice and consent of Congress. That intent was made clear when Senators modified the text of the resolution proposed by the White House to limit the grant of authority to the September 11 attack.").

10. AUMF § 2(a), 115 Stat. at 224.

11. President George W. Bush, Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140, 1140–41 (Sept. 20, 2001).

12. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 594–95 (2006); Hamdi v. Rumsfeld, 542 U.S. 507, 519–21 (2004) (plurality opinion).

released.[13] Conversely, all three branches of the U.S. government have agreed that anyone who *is* a member of al Qaeda or the Taliban can be detained without charge, and—according to the views of the past two administrations—subject to lethal force in appropriate circumstances as well.[14] The AUMF has thus been the principal source of authority for U.S. military operations in Afghanistan and, so far as can be gleaned from public reports, targeted killing operations in Pakistan, Yemen, and Somalia, as well.[15]

Twelve years later, al Qaeda's core has been effectively eviscerated—it is a group President Obama describes as "a shadow of its former self,"[16] and which the Director of National Intelligence testified before Congress as being "probably unable to carry out complex, large-scale attacks in the West."[17] At the same time, the Taliban has been removed from power in Afghanistan, with the impending withdrawal of U.S. ground troops also heralding in a new phase in U.S. policy there. Increasingly, then, legal and policy debates over the AUMF have focused less and less on al Qaeda and the Taliban, and more and more on those groups and other actors that had nothing to do with the September 11 attacks, but pose a threat to U.S. interests *today*. Some of these groups can arguably be understood as covered by the AUMF to the extent that they are appropriately defined as an "associated force" of al Qaeda and the Taliban; others cannot unless the notion of "associated force" is stretched beyond recognition. The debate over the future of the AUMF has thus become one dominated by a discussion of "associated forces"—and the purported need for new use-of-force authorities to neutralize threats that have no connection to the September 11 attacks.

13. *See, e.g.*, Greg Miller & Karen DeYoung, *Administration Debates Stretching 9/11 Law To Go After New al-Qaeda Offshoots*, WASH. POST, Mar. 7, 2013, at A1 (noting that law of war authorities pursuant to AUMF do not extend beyond al Qaeda, the Taliban, and associated forces; key debate, then, is over scope of "associated forces).].

14. *See, e.g.*, John O. Brennan, Assistant to the President for Homeland Sec'y and Counterterrorism, Remarks at Woodrow Wilson International Center for Scholars: The Ethics and Efficacy of the President's Counterterrorism Strategy (Apr. 30, 2012), *available at* http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy (emphasizing that "individuals who are part of al-Qaida or its associated forces are legitimate military targets"); *see also* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(b)(1), 125 Stat. 1298, 1562; Al Adahi v. Obama, 613 F.3d 1102, 1103 (D.C. Cir. 2010).

15. *See, e.g.*, Charlie Savage, *Secret U.S. Memo Made Legal Case To Kill a Citizen*, N.Y. TIMES, Oct. 8, 2011, at A1.

16. President Barack H. Obama, State of the Union Address (Feb. 12, 2013), *available at* http://www.nytimes.com/2013/02/13/us/politics/obamas-2013-state-of-the-union-address.html.

17. *See* Hon. James R. Clapper, Director of National Intelligence, Statement for the Record: Worldwide Threat Assessment of the U.S. Intelligence Community, at 4 (Mar. 12, 2013), *available at* http://www.intelligence.senate.gov/130312/clapper.pdf.

B. The Problem of "Associated Forces"

Most modern wars have involved more than two parties. Thus, in World War II, the United States was not just at war with Germany, Italy, and Japan; rather, the United States was also at war with their "co-belligerents," *e.g.*, Bulgaria, Hungary, and Romania, among others.[18] Both the Bush and Obama Administrations have applied this notion of co-belligerency to the conflict authorized by the AUMF as well. Thus, whereas Congress in the AUMF referred only to "those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons,"[19] the past two administrations—with subsequent ratification by Congress with respect to detention authority[20]—have understood this language to encompass not just al Qaeda and the Taliban, but also those groups that are "associated forces" thereof. As Jeh Johnson explained in a 2012 speech, the U.S. government defines associated forces to include those (1) organized armed groups that have entered the fight alongside al Qaeda; and (2) are a co-belligerent with al Qaeda in the hostilities against the United States and its coalition partners.[21]

Critically, this definition excludes groups of two or more terrorists with no direct affiliation with al Qaeda, *e.g.*, the Tsarnaev brothers. Similarly, it excludes entities that share ideological affinities with al Qaeda but that do not engage in any hostilities against the United States or its coalition partners. That said, it is decidedly unclear who *is* covered. Whereas there was no question during the relevant period of World War II that the United States was at war with co-belligerents Bulgaria, Hungary, and Romania, the U.S. government has never publicly made clear which groups qualify as "associated forces" subject to the AUMF. Thus, the government first acknowledged that al Qaeda in the Arabian Peninsula (AQAP) qualified as an associated force in litigation, but even there equivocated as to whether AQAP was covered by the AUMF because it was "part of" al Qaeda or because it was an "associated force."[22] There is even less certainty as to

18. *See, e.g.*, Declarations of War Against Bulgaria, Hungary and Rumania, chs. 323–25, 56 Stat. 307 (1942).

19. AUMF § 2(a), 115 Stat. at 224.

20. *See* FY2012 NDAA § 1021(b)(2), 125 Stat. at 1562 (authorizing detention of "A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces").

21. *See* Johnson, *supra* note 7.

22. *See* Opposition to Plaintiff's Motion for a Preliminary Injunction and Memorandum of the United States in Support of Defendants' Motion To Dismiss at 1, al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010), *available at* http://www.lawfareblog.com/wp-content/uploads/2010/09/usgbrief.pdf

which, if any, of the many groups operating in the tribal areas of Northwest Pakistan so qualify, or whether and under what circumstances entities such as al Shabaab, al Qaeda in the Islamic Maghreb (AQIM), or the al-Nusra Front—or parts of such groups—might also be encompassed within the definition of "associated force."

The absence of transparency as to the government's application of that concept have led some to speculate that the executive branch will simply subsume "extra-AUMF" threats into the AUMF, shoehorning emerging threats into the increasingly outdated framework of the September 2001 statute simply by labeling them "associated forces."[23] Were this to happen, the government could—despite the decimation of al Qaeda's core and the withdrawal of all U.S. ground troops from Afghanistan—seek to rely on the AUMF as authority for offensive military operations in Mali, Somalia, or even Syria, to say nothing of operations in other corners of the globe with even less of a connection to those who attacked us on September 11. More to the point, such force would be targeted against groups that have not coordinated with al Qaeda or the Taliban in hostilities against the United States, and that had no connection to the September 11 attacks (if they even existed twelve years ago), the language of the AUMF notwithstanding.

To be clear, there is no indication that this shift has already taken place. But there is relatively widespread agreement that it would be an unsatisfactory state of affairs, if and when it does.[24] The more that the AUMF is used to justify the use of military force against those with no connection to the September 11 attacks and the ensuing armed conflict, the more it is a fig leaf obfuscating the extent to which the United States is engaged in uses of force unauthorized by and inconsistent with Congress, the Constitution, and international law. As we explain in Part III below, if new groups emerge that pose a threat sufficient to warrant independent use-of-force authority, the government should affirmatively—and publicly—identify them, and obtain from Congress specific authorization to use force against *those* groups. If, in contrast, no special use-of-force authority is needed to respond to these groups, then there is no need for an expanded AUMF.

The proponents of the Hoover proposal, however, have seized upon a third

("The United States has further determined that AQAP is an organized armed group that is either part of al-Qaeda, or is an associated force, or cobelligerent, of al-Qaeda . . . .").

23. *See, e.g.*, CHESNEY ET AL., *supra* note 3, at 4 ("[I]n a growing number of circumstances, drawing the requisite connection to the AUMF requires an increasingly complex daisy chain of associations—a task that is likely to be very difficult (and hence subject to debate) in some cases, and downright impossible in others.").

24. *See, e.g.*, Miller & DeYoung, *supra* note 5 ("U.S. officials said administration lawyers are increasingly concerned that the law is being stretched to its legal breaking point, just as new threats are emerging in countries including Syria, Libya and Mali.").

possibility: That the lack of transparency surrounding the identity of associated forces, coupled with the belief that the government *will* seek to use force against so-called "extra-AUMF" threats regardless of the underlying statutory authorization, together justify a new regime that would address both issues. Thus, the Hoover proposal holds itself out as a compromise in which Congress delegates to the President the power to identify those groups against which military force is necessary pursuant to specific statutory criteria, but requires such delegations to be public—transparent and accountable, with *ex post* auditing and reporting, as well. As the Hoover proposal concludes,

> a listing system modeled on this approach best cabins presidential power while at the same time giving the president the flexibility he needs to address emerging threats. Such a listing scheme will also render more transparent and regularized the now very murky process by which organizations and their members are deemed to fall within the September 2001 AUMF.[25]

Although we agree wholeheartedly that greater transparency and accountability are necessary with regard to the government's scope of authority to use force against "associated forces" under the AUMF, we utterly fail to see how such increased oversight and transparency would justify Congress delegating its war authorizing powers to the Executive or the types of open-ended or broad force authorizations that both the Hoover paper and proposals reportedly being floated behind the scenes in Congress advocate.[26] To the contrary, as we explain below, such an approach rests on an assumption we—and Congress should—vigorously dispute, *i.e.*, that no alternative means exist for achieving a comparable result. Indeed, not only do such alternatives exist, but these proposals paradoxically threaten to make the nation *less* safe in the long term.

III. THE CASE AGAINST OPEN-ENDED AUTHORITY TO USE FORCE

The underlying assumption behind these proposals seems to be that expansion, not curtailment, of the military response to terrorism—including the targeted killing program and detention without charge—is required to keep the nation safe. These efforts, however, should be rejected for at least five reasons:

First, it is not at all clear that the threat these "extra-AUMF" groups pose has evolved to justify a new declaration of armed conflict; notably, the Executive is not saying it is needed. *Second*, repeated claims to the contrary notwithstanding, law enforcement

25. CHESNEY ET AL., *supra* note 3, at 10.

26. *See* sources cited *supra* note 6.

tools, coupled with international counterterrorism cooperation and capacity building, as well as strategic initiatives to reduce violent extremism, are and have proven to be a highly effective means of deterring, incapacitating, and gathering intelligence from terrorists; they can—and should—be the tools of first resort against these groups and their members. *Third*, to the extent that law enforcement tools are insufficient to prevent terrorist attacks against U.S. interests in a particular circumstance, the President's self-defense authorities should provide more than adequate authority to take necessary action. *Fourth*, if an organized armed group emerges that poses the type of sustained, intense threat that justifies a declaration of armed conflict, Congress can pass a new and appropriately circumscribed authorization to use military force—just as it did in the AUMF. *Fifth*, and most importantly, it is not at all clear that the expanded use of military force as a matter of first resort achieves the United States' ultimate security goal of protecting the nation from terrorist threats; to the contrary, it likely undermines it.

A. The Evolving Nature of the Threat

The push for a new AUMF is premised on the notion that, as the Hoover paper puts it, while the "original objects of the AUMF are dying off, newer terrorist groups that threaten the United States and its interests are emerging around the globe."[27] With this, we agree. The threat the United States faces from terrorism writ large has not been and cannot be eliminated by the decimation of al Qaeda's core.

But while the world is hardly threat-free, it is simply not evident that any particular emerging terrorist groups—or self-radicalized individuals—pose the kind of threat to the United States that al Qaeda posed on September 11, *i.e.*, one that cannot be met with existing tools, but instead requires an open-ended authorization of military force and the invocation of the laws of armed conflict. In fact, according to the Director of National Intelligence's recently released Intelligence Community Worldwide Threat Assessment, only AQAP is described as having the intent and capacity to launch attacks on the U.S. homeland.[28]

Moreover, under well-established rules of international law, a threat alone does not trigger an armed conflict, absent a certain level of hostilities that reach a threshold level of intensity involving an organized, armed group. This is for good reason: If any group of violent criminals triggered an armed conflict, virtually every nation-state would be in a perpetual state of war. A declaration of armed conflict against a long and/or open-ended list of emerging terrorist groups undermines the important distinction between war and peace, as well as the efforts to cabin war that have been the heart of the

27. CHESNEY ET AL., *supra* note 3, at 1–2.

28. *See* Clapper, *supra* note 17, at 3–4.

international community's collective engagement since the end of the Second World War. It would change the default from peace to war.[29]

B. The Expansion of Law Enforcement Capacities and Capabilities Since 2001

Claims to the contrary notwithstanding, law enforcement tools, coupled with other counterterrorism capabilities, are—and have proven to be—effective in dealing with a wide array of terrorist threats, including those also subject to military force under the AUMF. According to the Department of Justice's own statistics, for example, the United States has successfully prosecuted approximately 500 terrorists over the past decade, including several dozen who were apprehended overseas and/or arguably had connections to al Qaeda or its affiliates.[30]

More than just taking dangerous terrorists off the street, these arrests and prosecutions have also been the source of valuable intelligence about terrorist groups and their operations, due in part to the strong incentives for defendants to provide accurate, reliable information.[31] Recent examples include: Ahmed Warsame, who was captured off the coast of Yemen in 2011, transferred to the United States after a short period of military detention, and reportedly provided the government extensive intelligence and evidence prior to pleading guilty to providing material support to terrorism, among other charges;[32] Ibrahim Suleiman Adnan Adam Harun, an al Qaeda

29. Even if it is not the intention of the Hoover proposal's authors, experience under the FTO designation process suggests that the list of groups with which the United States is engaged in an armed conflict would grow, not shrink, over time—with every incentive leaving the Executive included to expand, not curtail its own the authority to use force; both the Executive and Congress loath to delist groups that might someday pose us harm; and little to no meaningful opportunity to correct flaws in either the process or substance of individual designations. *Cf.* United States v. Afshari, 446 F.3d 915, 917–22 (9th Cir. 2006) (Kozinski, J., dissenting from the denial of rehearing en banc) (critiquing FTO designation process). *But see* Jack Goldsmith, *Response to Jennifer and Steve on Statutory Authority and Next Generation Threats*, LAWFARE, Mar. 18, 2013, http://www.lawfareblog.com/2013/03/response-to-jennifer-and-steve-on-statutory-authority-and-next-generation-threats/ (asserting that the Hoover proposal contains "stricter substantive and temporal limits than the unilateral executive branch expansions of the AUMF combined with unilateral Article II authorities").

30. Department of Justice data obtained by Human Rights First in response to FOIA request (on file with authors).

31. *See, e.g.*, David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT'L SECURITY L. & POL'Y 1, app. 1 at 80–95 (2011) (providing examples of intelligence obtained from terrorism targets in law enforcement custody between approximately 1998 and 2010).

32. U.S. Att'y Office, S.D.N.Y., Guilty Plea Unsealed in New York, Mar. 25, 2013, http://www.fbi.gov/newyork/press-releases/2013/guilty-plea-unsealed-in-new-york-involving-ahmed-warsame-a-senior-terrorist-leader-and-liaison-between-al-shabaab-and-al-qaeda-in-the-arabian-peninsula-for-providing-material-support-to-both-terrorist-organizations.

operative captured in Italy last year, extradited to the United States, and is reportedly cooperating with investigators; [33] and David Headley, who provided valuable information about the terrorist organization Lashkar y Tayyiba, and Pakistan-based terrorist leaders, prior to being sentenced to 35 years for his role in the 2008 terrorist attack in Mumbai, India, and another planned, but thwarted attack, in Denmark, and committed to continued cooperation.[34] And just a few months ago, Abu Ghaith, Osama bin Laden's son-in-law, was taken into custody in Jordan, and is now being prosecuted in federal civilian court in New York for conspiring to kill Americans abroad.

To be sure, as critics will be quick to point out, law enforcement was not effective in stopping the September 11 attacks. But this response is a red herring, particularly when one considers just how much our counterterrorism capacities have increased over the past decade. Since 2001 alone,

- The so-called Foreign Intelligence Surveillance Act (FISA) wall, which was sharply criticized by the 9/11 Commission for inhibiting the sharing of intelligence and law enforcement information and thereby contributing to pre-September 11 law enforcement failures, [35] has come down. Thanks to amendments included in the USA PATRIOT Act of 2001, FISA now explicitly permits the coordination of law enforcement and intelligence officials to protect against acts of international terrorism,[36] and various statutory reforms over the past decade have only further facilitated such interagency cooperation.[37]

33. Mosi Secret, *Man Charged with Plotting Against U.S. Abroad*, N.Y. TIMES, Mar. 20, 2013, at A28.

34. U.S. Dep't of Justice, David Headley Sentenced to 35 Years in Prison for Role in Indian and Denmark Terrorist Attacks, Jan. 24, 2013, http://www.justice.gov/opa/pr/2013/January/13-nsd-104.html; U.S. Dep't of Justice, Fact Sheet: The Criminal Justice System as a Counterterrorism Tool, Jan. 26, 2010, http://www.justice.gov/opa/pr/2013/January/13-nsd-104.html.

35. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 78–80, 270–72 (2004).

36. *See* 18 U.S.C. § 1806(k); *see also* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 218, 115 Stat. 272, 291 (2001) (overruling the "primary purpose" doctrine, pursuant to which FISA had been interpreted to require that "the purpose" of FISA surveillance be to collect foreign intelligence information, and replacing it with a requirement that foreign intelligence be a "significant purpose" of such surveillance).

37. *See also* JEROME P. BJELOPERA, CONG. RES. SERV., THE FEDERAL BUREAU OF INVESTIGATION AND TERRORISM INVESTIGATIONS (2013), *available at* http://www.fas.org/sgp/crs/terror/R41780.pdf (describing the enhanced investigative tools, authorities, and capabilities provided and employed by the FBI since September 11, 2001).

- The FISA Amendments Act of 2008 further authorized the government, albeit not without controversy, to engage in the warrantless interception of communications that take place in the United States if the targets are foreigners overseas. In a recent debate, Sen. Dianne Feinstein, Chairwoman of the Senate Intelligence Committee, described these authorities as having "produced and continu[ing] to produce significant information that is vital to defend the nation against international terrorism and other threats"—including information relied upon in making recent terrorism-related arrests.[38]

- Substantive criminal laws have evolved to respond to the changing nature of the threat. Material support statutes, for example, which have been interpreted broadly,[39] were expanded to cover overseas conduct in October 2001, with further expansions in 2004.[40] Additional substantive expansions to these laws were also added in 2004, including the addition of a new crime of "receiving military-type training from a foreign terrorist organization."[41]

- In 2009, the High-Value Intelligence Group was put into effect—pulling together the expertise of top intelligence professionals across the government, including from the FBI, CIA, and DOD—to design and conduct intelligence interviews of high-value terrorism detainees.

- Federal courts have recognized an expanded "public safety" exception to *Miranda* to allow for the limited introduction into evidence of unwarned statements.[42]

- An increasing cohort of judges and civilian prosecutors has successfully navigated the handling of classified information. Obvious examples include the recent closed-door arraignment of three European men apprehended on their way to

38. *See* Ellen Nakashima, *Senate Approves Measure to Renew Controversial Surveillance Authority*, WASH. POST. Dec. 28, 2012, at A3.

39. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) (upholding 18 U.S.C. § 2339B against First and Fifth Amendment constitutional challenges).

40. *See* Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, § 6603(d), 118 Stat. 3638, 3763 (amending 18 U.S.C. § 2339B(d)); USA PATRIOT Act of 2001 § 805(a)(1)(F), 115 Stat. at 377 (amending 18 U.S.C. § 2339A(a)).

41. *See* IRTPA § 6602, 118 Stat. at 3761–62 (codified at 18 U.S.C. § 2339D).

42. *See, e.g.*, United States v. Khalil, 214 F.3d 111, 115–21 (2d Cir. 2000) (upholding questioning of terrorism suspect pursuant to public safety exception); United States v. Abdulmutallab, No. 10-20005, 2011 WL 4345243 (E.D. Mich., Sept. 16, 2011) (relying on the public safety exception to *Miranda* in rejecting motion to suppress statements obtained under 50 minutes of unwarned questioning).

Yemen and accused of supporting al Shabaab,[43] and the extensive handling of classified information in the prosecution of Ahmed Ghailani, now serving a life sentence for his role in the 1998 embassy bombings.[44] But other examples abound.[45]

- Meanwhile, widely cited fears about the potential harm of bringing high-profile terrorism suspects into federal court have proven baseless. Not a single terrorist trial has been attacked, and not a single terrorism suspect or convict has escaped.

To be sure, intelligence gathering capacities are still imperfect—as the Boston Marathon bombings show all too harshly. But the Boston episode underscores a critical point lost to many critics: the shortcomings in law enforcement tools generally stem from shortcomings in anticipatory knowledge, *i.e.*, the government's ability to know in advance of any and all potential attacks. This is a problem that affects law enforcement and military uses of force *alike*. Where the government *does* have knowledge of a threat to the nation's security, law enforcement tools have proven to be effective in both incapacitating threatening actors and gathering intelligence that can help thwart other attacks.

C. The President's Unquestioned Self-Defense Authorities

Our support of law enforcement tools notwithstanding, we do not claim that the law enforcement approach is the *only* possible response to terrorism, or that the nation's hands are tied if law enforcement tools are unavailable (given the location of the individual) or ineffective (given the scale of the threat). To the contrary, we recognize the possibility that groups or individuals will come to light that pose a significant, strategic, and imminent threat that the criminal law cannot adequately address. But if and when this situation presents itself, the Executive has the authority—and the responsibility—to act.

Indeed, it is well settled that the President has inherent authority under Article II of the U.S. Constitution and Article 51 of the U.N. Charter to take immediate—and, where necessary, lethal—action in defense of the nation. As the Supreme Court explained 150

43. *See* U.S. Atty's Office for the E. Dist. of N.Y., Three Supporters of Foreign Terrorist Organization al Shabaab Charged in Brooklyn Federal Court, Face Life in Prison, Dec. 21, 2012, http://www.fbi.gov/newyork/press-releases/2012/three-supporters-of-foreign-terrorist-organization-al-shabaab-charged-in-brooklyn-federal-court-face-life-in-prison.

44. *See* Benjamin Weiser, *Ex-Detainee Gets Life Sentence in Embassy Blasts*, N.Y. TIMES, Jan. 25, 2011, at A18.

45. *See, e.g.*, United States v. Abu Ali, 528 F.3d 210 (4th Cir. 2008).

years ago, "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority."[46] President Bush would have required no statute to shoot down the planes headed to the World Trade Center on September 11; President Obama would have required no statute to defend U.S. diplomats from attack in Benghazi. The failure to do so in either tragic episode was not the result of insufficient authorities, but insufficient intelligence in advance of the attacks.

Take, moreover, the type of situation with which the Hoover proposal seems most concerned: a terrorist group that does not neatly fall within the AUMF, but is poised to carry out an imminent and lethal attack on the U.S. homeland from a part of the world in which nonmilitary means of thwarting the attack are unavailable. In such a situation, the President could—and should—take action, consistent with the international law requirements of necessity and proportionality, without waiting for a new congressional authorization to use force. We, too, worry about such a hypothetical, but we fail to why, on those facts, self-defense authorities would be inadequate.

D. Congress's Ability to Pass a Group-Specific AUMF If and When It Is Needed

Moreover, even if such a group *were* to emerge, nothing would or should stop Congress from providing a new, narrow, and specific authorization to use force, just as it did within three days of the September 11 attacks, based on a case-specific determination that the target of the force authorization is an organized armed group that presents the type of sustained, significant threat justifying the affirmative declaration of an armed conflict.

Proposals to delegate such future—and momentous—decisions to the President lack *any* historical precedent, and for good reason. It is *Congress*, not the Executive, that is given the authority under our Constitution to declare war. An authorization to use military force is a measure that should be undertaken solemnly, and only with public debate and buy-in by representatives of a cross-section of the nation, based upon a careful and deliberate evaluation of the nature of the specific threat. It should not be an *ex ante* delegation to the President to make unreviewable decisions to go to war at some future date. This is something our Founding Fathers understood well. Thus, proposals to delegate such a determination to the President threaten the carefully calibrated balance of powers enmeshed within the Constitution, essentially asking Congress to surrender one of its most important functions to the Executive.

46. The Prize Cases, 67 U.S. (2 Black) 635, 668 (1863).

The authors of the Hoover proposal nevertheless respond that Congress can't be expected to act with sufficient dispatch: "Congress probably cannot or will not, on a continuing basis, authorize force quickly or robustly enough to meet the threat, which is ever-morphing in terms of group identity and in terms of geographic locale."[47] And yet, no examples exist of cases where Congress either could not or would not provide the necessary authority—or why, in the interim, the President's Article II authorities, criminal laws, and other existing counterterrorism authorities weren't sufficient to meet the threat. Until and unless Congress is besieged with requests to authorize the use of military force against a range of terrorist groups, each of which presents a threat akin to that posed by al Qaeda a decade ago, and fails to act on them, it is difficult to see why case-specific use-of-force authorizations would be inadequate.

E. Why a New AUMF Would Also Be Unwise

Up to this point, our analysis has focused on the many reasons why a new AUMF is not needed. Such a measure would also be counterproductive and unwise. Most importantly, an open-ended declaration of armed conflict actually runs the risk of *undermining* our principal counterterrorism goal—*i.e.*, protecting this and future generations of Americans from the threat of international terrorism.

In recent testimony before a subcommittee of the Senate Judiciary Committee, Farea al-Muslimi, a freelance journalist from Wassab, Yemen, provided a stark reminder of this risk. Mr. al-Muslimi painted a vivid description of the ways in which a recent drone strike in his village invoked terror of the United States. As he put it: "Had the United States built a school or hospital, it would have instantly changed the lives of my fellow villagers for the better and been the most effective counterterrorism tool."[48] Instead, he warns that the strikes are strengthening AQAP's standing and undercutting U.S. security: "AQAP recruits and retains power through its ideology, which relies in large part on the Yemeni people believing that America is at war with them."[49]

Mr. Muslimi is not alone in his views. He is joined by none other than General Stanley McChrystal, former commander of U.S. forces in Afghanistan; General James E. Cartwright, former Vice-Chairman of the Joint Chief of Staff; and Admiral Dennis Blair,

47. CHESNEY ET AL., *supra* note 3, at 10.

48. *Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killings*, Hearing Before the S. Comm. on the Judiciary, Subcomm. on the Constitution, Civil Rights, and Human Rights, 113th Cong. (2013) (statement of Farea Al-Muslimi), *available at* http://www.judiciary.senate.gov/pdf/04-23-13Al-MuslimiTestimony.pdf.

49. *Id.*

former Director of National Intelligence—all of whom have warned of the ways in which excessive reliance on uses of force in general, and targeted killings in particular, can increase or otherwise engender resentment toward the United States.[50] These men echo the lessons of the U.S. Army's Counterinsurgency Manual, which describes the recuperative power of insurgent groups, the impossibility of killing every insurgent, and the potential counterproductive consequences of such attempts.[51]

Other counterproductive consequences include the risks of further destabilizing already unstable regimes, increased international condemnation, and the very real possibility of reduced counterterrorism cooperation as a result. Already, there are indications that some key allies are nervous about providing the United States with intelligence information that might be used as a basis for drone strikes.[52] In fact, Germany reportedly restricted the type of information it can pass on to its American counterparts in response to concerns about its intelligence being used to support what it deemed to be illegitimate drone strikes.[53] Meanwhile, it sets a disturbing precedent for other sovereigns—strengthening the claims of Russia and China, among others, to use

50. *See* Dennis Blair, Op-Ed, *Drones Alone Are Not the Answer*, N.Y. TIMES, Aug. 15, 2011, at A21 (describing the United States' "reliance on high-tech strikes that pose no risk to our soldiers [as being] bitterly resented in a country that cannot duplicate such feats of warfare without cost to its own troops"); David Alexander, *Retired General Cautions Against Overuse of Hated Drones*, REUTERS, Jan. 7, 2013, *available at* http://www.reuters.com/article/2013/01/07/us-usa-afghanistan-mcchrystal-idUSBRE90608O20130107 (quoting Retired General Stanley McChrystal as warning of the "resentment created by American use of unmanned strikes"); Mark Mazzetti & Scott Shane, *As New Drone Policy is Weighed, Few Practical Effects Are Seen*, N.Y. TIMES, Mar. 22, 2013, at A11 (quoting General Cartwright as warning of "blowback" resulting from targeted killings); *see also* MICAH ZENKO, REFORMING U.S. DRONE POLICIES, COUNCIL OF FOREIGN RELATIONS: SPECIAL REPORT NO. 65, at 10-11 (2013), *available at* http://www.cfr.org/wars-and-warfare/reforming-us-drone-strike-policies/p29736?co=C009601 (describing the strong correlation in Yemen between increased targeted killings since December 2009, heightened anger toward the United States, and sympathy with or allegiance to AQAP).

51. U.S. Dep't of the Army, Field Manual No. 3-24: Counterinsurgency ¶ 128 (2006) ("[K]illing every insurgent is normally impossible. Attempting to do so can also be counterproductive in some cases; it risks generating popular resentment, creating martyrs that motivate new recruits, and producing cycles of revenge."); *see also id.* ¶ 129 ("Dynamic insurgencies can replace losses quickly. Skillful counterinsurgents must thus cut off the sources of that recuperative power" by increasing their own legitimacy at the expense of the insurgent's).

52. *See, e.g.*, Ravi Somaiya, *Drone Strike Prompts Suits, Raising Fears for U.S. Allies*, N.Y. TIMES, Jan. 30, 2013, at A4.

53. *See, e.g.*, Holger Stark, *Drone Killing Debate: Germany Limits Information Exchange with US Intelligence*, DER SPIEGEL, May 17, 2011, *available at* http://www.spiegel.de/international/germany/drone-killing-debate-germany-limits-information-exchange-with-us-intelligence-a-762873.html.

force as a matter of first resort against any member of groups they deem to be "terrorist," broadly defined.[54]

IV. THE BETTER WAY FORWARD

Ultimately, we ought to be having a discussion not about how to perpetuate the conflict that al Qaeda began, but about how to end that conflict and shift away from a permanent state of war. To that end, we urge policymakers to consider three possible alternatives:

A. A More Transparent AUMF

For all the reasons described in Part I, the AUMF, coupled with law enforcement and intelligence tools and backstopped by the President's inherent Article II authorities, have proven to be a more than adequate basis for addressing the threat posed by organized terrorist groups since September 11. Should an organized armed group emerge that cannot adequately be dealt with through these existing authorities, the President would be able to ask, and Congress would be in a position to grant, authorization to deal with the threat posed by that specific group. Notably, the Obama Administration does not appear to think that such a situation exists at the present, and is not asking for new, expanded authority. Never before has Congress declared war against an enemy when the President has not asked it to do so.

That said, there is a legitimate concern about the lack of transparency in how the AUMF is being interpreted, especially with regard to which groups qualify as associated forces. The United States should not be engaged in a secret war. Such secrecy flies in the face of the most fundamental aspect of the rule of law—fair notice—while also generating suspicion and distrust. The American public should be aware of, and thus able to publicly discuss and debate, the groups that we are fighting. Meanwhile, innocent civilians should be given the benefit of notice, thereby allowing them to take steps to disassociate themselves from those groups (and the members thereof) with which the United States deems itself to be in an armed conflict. Either the President should take it upon himself to make public any determination that a particular group qualifies as an associated force of al Qaeda or the Taliban under the AUMF, or Congress should demand it.

54. John O. Brennan, Assistant to the President for Homeland Sec'y & Counterterrorism, Remarks at the Harvard Law School Program on Law & Security: Strengthening our Security by Adhering to our Values and Laws (Sept. 16, 2011), *available at* http://www.lawfareblog.com/2012/04/brennanspeech/ (acknowledging that "we are establishing precedents that other nations may follow, and not all of them will be nations that share our interests or the premium we put on protecting human life, including innocent civilians.").

B. An Afghanistan-Based AUMF Sunset

An alternative option would be for Congress to write a sunset provision into the AUMF—one that is tied to the withdrawal of forces from Afghanistan, currently scheduled for the end of 2014. This approach has intuitive appeal, given the range of concerns about an open-ended and ever-expanding armed conflict without an identifiable battleground or core center of operations. The long lag time before the authorities actually sunset would provide the Executive ample opportunity to determine what, if any, additional authorities are needed to deal with the threat, and would leave Congress ample time to respond.

One issue that arises with the approach, however, is the question of the Guantánamo detainees. With the formal cessation of hostilities comes the end of the authority to detain under the laws of war—and, therefore, under the AUMF. While this will be a cause for celebration for many, it is likely to be a cause of concern for some members of Congress and the Executive. A 2009 review conducted by the Obama Administration concluded that of the 166 detainees still at Guantánamo, some four dozen were deemed "too dangerous to release" but ineligible for prosecution. While conditions may have changed since that assessment was made, and some reasonable "wind-down" authority will almost certainly be permitted,[55] at some point that authority *will* cease. That said, the government's interest in continued detention pursuant to the laws of war ought not be the *reason* for the war—this would be a perverse example of the tail wagging the dog. We note that it would probably be feasible to negotiate deals to keep these detainees under surveillance, particularly with the use of sophisticated intelligence and law enforcement tools, so long as we could find a nation to take them.

It is worth noting, however, that this issue may soon arise whether or not Congress formally sunsets the AUMF. In *Hamdi* v. *Rumsfeld*,[56] the Supreme Court concluded that the authorization to use force includes the authority to detain, a plurality of the court also warned that "[i]f the practical circumstances of a given conflict [meaning boots on the ground] are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel."[57] With the withdrawal

55. *Cf.* Ludecke v. Watkins, 335 U.S. 160 (1948) (upholding detention of German nationals under Alien Enemy Act of 1798 even after 1945 German surrender).

56. 542 U.S. 507 (2004).

57. *Id.* at 520 (plurality opinion). Congress has since "affirm[ed]" this detention authority, specifying by statute that the authority to use force includes the authority to detain. *See* FY2012 NDAA § 1021, 125 Stat. at 1562. But it is not clear that affirmation by Congress grants authority that the Supreme Court would otherwise reject.

of troops from Afghanistan, the relevant practical circumstances will have in fact changed, and may yield a turning point with respect to the Guantánamo detainees (especially those whose detention is based upon ties to the Taliban rather than al Qaeda), regardless of whether the AUMF sunsets.

A sunset provision has the obvious benefit of making clear to our allies and to the pool of would-be terrorist recruits that, twelve years on, the United States is not engaged in, or seeking to engage in, a state of perpetual war. More significantly, it also drives home the larger point—that at some point, perhaps soon, the conflict Congress authorized in September 2001 will effectively have run its course. The Executive could, of course, treat the AUMF as lapsed, even without such legislation.

C. Repeal and Replace

A final, albeit suboptimal, option would be to repeal the AUMF and replace it with an AQAP-specific authorization. So long as the AUMF remains on the books, AQAP's apparent inclusion as an "associated force" provides authority for the United States to use military force against it, and thereby moots the need for an AQAP-specific statute. But if Congress were to pursue an AUMF sunset or if the current AUMF were otherwise determined to have lapsed, it is possible the Obama Administration would pursue such an authorization, given that AQAP is the one terrorist group currently deemed to have the capacity and intent to launch attacks on the U.S. homeland, according to the recent Intelligence Community Worldwide Threat Assessment. The threat is qualified, however. As the Assessment describes, AQAP leaders will have to "weigh the priority they give to US plotting against other internal and regional objectives," along with limits on the number of their members who are in a position to operationalize U.S. attacks."[58]

In any event, such an authorization should only be adopted after public debate and discussion, based on legislative determinations that AQAP poses the type of sustained, intense threat that justifies the application of law-of-war tools, and that a declaration of armed conflict is in the nation's best security interests. *If* the facts (and the public) support it, an AQAP-specific authorization would be the type of *narrow and specific* authorization that we have argued for throughout, and would be far preferable to the more expansive (if not potentially limitless) proposals also under consideration.

That said, Mr. Muslimi's testimony before the Senate Judiciary Committee, taken together with the comments of Blair, Cartwright, and McChrystal, among others, provide an important moment of pause, and a reminder of why Congress should be cautious before embracing this approach. As they all note, targeted killing operations

58. Clapper, *supra* note 17, at 3–4.

may be creating more enemies than they are eliminating. Replacing the AUMF with an AQAP-specific statute—and thereby condoning the permissive use of force vis-à-vis AQAP as a matter of first resort going forward—might invite the very type of excessive reliance on targeted killings that facilitate AQAP recruitment, induce an increased focus on U.S. operations, and ultimately do us harm.

V. CONCLUSION

In his majority opinion in *Boumediene* v. *Bush*, Justice Anthony Kennedy offered a sober reflection on the historical relationship between the courts and the political branches with respect to the war powers. In his words,

> Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury. *This result is not inevitable, however.* The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism.[59]

It seems beyond dispute that the target of Justice Kennedy's rhetoric was the AUMF—and the very real possibility that, absent thoughtful legislative intervention, the courts would soon have to confront questions that they have historically sidestepped about the scope of use-of-force authorizations during wartime. And yet, next month marks the fifth anniversary of the *Boumediene* decision, and the AUMF remains in full force. The time has come to take up Justice Kennedy's invitation—to "engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism." Reasonable minds will certainly disagree about the right answer, but an open-ended and unnecessary expansion of the AUMF is clearly the wrong one.

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59. Boumediene v. Bush, 553 U.S. 723, 797–98 (2008) (emphasis added).

Chairman LEVIN. Senator Kaine.

Senator KAINE. Just briefly, Mr. Chairman. This is more of a comment.

Based on Mr. Donnelly's question, where this becomes very important, and I was not going to use any examples in mine because I think hypotheticals can get you into trouble. But Mr. Donnelly asked the question about al Nusra, and Secretary Sheehan's answer was, yes, that would be an affiliated group. I think it is highly important that we stress to the administration that commencing hostilities that puts American troops or materiel in harm's way in Syria without fresh congressional discussion and approval, utilizing the 2001 document would be enormously controversial. The testimony that I hear today suggests that the administration believes that they would have the authority to do that. But I do not want us to walk out of the room with leaving an impression that Members of Congress also share the understanding that would be acceptable.

There may come a time when we would need to have that discussion, but I fully believe, in looking at this AUMF, that discussion would have to take place between the executive and Congress and could not rely on an expanded interpretation of the AUMF language.

So since Senator Donnelly raised that question about Syria and Secretary Sheehan said that al Nusra would be included in the affiliated groups as currently interpreted by the administration, I just do not want to walk out of this room with any doubt that at least this Senator would expect under the Constitution that an administration would come back to Congress and have that discussion and not use this AUMF to justify commencement of hostilities in that theater or others.

Chairman LEVIN. If I can use your time just to comment, I happen to agree with you that this administration or any other administration would be very wise to come back to Congress before they did what you said in your hypothetical, which was to put boots-on-the-ground in Syria based on this authority. They would be wise to do it.

However, I think we all have to face the question as to whether or not if they decided to use a drone against al Nusra, if they decided al Nusra was affiliated with al Qaeda, whether they would have the authority to use a drone, for instance, against al Nusra. I am not sure that would be the same question that you raised in terms of boots-on-the-ground in terms of the wisdom of a President coming to Congress to discuss that.

I think Senator King has raised an extremely important question. It needs to be answered, I believe, in a much more definitive way for the record by the Attorney General as to whether or not the affiliated language applies to subsequent affiliations, for instance, I think that is an important one, of somebody that was not even an entity in existence at the time of 2011.

So, Senator King, it is your turn.

Senator KING. Senator Kaine made my point somewhat less passionately than I did, but I think he made the point.

I want to be clear. I believe that fighting terrorism is an absolute paramount responsibility of this Government and this President or

any President. I think we have to be able to respond. I am uncomfortable doing it through gloss on a legal document that, to my view, does not support it and would much rather do it in a straightforward way. Senator Inhofe said if there was an abuse, he would be the first to act on it. My concern is that when there is an abuse, it may be too late to act on it. The whole idea of the Constitution is that Congress makes that initial decision.

I actually worked here in the 1970s when the War Powers Act was negotiated. I am well aware that this is not an easy question. It is not a clear, bright question about declaring war. But I do think this is an erosion of legislative authority that was expressly granted to Congress, and I think we need to take care that it does not happen through an overly broad reading of a 12-year-old legal document that I think absolutely, clearly does not apply to many of these new threats that we are dealing with. It does not mean we do not have to deal with them, but I just do not like the idea of reading a 12-year-old document so broadly that it renders the congressional authority and the importance of congressional authority for using military force abroad of no force and effect. That is my only concern.

Thank you, Mr. Chairman.

Chairman LEVIN. We will ask the Attorney General this question that you have raised as to whether or not the authority exists under the AUMF to go after affiliated groups that are not named and which subsequently become affiliated with al Qaeda.

The questions which my colleagues have raised I think are important questions, including the one on al Nusra. It struck me as well. In that situation, is there authority? Because if we find that they are affiliated, apparently they are, with al Qaeda, is there authority to go after them and using what mechanism? I think it is a little easier in your assumption, Senator Kaine, your hypothetical, to say you should come back to Congress if we are talking about boots-on-the-ground against al Nusra. On the other hand, if it is a drone attack on them, how is that different from drone attacks which have been used against affiliates of al Qaeda in other places.

Senator KING. Mr. Chairman, I would point in response to a question from Senator Graham, the panel responded affirmatively, and I wrote down the quote. "The President has authority to put boots-on-the-ground in Yemen or the Congo under this Act." I believe that was the testimony, and that is where I am getting very concerned.

Chairman LEVIN. It has to not only be affiliated, I want to make clear, under my question to the panel, but they must join the fight against us as well.

Now, one other point that you just made, Senator King. I believe it was Mr. Taylor who was trying to answer Senator Graham saying there is not only authority domestically, there is a question under international law as well. That also becomes involved in, I believe, Senator Graham's hypothetical.

I must say that if this power were abused, I would be joining Senator Inhofe as to who would be first in line to object to an abuse of this authority. We would have to fight for who is first in line to

take on any abuse of this authority. But it is a very important question which has been raised here.

We are very grateful. If there are no additional questions by our colleagues, we are grateful to this panel. We will have a lot of additional questions for the record in addition to the ones that have been raised here. The staff will prepare the letter to the Attorney General setting out the question which has been raised by Senator King. We thank you all. Yes, Secretary Sheehan?

Mr. SHEEHAN. Senator, just one clarification. When I was asked whether the President had authority to put boots-on-the-ground which, by the way, is not legal term and that he did have the authority to put boots-on-the-ground in Yemen or in the Congo, I was not necessarily referring to that under the AUMF. Certainly the President has military personnel deployed all over the world today in probably over 70 or 80 countries, and that authority is not always under AUMF. So I just want to clarify for the record that we were not talking about all of that authority subject to AUMF.

Chairman LEVIN. Okay. I am satisfied with that. Thank you for that clarification.

We will call the second panel now with thanks to our first panel. Our second panel today is a number of legal experts on the topics under discussion. We have Ms. Rosa Brooks, Professor of Law, Georgetown University Law Center; Mr. Geoffrey Corn, Professor of Law, South Texas College of Law; Mr. Jack Goldsmith, Professor of Law, Harvard Law School; Mr. Kenneth Roth, Executive Director of Human Rights Watch; Mr. Charles Stimson, who is Manager of the National Security Law Program at The Heritage Foundation.

We very much appreciate your willingness to appear at this hearing today. We look forward to your testimony. Your full testimony, your written testimony, will be made part of the record. We, of course, want you to make opening statements. If you can, restrict your opening statements to 6 minutes. We arranged our witnesses alphabetically. So we are going to start with you, Ms. Brooks.

STATEMENT OF MS. ROSA BROOKS, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER

Ms. BROOKS. Thank you, Chairman Levin and Senator Inhofe. It is great to be here. I really appreciate your holding these hearings because these issues are incredibly important.

I spent 2½ years working at DOD as Counselor to the Under Secretary of Defense for Policy, so I also want to say how much respect I have for the accomplishments and talents of the members of the first panel. I also want to extend my sympathies to them because I think they were put in a position where I have, frankly, never seen such an accomplished, talented group of people give such muddled and incoherent answers to some fairly straightforward questions. I think they have created what my military colleagues call a target-rich environment for those of us on panel two. It is a little tough to know where to start here.

So let me try to start by talking a little bit about the context in which the AUMF was passed, and this is something you, obviously, know much more about than I do. Right after September 11, while the World Trade Center was still smoking, the Pentagon was still smoking, is when the first discussions of passing an AUMF oc-

curred. At that time, as you recall, the Bush administration initially came to this body and asked for a more open-ended authorization to use military force than was ultimately passed. I believe that the language that the Bush administration had proposed at that time was that the AUMF authorized the President to use force to, "deter and preempt any future acts of terrorism or aggression against the United States."

Now, even a few short days after the September 11 attacks, Congress was reluctant to give the administration such an open-ended authorization to use force because I think they saw, very rightly, that would have the potential to be an open-ended declaration of war against an undefined enemy which could routinize the use of force in a way that would be totally unconstrained. I think Senator King quite rightly commented that Congress is given not only the power to declare war but a wide range of associated powers. I think Congress quite rightly felt at that time that such a broad authorization, what would amount to a declaration of war legally speaking, which would then trigger the applicability of armed conflict, was too broad and Congress would cede too many of its powers to the executive branch. As you all know, frankly, once you cede power to the executive branch, it is awfully hard to get it back again.

Instead, as has already been stated, the AUMF that was passed was fairly clearly restricted in terms of manifesting congressional intent: (A) to those responsible in some way or another for the September 11 attacks; and (B) for the purpose of preventing attacks against the United States; not for the purpose of preventing terrorist attacks of all sorts everywhere against anyone, but for the purpose of preventing such attacks by such specified groups responsible for September 11 against the United States itself.

My sense is that even at that very frightening moment when emotions ran very high and the threat was far greater, I think, than it is today, Congress was very careful to try to not send a signal to the executive branch that Congress was effectively delegating its war powers permanently.

Nevertheless, I think we have seen, and I think this came through in the previous panel, the existing AUMF has effectively been interpreted as creating exactly the open-ended grant of authority for an ongoing armed conflict with no limitations that Congress sought to avoid initially. That is primarily through this concept of associated forces.

Now, the representatives of the administration are quite correct to say that under law of armed conflict, the authorization to use force does extend to co-belligerents. The difficulty is that today, unlike in World War II, it is a lot harder to know how to apply that rule, particularly outside of so-called hot battlefields. I do not quite know what it means or what the criteria are for entering the fight, for instance, what that means outside of hot battlefields. I do not know what happens if the al Qaeda core is decimated and ceases to exist. Can we still have associates of al Qaeda, in that case forever, as long as they indicate their sympathy, and if so, what kind of constraint does that pose?

I also do not quite know what it means if we simultaneously say, as members of the first panel quoted Jeh Johnson saying, that to

be an associated force you have to be an organized force, but then say we cannot give Congress list of such forces because they are too disorganized. Their membership is too shifting. Their alliances are too murky. It has to be one or the other, it seems to me, and I think that is a pretty incoherent standard.

What has happened, as a result, is that we now appear, and obviously, I am going only on publicly available information, to be using armed force against such entities as Somalia's al Shabaab, which not only appears to have no connection to the September 11 attacks, but does not appear, according to our own Director of National Intelligence, to pose any particular threat to the United States insofar as its ambitions are primarily local.

What has happened, essentially, is that this idea of associated forces has been used as a back door to shoehorn into the AUMF everything with virtually no limits, and I think we have heard that here.

So what do we do? You have three options. One is, I think, to do nothing. You do nothing and you let the administration continue to make something of a mockery of Congress' intent as I take it to have been. Two, you can expand the AUMF to effectively explicitly authorize what is going on right now, which would have the virtue of clarity and honesty. Or three, if what is being done at the moment exceeds what, from a policy perspective, you consider wise, you should, in fact, amend or revise the AUMF to place limits on what the executive branch can do without additional authorizations from you.

In my own view, an expanded AUMF would be neither wise nor necessary.

I think that this is as much a policy question as it is a legal question. We, frankly, have a choice of legal regimes here, and I will talk more about that in a minute.

My own view is that expanding beyond those who actually pose a sustained, intense threat to the United States is not a very good idea. I, frankly, think it is counterproductive. I think we run the risk of doing what Donald Rumsfeld asked during the Iraq War which is creating new terrorists faster than we can kill them.

I also think at the moment we risk alienating some of our key European allies whose view of the applicable international law is very different from ours and who may become somewhat reluctant to share intelligence information with us because they are also operating in a different domestic legal regime and face potential liability in their own courts if they are complicit in what their courts choose to see as extrajudicial killings.

I also think it is unwise for separation of powers reasons. As I said, once you cede power open-endedly to the executive branch, it is hard to get it back. Just from an institutional perspective, I would urge you to be quite careful, measured, and detailed in precisely what you mean when you authorize the executive branch to use force on the theory that it is always easier to give more if it becomes necessary than to take back what has been improvidently given.

I also think that it is unnecessary to expand the AUMF. Here I think maybe this will get to the root of the earlier discussion be-

tween Senator King and Senator Levin on what exactly does the administration have the authority to do.

The authority to use force is not the same as the authority to enter an armed conflict. It is not an all-or-nothing matter. It is not as though either we have an armed conflict and you can use force against threats or you do not have an armed conflict and you cannot. Both from a constitutional perspective, the President clearly has the inherent authority to use force if necessary to protect the United States against a specific imminent threat, and equally under international law even if there is no armed conflict, the President clearly has the authority to use military force to protect the United States against an imminent threat.

So the President either way, AUMF or no AUMF, if there is a threat to the United States of the nature that al Qaeda presented on September 11 or even, frankly, a good deal less, if the threat is imminent and specific against the United States, there is no question that whatever this body does, I think, the U.S. public, Congress, and international community would be fully supportive of the President's legal right and indeed responsibility to use force to protect the Nation.

That is because we have two different legal constructs here. One is the law of armed conflict. One is the international law of self-defense and they roughly track what Congress could give in the AUMF and what the President has even in the absence of an AUMF.

With the law of armed conflict, it is the most permissive legal regime with regard to executive authority to use force in an ongoing way. It has the fewest constraints on executive discretion. Once the law of armed conflict has been triggered and authorized by this Congress, the President can use force against threats that are not imminent. He can use force against people based on their status, e.g., their membership and affiliations rather than their actual activities. You can target a sleeping enemy under the law of armed conflict, and the authorization to use force is continuous until such time as the conflict actually comes to an end.

In the international law of self-defense, in contrast, which the President, I believe, has the right to use under his inherent constitutional authorities, there are more legal constraints. There are more legal constraints because it does not require congressional approval, the President is presumed to be limited to using force to the extent necessary to respond to an imminent, specific threat and the authorization under that inherent regime essentially could be seen as expiring either when the threat has been addressed or at such time that Congress has been able to act to replace it with some other kind of legal regime.

So in my view, I think that it would be more appropriate if Congress wants to do something to limit the President's ability to continue to use force under the existing AUMF with a sunset clause or something similar. You do not need to fear that leaves the United States vulnerable at all. I think, in whatever muddled way, the first panel was trying to say this. There is already enough authority to respond to imminent threats. The question for you as a body is, do you want to make that authority where the President has to come back to you and ask for more if he needs it as a default

or where the President gets to go on at his own discretion without ever having to return as the default, as I think the first panel suggested they thought was legally the case.

Thank you.

[The prepared statement of Ms. Brooks follows:]

PREPARED STATEMENT BY MS. ROSA BROOKS

Chairman Levin, Ranking Member Inhofe, and members and staff of the Committee on Armed Services, thank you for giving me the opportunity to testify today on the law of armed conflict, the use of military force, and the 2001 Authorization for Use of Military Force (AUMF). These are extraordinarily important issues, and I appreciate your commitment to taking a fresh look at them.

I am a law professor at Georgetown University, where I teach courses on international law, constitutional law, and national security issues. I am also a Bernard L. Schwartz Senior Fellow at the New America Foundation, and I write a weekly column for Foreign Policy magazine. From April 2009 to July 2011, during a public service leave of absence from Georgetown, I had the privilege of serving as Counselor to the Under Secretary of Defense for Policy at the Department of Defense. This testimony reflects my personal views only, however.

Mr. Chairman, almost 12 years have gone by since the passage of the AUMF on September 14, 2001. The war in Afghanistan—the longest war in U.S. history—has begun to wind down. But at the same time, a far more shadowy war has quietly accelerated.

I am referring to what many have called the "drone war": the increased use of military force by the United States outside of traditional, territorially bounded battlefields,[1] carried out primarily, though not exclusively,[2] by missile strikes from remotely piloted aerial vehicles.[3] In recent years this shadowy war has spread ever further from "hot" battlefields, migrating from Afghanistan and Iraq to Yemen, Pakistan, and Somalia, and perhaps to Mali and the Philippines as well.[4]

Most information about U.S. drone strikes and other U.S. uses of military force outside "hot battlefields" remains classified. As a result, virtually all of what is publicly known has had to be pieced together from leaked U.S. Government documents, court filings, nongovernmental organizations, media investigations, and occasional statements from government officials of foreign states. Everything in this testimony is therefore subject to the caveat that I can only comment on publicly available information, which is inevitably partial and (in some cases potentially misleading).

Subject to that caveat, however, it appears that U.S. drones strikes, which began as a tool used in extremely limited circumstances to target specifically identified high-ranking al Qaeda officials, have become a tool relied on to go after an ever-lengthening list of bad actors, many of whom appear to have only tenuous links to al Qaeda and the September 11 attacks, and many of whom arguably pose no imminent threat to the United States. Some of these suspected terrorists have been identified by name and specifically targeted, while others have reportedly been targeted solely on the basis of behavior patterns deemed suspect by U.S. officials.[5]

We also appear increasingly to be targeting militants who are lower and lower down the terrorist food chain,[6] rather than high-ranking terrorist planners and

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[1] I will use the term "hot battlefields" interchangeably with "traditional battlefields," "traditional territorially bounded battlefields" or "active theaters of combat." The intent is not to assert that there is a clear legal distinction between these concepts (that, after all, is part of what is at issue today), but rather to distinguish descriptively between bounded geographical locations in which the existence of an armed conflict is legally uncontroversial and universally acknowledged—such as Afghanistan, or Iraq prior the the withdrawal of U.S. troops—and situations in which the existence of an armed conflict and/or the applicability of the law of armed conflict is precisely what is controversial.

[2] While drone strikes have garnered the most media attention, most of the analysis in this testimony applies equally to strikes carried out by manned aircraft and to strikes or raids that involve "boots-on-the-ground," such as those carried out by Special Operations Forces.

[3] These have variously been termed "drones," "unmanned aerial vehicles," and "remotely piloted vehicles." I will generally use the term "drone" as shorthand.

[4] See http://www.longwarjournal.org/threat-matrix/archives/2012/06/did—the—us—launch—a—drone—stri.php and http://www.brookings.edu/research/opinions/2012/03/05-drones-philippines-ahmed

[5] So called "signature strikes."

[6] See http://articles.cnn.com/2012–09–05/opinion/opinion—bergen-obama-drone—1—drone-strikes-drone-attacks-drone-program

operatives.[7] Although drone strikes are thought to have killed well over 3,000 people since 2004,[8] analysis by the New America Foundation and more recently by the McClatchy newspapers suggests that only a small fraction of the dead appear to have been so-called "high-value targets."[9]

The increasing use of weaponized drones to target individuals who only tenuous links to al Qaeda and the September 11 attacks raises critical legal and policy questions, particularly when such drone strikes occur outside of traditional battlefields. Most pertinent for today's hearing, such strikes raise significant domestic legal questions about whether current U.S. targeted killing policy is fully in conformity with Congress' 2001 AUMF.

In my view, current U.S. targeted killing policy has grown increasingly difficult to justify under the 2001 AUMF. As I will discuss, however, I believe it is neither necessary nor wise to expand the AUMF to give the President broad additional authorities to use force. Expanding the AUMF would effectively cede to the executive branch powers our Constitution entrusts to Congress. This would undermine the separation of powers scheme so vital to sustaining our constitutional democracy, and could easily lead to an irresponsible and unconstrained executive branch expansion of what has already been termed "the forever war."[10]

Expanding the AUMF is also wholly unnecessary. Even without any AUMF, the President already has both the constitutional power and the right under international law to use military force to defend the United States from an imminent attack, regardless of whether the threat emanates from al Qaeda or from some new and unrelated terrorist organization.

If Congress chooses to revise the AUMF, it would be far more appropriate to add geographic and temporal limitations—or clarify Congress' assumptions about the nature of the force authorized—than to expand it. The 2001 AUMF created a domestic legal framework that assumes an indefinitely continuing state of armed conflict and gives the President advance authorization to use force more or less as he chooses, without regard to geography and without regard to the gravity or imminence of any threats posed to the United States. But as the threat posed by al Qaeda dissipates and U.S. troops begin to withdraw from Afghanistan, it is appropriate for the United States to transition to a domestic legal framework in which there is a heightened threshold for the use of military force.

Congressional authorization for the President to use military force should be reserved for situations in which there is a sustained and intense threat to the United States. If this President or any future President identifies a specific new threat of that nature, he can and should provide Congress with detailed information about the threat, and request that Congress authorize the use of military force in a manner tailored to address the specific threat posed by a specific state or organization.

In the event that the President becomes aware of a threat so imminent and grave that it is not feasible for him to seek congressional authorization prior to using military force, he can rely on his inherent constitutional powers to take appropriate action—by force if needed—until the threat has been dissipated or until Congress can act. There is simply no need for Congress to preemptively authorize the President to use military force indefinitely against inchoate threats that have not yet emerged.

Mr. Chairman, the United States is usually credited with the first modern codification of the rules of armed conflict. In 1863, President Abraham Lincoln signed General Order 100, "Instructions for the Government of Armies of the United States in the Field"—better known as the Lieber Code—outlining the core rules of armed conflict with which he expected the Union Army to comply. In Article 29, the Lieber Code makes a bold declaration: "Peace is [the] normal condition; war is the exception. The ultimate object of all modern war is a renewed state of peace."[11]

This rings as true today as in 1863, when the United States faced a truly existential threat. It invites us to ask a broad policy question in addition to a legal question: do we want to live in a world of perpetual, open-ended war? If not, how do we begin to turn the page on the September 11 era? What congressional action will ensure that we retain the ability to protect ourselves when necessary, while at the same time ensuring that peace, rather than war, once again becomes our norm?

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[7] See http://www.washingtonpost.com/wp-dyn/content/article/2011/02/20/AR2011022002975.html

[8] See http://counterterrorism.newamerica.net/drones

[9] See http://counterterrorism.newamerica.net/drones; http://www.mcclatchydc.com/2013/04/09/188062/obamas-drone-war-kills-others.htmlUZF-Xncq9QI; and http://www.washingtonpost.com/wp-dyn/content/article/2011/02/20/AR2011022002975.html

[10] http://opiniojuris.org/wp-content/uploads/2013–5–7-corrected-koh-oxford-union-speech-as-delivered.pdf

[11] http://avalon.law.yale.edu/19th—century/lieber.asp

Difficult as this question is, I am certain of one thing: an expanded AUMF will do nothing to prevent a "forever war." On the contrary, it would likely lead only to thoughtless further expansion of our current shadowy drone war—and this, I believe, would both undermine the rule of law and represent an act of supreme strategic folly.

Moving well beyond the issue of the AUMF, U.S. drone strikes outside traditional battlefields also raise significant questions about U.S. compliance with international law principles, and even about what international legal framework is the appropriate framework for evaluating current U.S. targeted killing policy. Is it the international law of armed conflict? The international law concerning the right of states to use force in self-defense? International human rights law? Some combination of all these, or a different framework depending on the factual circumstances unique to each situation? Even more broadly, current U.S. policy raises grave questions about what it means to respect the rule of law when the law itself appears to be ambiguous or indeterminate.

I recently testified at a hearing on "The Constitutional and Counterterrorism Implications of Targeted Killing" held by the Senate Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Human Rights. In my written statement submitted for the record for that April 23 hearing (see Appendix), I addressed a number of broader issues that I believe are also of interest to the Committee on Armed Services.

Specifically, my April 23 testimony discussed what I view as some of the most common but unfounded criticisms of U.S. drone strikes, and identified some advantages of using drones as weapons delivery systems. I argued that drones present no new legal issues as such, but drone technologies lower the perceived costs of using lethal force across borders. As a result, they have facilitated a steady expansion of the use of force beyond traditional battlefields, which will likely have long-term strategic costs for the United States.

My April 23 testimony also addressed the significant rule of law challenges posed by current U.S. targeted killing policy. I discussed the international legal framework in which U.S. drone strikes occur, focusing specifically on the law of armed conflict and the international law of self-defense, and arguing that existing international law frameworks offer only ambiguous guidance with regard to the legality of U.S. targeted killings. This creates a grave rule of law problem: when the legal framework for assessing U.S. targeted killings is uncertain and contested, the "legality" of such killings becomes effectively indeterminate. My April 23 testimony also addressed the question of what precedent U.S. targeted killing policy risks setting for other less scrupulous nations, and concluded by highlighting a number of possible ways for Congress to ensure that U.S. targeted killing policy does not continue to undermine vital rule of law norms.

Rather than restate these arguments in this testimony prepared for the Committee on Armed Services, I will focus today solely on questions relating to the 2001 AUMF. However, I am including as an appendix to today's written testimony the statement I submitted on April 23 to the Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Human Rights, and I respectfully request that you consider it part of the record for today's hearing as well.

THE 2001 AUTHORIZATION FOR USE OF MILITARY FORCE

Mr. Chairman, our Constitution gives Congress vital powers relating to the use of military force. Congress is given the power to declare war and the power to raise, support, and make rules regulating the armed forces and to make rules concerning "captures on land and water." Congress is also given the constitutional power to call forth "the militia to execute the laws of the Union, suppress insurrections and repel invasions," as well as the power to "define and punish ... offenses against the law of nations." The constitutional grant of these powers to Congress is essential to our scheme of separation of powers, and Congress has rightly been vigilant against executive usurpation of its constitutional prerogatives.

The original AUMF was passed on September 14, 2001. It gives the President congressional blessing to:

> "[U]se 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, in order to prevent any future acts of inter-

national terrorism against the United States by such nations, organizations, or persons."[12]

Mr. Chairman and Senator Inhofe, as you and your colleagues on this committee undoubtedly recall, the Bush administration initially proposed a broader, more open-ended AUMF, one that would authorize the use of force to "deter and pre-empt any future acts of terrorism or aggression against the United States."[13] But even in those frightening days right after the September 11 attacks—even as bodies continued to be pulled from the rubble of the Pentagon and the Twin Towers—Congress refused to give the executive branch what would have amounted to an unnecessary and open-ended declaration of permanent war against an inchoate, undefined enemy.

Congressional power once ceded to the executive branch tends never to be regained, and in 2001, Congress rightly wished to ensure that its authorization to use force would not end up eviscerating its vital role in the constitutional scheme. As a result, the language of the 2001 AUMF was drafted with great care. The 2001 AUMF is forward looking, insofar as its language is focused on prevention rather than retaliation; but it is also backward looking, insofar as force is explicitly authorized only against those with responsibility for the September 11 attacks.

The 2001 AUMF does not authorize the United States of military force against every terrorist or anti-U.S. extremist the world contains. Instead, it focuses squarely on those "nations, organizations, or persons who specifically "planned, authorized, committed, or aided" the September 11 attacks, as well as those who "harbored" such organizations or persons.

The AUMF also does not authorize force for the open-ended purpose of preventing any and all future acts of terrorism. Instead, it authorizes force for a limited and defined purpose: "to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons." (emphasis added). This language, on its face, does not authorize the use of force for the purpose of preventing terrorist acts not directed against U.S. territory or U.S. persons, and it also does not authorize the use of force for the purpose of preventing terrorist attacks by nations, organizations, or persons who with no culpability for September 11. Furthermore, as the U.S. Supreme Court has several times emphasized, the AUMF must be construed as authorizing force only to the degree that it is also consistent with the international laws of war. This in turn means that any use of force under the AUMF must be consistent with longstanding law of war principles relating to necessity, proportionality, humanity, and distinction.[14]

For much of the last dozen years, the AUMF provided adequate domestic legal authority both for the conflict in Afghanistan and for most U.S. drone strikes outside hot battlefields, since most of the individuals targeted in early U.S. strikes were reportedly senior Taliban or al Qaeda operatives. Early U.S. drone strikes could of course still be criticized on other grounds—as strategically foolish, or as lacking in transparency and protections against abuse[15]—but strictly from the perspective of domestic authorizing legislation, most of the early U.S. drones strikes appeared comfortably within the scope of the congressionally-granted authority to use force. I believe that this has changed in the last few years.

The September 11 attacks have receded into the past, the war in Iraq—which had its own independent AUMF[16]—is over, the war in Afghanistan is winding down, and al Qaeda no longer poses the urgent, intense, and sustained threat it posed in September 2001. As former Secretary of Defense Leon Panetta said in November 2012, the "core" of al Qaeda has been "decimated."[17] In his March 2013 testimony before the Senate Select Committee on Intelligence, Director of National intelligence

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[12] Pub. L. No. 107–40, § 2(a), 115 Stat. 224, 224 (codified at 50 U.S.C. § 1541 note).

[13] See 147 CONG. REC. S9950–51 (daily ed., Oct. 1, 2001) (statement of Senator Byrd) (providing the text of the administration's initial proposal); see also id. at S9949 ("[T]he use of force authority granted to the President extends only to the perpetrators of the September 11 attack. It was not the intent of Congress to give the President unbridled authority . . . to wage war against terrorism writ large without the advice and consent of Congress. That intent was made clear when Senators modified the text of the resolution proposed by the White House to limit the grant of authority to the September 11 attack").

[14] See *Hamdan* v. *Rumsfeld,* 548 U.S. 557, 594–95 (2006); *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 519–21 (2004) (plurality opinion).

[15] See, e.g., Rosa Brooks, Take Two Drones and Call me in the Morning, Foreign Policy, Sept. 12, 2012. Available at http://www.foreignpolicy.com/articles/2012/09/12/take—two—drones—and—call—me—in—the—morning

[16] http://en.wikipedia.org/wiki/Iraq—Resolution

[17] Hon. Leon Panetta, Sec'y of Def., "The Fight Against al Qaeda: Today and Tomorrow," Speech Before the Center for a New American Security (Nov. 20, 2012), available at http://www.cfr.org/defense-strategy/panettas-speech-al-qaeda-november-2012/p29547.

James Clapper similarly observed that "core" al Qaeda has been "degraded ... to a point that the group is probably unable to carry out complex, large-scale attacks in the west."

This does not, of course, mean that the world no longer contains any terrorists or anti-U.S. extremists. The world is unfortunately replete with people who resent the United States or oppose U.S. policies. Some subset of those people self-identify with the distorted brand of Islam favored by al Qaeda and the Taliban, and a further subset may be willing to use violence to further their ends.[18]

Not all these people and organizations pose serious or urgent threats to the United States, however. I am not privy to classified military or intelligence evaluations of the capabilities of foreign terrorist organizations, but publicly available information suggests that while extremists and terrorists abound, few have both the intent and the ability to plan and implement actual attacks against the United States.

Indeed, in his March 2013 testimony SSCI testimony, DNI James Clapper did not highlight any organization known to have both the current intent and the current capacity to carry out attacks against the United States. He noted, for instance, that al Qaeda in the Arabian Peninsula (AQAP) continues to view attacks on U.S. soil as "part of [its] transnational strategy," but he also suggested that AQAP has regional and internal priorities that its leaders may view as taking precedence over U.S. operations, given its limited number of "individuals who can manage, train, and deploy operatives for U.S. operations."[19] DNI Clapper suggested that other known international terrorist organizations are primarily local or regional in their interests and reach. Al Qaeda in Iraq's "goals inside Iraq will almost certainly take precedence over U.S. plotting," while "Somalia-based al Shabaab will remain focused on local and regional challenges." Clapper offered similar assessments of Syria's al Nusra Front, al Qaeda in the Islamic Maghreb (AQIM), Nigeria's Boko Haram, and Pakistan's Lashkar-e-Tayibba.

Nevertheless, the publicly available evidence suggests that the United States continues to use military force outside hot battlefields not only against the remnants of "core" al Qaeda and the Taliban, but also against known or suspected members of other organizations—including Somalia's al Shabaab—as well as against individuals identified by U.S. intelligence only as "militants", "foreign fighters", and "unknown extremists."[20]

Insofar as such groups and individuals were unconnected to the September 11 attacks and are not planning or carrying out terrorist attacks against the United States, the use of force against these groups and individuals—at least outside of traditional battlefields—does not appear to be authorized by the 2001 AUMF.

The Obama administration has countered this argument by asserting that insofar as Congress intended the AUMF to be the functional equaivalent of a declaration of war, the AUMF must be read to include the implied law of war-based authority to target groups that are "associates" of al Qaeda or the Taliban.

However, it is not clear that Congress intended to authorize the use of force outside of traditional territorial battlefields against mere "associates" of those responsible for the September 11 attacks. It is also not clear how the executive branch defines "associates" of al Qaeda, and the Obama administration has not offered any public explanation of which groups it considers to be "associates" of al Qaeda or the Taliban.

The international law of war unquestionably permits parties to a conflict to target "co-belligerents" of the enemy. On a traditional battlefield—such as within the territorial confines of Afghanistan—it would clearly be permissible for the United States to target individuals and groups that are fighting alongside the Taliban or al Qaeda.[21] It is less clear that this is the case outside "hot battlefields." In this murkier context, it is far harder to determine what would constitute "co-belligerency" with al Qaeda, and executive branch officials have provided no clear criteria, nor even a simple list of those it regards as "associates" under a co-belligerency theory.

As a result, there is a real danger that the administration's assertion that the AUMF authorizes the use of force against AQ "associates" even outside of tradi-

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[18] Arguably, post-September 11 U.S. counterterrorism policy has increased, rather than decreased, the number of people in this category.

[19] http://www.intelligence.senate.gov/130312/clapper.pdf

[20] http://www.mcclatchydc.com/2013/04/09/188062/obamas-drone-war-kills-others.html.UZF-Xncq9QI

[21] Indeed, the AUMF notwithstanding, the United States would be justified under international self-defense principles in using force against persons or organizations posing an imminent threat to U.S. personnel, subject to the principles of necessity and proportionality.

tional battlefields could become a backdoor way of expanding the AUMF far beyond Congress' intent.

As noted earlier, in 2001 Congress refused to acquiesce in Bush administration proposals to that the AUMF authorize force to "deter and pre-empt any future acts of terrorism or aggression," and instead opted for language that was far more specific and limiting. If Congress now accepts Obama administration claims that force can be used against a broad category of persons and organizations determined (based on unknown criteria) to be al Qaeda "associates," this would effectively turn the AUMF into precisely the open-ended authorization to use force that Congress chose to avoid in 2001.

Congress bears some responsibility for enabling the executive branch to assert such virtually unlimited authority to use force, however. In the 2006 and 2009 Military Commissions Acts, for instance, Congress gave military commissions jurisdiction over individuals who are "part of forces associated with al Qaeda or the Taliban," along with "those who purposefully and materially support such forces in hostilities against U.S. coalition partners."[22]

This allowed the Bush administration and later the Obama administration to argue that if Congress considers it appropriate for U.S. military commissions to have jurisdiction over al Qaeda and Taliban associates—including over those "associates" who were detained in geographical locations far from traditional battlefields—Congress must believe the executive branch has the authority to detain such associates found far from traditional battlefields, and the authority to detain must stem from the authority to use force. Indeed, by 2009 the Obama administration was arguing in court that at least when it comes to detention, the AUMF implicitly authorizes the President "to detain persons who were part of, or substantially supported, Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners."[23] (My emphasis).

But note how far this has shifted from the original language of the AUMF: at least with regard to detention, the administration's focus is no longer merely on those who were directly complicit in the September 11 attacks, but on a far broader category of individuals. This broadened understanding of executive detention authority was later given the congressional nod in the National Defense Authorization Act (NDAA) 2012, which used virtually identical language.[24]

The key subsequent move in the executive branch's gradual expansion of the scope of the 2001 AUMF was the conflation of detention authority with the authority to target using lethal force. Logically, as the Supreme Court noted in 2004,[25] a party to a conflict must have the power to lawfully detain all persons it has the lawful power to kill. The greater power must include the lesser: if it would be lawful to shoot an enemy combatant, it must be lawful to capture and hold him instead. Working backward from this principle, the Obama administration appears to have reasoned that if it is lawful to detain an individual, it is equally lawful to use force against him.

This does not follow: while the existence of the greater power implies the existence of the lesser power, congressional authorization of the lesser power (detention) should not be construed—in the absence of express, unambiguous manifestations of congressional intent—to include congressional authorization of the greater power (the use of military force to target and kill "associates" of al Qaeda). However, Congress' failure to clarify its intent with regard to the AUMF has enabled the executive to read congressional silence as approval.

Notwithstanding executive branch efforts to shoehorn the vague category of "associates" into the AUMF, few would dispute that as the "drone war" expands, it has become more and more difficult to view all current Obama administration uses of force as congruent with the limited authorities granted by Congress on September 14, 2011. In February 2012, then-Pentagon General Counsel Jeh Johnson insisted that the 2001 AUMF remains the domestic legal "bedrock" of the military's drone strikes,[26] and administration representatives have repeatedly affirmed this view. But as a recent Hoover Institution white paper authored by former Obama official Bobby Chesney, former Bush officials Jack Goldsmith and Matt Waxman, and the

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[22] See, e.g, Military Commissions Act of 2006 (2006 MCA), Pub. L. No. 109–366, 120 Stat. 2600 (codified in part at 28 U.S.C. § 2241)

[23] http://www.justice.gov/opa/documents/memo-re-det-auth.pdf

[24] See NDAA for Fiscal Year 2012 § 1021(b)(2), 125 Stat. at 1562 (authorizing detention of "A person who was a part of or substantially supported al Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces").

[25] *Hamdi* v. *Rumsfeld*, http://www.law.cornell.edu/supct/html/03–6696.ZS.html

[26] http://www.cfr.org/counterterrorism/targeted-killings/p9627

Brookings Institution's Ben Wittes concludes, "in a growing number of circumstances, drawing the requisite connection to the AUMF requires an increasingly complex daisy chain of associations—a task that is likely to be very difficult . . . in some cases, and downright impossible in others."[27]

John Bellinger, former State Department Legal Advisor under President Bush, is equally blunt: the AUMF is "getting a little long in the tooth." Like it or not, the language of the AUMF is still clearly "tied to the use of force against the people who planned, committed, and/or aided those involved in September 11," says Bellinger. "The farther we get from [targeting] al Qaeda, the harder it is to squeeze [those operations] into the AUMF." those involved in September 11," says Bellinger. "The farther we get from [targeting] al Qaeda, the harder it is to squeeze [those operations] into the AUMF."[28]

If the administration's use of force outside traditional battlefields is increasingly hard to justify under the AUMF, what should Congress do in response?

Congress could, of course, choose to do in 2013 what it refused to do in 2001, and broaden the existing AUMF to expressly permit the executive branch to use force to deter or preempt any future attacks or aggression towards the United States or U.S. interests. But such an expansion of the AUMF would give this and all future administrations virtual carte blanche to wage perpetual war against an undefined and infinitely malleable list of enemies, without any time limits or geographical restrictions.

In my view, this would amount to an unprecedented abdication of Congress' constitutional responsibilities. In effect, Congress would be delegating its warpowers almost wholesale to the executive branch. While such a broad authorization to use military force could in theory be narrowed or withdrawn by a subsequent Congress, history suggests that the expansion of executive power tends to be a one-way ratchet: power, once ceded, is rarely regained.

Mr. Chairman, my guess is that few members of this committee would wish to contemplate such a broadened AUMF. What is more, it is worth emphasizing once again that while the Bush administration requested such open-ended authority to use force immediately after September 11, Congress refused to provide it—even at a moment when the terrorist threat to the United States was manifestly more severe than it is now.

Today, the Obama administration has not requested or suggested that it sees any need for an expanded AUMF. It would be utterly unprecedented for Congress to give the executive branch a statutory authorization to use force when the President has not requested it.

Similar flaws characterize proposals to revise the AUMF to permit the President to use force against any organizations he may, in the future, specifically identify as posing a threat to the United States, based on criteria established by Congress. This is the proposal made by the Hoover Institute White Paper co-authored by my colleague Jack Goldsmith. He and his co-authors argue that Congress could pass a revised AUMF containing "general statutory criteria for presidential uses of force against new terrorist threats but requir[ing] the executive branch, through a robust administrative process, to identify particular groups that are covered by that authorization of force."

While it would surely be useful for Congress to provide greater clarity on what, in its view, constitutes a threat sufficient to justify the open-ended use of military force—amounting to a declaration of armed conflict—such a revised AUMF would still effectively delegate to the President constitutional powers properly entrusted to Congress. Once delegated, these powers would be difficult for Congress to meaningfully oversee or dial back—and, once again, it is notable that the President has not requested such a power.

Mr. Chairman, Senator Inhofe, if what we're concerned about is protecting the Nation, there is no need for an expanded AUMF. With or without the 2001 AUMF, no one disputes that the President has the constitutional authority (and the international law authority) to use military force if necessary to defend the United States from an imminent attack, regardless of whether the threat emanates from al Qaeda or from some as yet unimagined terrorist organization.

If Congress chooses to revise the AUMF, it would be far more appropriate to limit it than to expand it. The 2001 AUMF established—at least as a matter of domestic

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[27] Robert Chesney et al., Hoover Inst., A Statutory Framework for Next-Generation Terrorist Threats (2013), http://media.hoover.org/sites/default/files/documents/Statutory-Framework-for-Next-Generation-Terrorist-Threats.pdf.

[28] http://www.washingtonpost.com/world/national-security/administration-debates-stretching-911-law-to-go-after-new-al-qaeda-offshoots/2013/03/06/fd2574a0–85e5–11e2–9d71-f0feafdd1394—print.html

U.S. statutory law—an indefinitely continuing state of armed conflict between the United States, on the one hand, and those responsible for the September 11 attacks, on the other hand. This has enabled the executive branch to argue (both as a matter of U.S. law and international law) that it is the principles of the law of armed conflict that should govern the U.S. use of armed force for counterterrorism purposes. But if the law of armed conflict is the applicable legal framework through which to understand the AUMF and through which to evaluate U.S. drone strikes outside of traditional battlefields, there are very few constraints on the U.S. use of armed force, and no obvious means to end the conflict.

Compared to other legal regimes, including both domestic law enforcement rules and the international law on self defense, the law of armed conflict is extremely permissive with regard to the use of armed force. The law of armed conflict permits the targeting both of enemy combatants and their co-belligerents. It also allows enemy combatants to be targeted by virtue of their status, rather than their activities: it is permissible to target enemy combatants while they are sleeping, for instance, even though they pose no "imminent' threat while asleep, and the lowest-ranking enemy soldier can be targeted just as lawfully as the enemy's senior-most military leaders. Indeed, uniformed cooks and clerks with no combat responsibilities can be targeted along with combat troops.

It is this highly permissive law of armed conflict framework that has enabled the executive branch to assert that "associates" of al Qaeda and the Taliban may be targeted beyond traditional battlefields, even though this expansion of the use of force beyond those responsible for September 11 was not contemplated by Congress in the 2001 AUMF. Similarly, it is the law of armed conflict framework that has permitted the executive branch to assert the authority to target ever lower-level terrorists and suspected "militants," rather than restricting drone strikes to those targeting the most dangerous "senior" operatives. It is also the law of armed conflict framework that permits the executive branch to assert that it may target even those individuals and organizations that pose no imminent threat to the United States, in the normal sense of the word "imminent."

But as the threat posed by al Qaeda dissipates and U.S. troops withdraw from Afghanistan, it is appropriate for the United States to transition to a domestic (and international) legal framework in which there are tighter constraints on the use of military force. Congress can help this transition along by clarifying that the existing AUMF is not an open-ended mandate to wage a "forever war," and requiring the President to satisfy more exacting legal standards before military force is authorized or used.

In the event that the President becomes aware of a threat so imminent and grave he cannot wait for congressional authorization prior to using military force, there is no dispute that he can rely on his inherent constitutional powers to take appropriate action until the threat has been eliminated or until Congress can act. However, by expressly granting the power to declare war and associated powers to Congress, our Constitution presumes that the President will only in rare circumstances rely solely on his inherent executive powers to use military force. Historically, non-congressionally authorized uses of force by the President have generally been reserved for rare and unusual circumstances, and this is as it should be.

Beyond these rare situations of extreme urgency, if the President believes that there is a sustained and intense threat to the United States, he can and should provide Congress with detailed information about the threat, and request that Congress authorize the use of military force to address the specific threat posed by a specific state or organization.

Congress should authorize the use of military force in these circumstances only—there is no need for Congress to preemptively authorize the President to use military force indefinitely against unspecified threats that the President has not yet identified. If Congress does authorize the use of military force at the President's request, the force authorized should be carefully tailored to the specific threat. Furthermore, Congress should be explicit about whether an AUMF is acknowledging or authorizing an ongoing armed conflict, on the one hand, or whether it is simply authorizing the limited use of force for self-defense, on the other hand.

International law imposes criteria for the use of force in national self-defense that are far more stringent than the criteria for using force in the course of an armed conflict that is ongoing. Unlike the international law of armed conflict, the international law of self-defense permits states to use force only to respond to an armed attack or to prevent an imminent armed attack, and the use of force in self defense is subject to the principles of necessity and proportionality. Under self defense rules (unlike law of armed conflict rules) individuals who pose no imminent threat cannot be targeted, and inquiries into imminence, necessity and proportionality tend to restrict the use of force in self defense to strikes against those who—by virtue of their

operational seniority or hostile activities—pose threats that are urgent and grave, rather than speculative, distant, or minor.

For this reason, I believe that if Congress wishes to refine or clarify the AUMF, it should consider limiting the AUMF's geographic scope, limiting its temporal duration, limiting the authorized use of force to that which would be considered permissible self defense under international law, or all three.

Expressly limiting the AUMF's geographic scope to Afghanistan and/or other areas in which U.S. troops on the ground are actively engaged in combat, for instance, would clarify that the ongoing armed conflict (and the applicability of the law of armed conflict) is limited to these more traditional battlefield situations. As noted above, such a geographical limitation would by no means undermine the President's ability to use force to protect the United States from threats emanating from outside of the specified region. Such a geographical limitation would merely make it clear that any presidential desire to use force elsewhere would require him either to request an additional narrowly drawn congressional authorization to use force, or would require that any non-congressionally authorized use of force be justified—constitutionally and internationally—on self defense grounds, by virtue of the gravity and imminence of a specific threat.

Limiting the AUMF's temporal scope could be accomplished by adding a "sunset" provision to the AUMF. The current AUMF could be set to expire when U.S. troops cease combat operations in Afghanistan, for instance, or in 2015, whichever date comes first. Here again, such a limitation would not preclude the President from requesting an extension or a new authorization to use force, if clearly justified by specific circumstances, nor would it preclude the President from relying on his inherent constitutional powers if force becomes necessary to prevent an imminent attack.

Finally, the AUMF could be revised to clarify Congress' view of the applicable legal framework. Congress could state explicitly that it authorizes the President to engage in an ongoing armed conflict within the borders of Afghanistan between the United States and al Qaeda, the Taliban, and their co-belligerents, but that it does not currently authorize the initiation or continuation of an armed conflict in any other place, and expects therefore that any U.S. military action elsewhere or against other actors shall be governed by principles of self-defense rather than by the law of armed conflict.

There are many possible ways for Congress to signal its commitment to preventing the AUMF from being used to justify a "forever war." Each of these approaches has both benefits and drawbacks, and each would require significant further discussion. But I believe that Congress' focus should be on ensuring that war remains an exceptional state of affairs, not the norm. At a minimum, this should preclude any Congressional expansion of existing AUMF authorities.

Mr. Chairman, let me close with a plea for perspective. We live in a dangerous world: adversarial states such as North Korea and Iran remain bellicose; the changing role of near-peer powers such as China and Russia poses challenges to U.S. interests and global stability; the Middle East remains awash in violence, and technological advances could place lethal tools in the hands of irresponsible actors. We also face unprecedented challenges from our increased global interdependence: climate change, the interdependence of global financial systems and our ever-increasing reliance on the internet all create new vulnerabilities. Against the backdrop of these many dangers, old and new, the fear of terrorist attack should not be the primary driver of U.S. national security policy.

Terrorism is a very real problem, and we cannot ignore it, any more than we should ignore violent organized crime or large-scale public health threats. Like everyone else, I worry about terrorists getting ahold of weapons of mass destruction. At the same time, we should recognize that terrorism is neither the only threat nor the most serious threat the United States faces.[29] With the sole exception of 2001, terrorist groups worldwide have never succeeded in killing more than a handful of Americans citizens in any given year. According to the State Department, 17 American citizens were killed by terrorists in 2011, for instance. The terrorist death toll was 15 in 2010 and 9 in 2009.[30]

These deaths are tragedies, and we should continue to strive to prevent such deaths-but we should also keep the numbers in perspective. On average, about 55 Americans are killed by lightning strikes each year,[31] and ordinary criminal homi-

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[29] http://www.foreignpolicy.com/articles/2013/03/04/fp—survey—future—of—war

[30] http://www.state.gov/j/ct/rls/crt/2011/index.htm

[31] http://usatoday30.usatoday.com/weather/news/story/2012–01–09/lightning-deaths-storms-weather/52504754/1

cide claims about 16,000 U.S. victims each year.[32] No one, however, believes we need to give the executive branch extraordinary legal authorities to keep Americans from venturing out in electrical storms, or use armed drones to preemptively kill homicide suspects.

What's more, we should keep in mind that military force is not the only tool in the U.S. arsenal against terrorism.[33] Since September 11, we've gotten far more effective at tracking terrorist activity, disrupting terrorist mmunications and financing, catching terrorists and convicting them in civilian courts,[34] and a wide range of other counterterrorism measures. Much of the time, these non-lethal approaches to counterterrorism are as effective as targeted killings. In fact, there's growing reason to fear that the expansion of U.S. drone strikes is strategically counterproductive.

Former Vice Chair of the Joint Chiefs of Staff General James Cartwright recently expressed concern that as a result of U.S. drone strikes, the United States may have "ceded some of our moral high ground."[35] Retired General Stanley McChrystal has expressed similar concerns: "The resentment created by American use of unmanned strikes ... is much greater than the average American appreciates. They are hated on a visceral level, even by people who've never seen one or seen the effects of one," and fuel "a perception of American arrogance."[36] Former Director of National Intelligence Dennis Blair agrees: the United States needs to "pull back on unilateral actions ... except in extraordinary circumstances," Blair told CBS news in January. U.S. drone strikes are "alienating the countries concerned [and] ... threatening the prospects for long-term reform raised by the Arab Spring ... [U.S. drone strategy has us] walking out on a thinner and thinner ledge and if even we get to the far extent of it, we are not going to lower the fundamental threat to the United States any lower than we have it now."[37]

Mr. Chairman, Senator Inhofe, I believe it is past time for a serious overhaul of U.S. counterterrorism strategy. This needs to include a rigorous cost-benefit analysis of U.S. drone strikes, one that takes into account issues both of domestic legality and international legitimacy, and evaluates the impact of targeted killings on regional stability, terrorist recruiting, extremist sentiment, and the future behavior or powerful states such as Russia and China. If we undertake such a rigorous cost-benefit analysis, I suspect we may come to see scaling back on kinetic counterterrorism activities less as an inconvenience than as a strategic necessity—and we may come to a new appreciation of counterterrorism measures that don't involve missiles raining from the sky.

This doesn't mean we should never use military force against terrorists. In some circumstances, military force will be justifiable and useful. But it does mean we should rediscover a longstanding American tradition: reserving the use of exceptional legal authorities for rare and exceptional circumstances.

Thank you for the opportunity to testify today.

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[32] http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61—06.pdf

[33] http://www.whitehouse.gov/sites/default/files/counterterrorism—strategy.pdf

[34] http://www.justice.gov/cjs/

[35] http://m.npr.org/news/Politics/178753575?textSize=small

[36] http://www.telegraph.co.uk/news/worldnews/asia/pakistan/9787912/Stanley-McChrystal-criticises-reliance-on-drones-as-strikes-hit-Pakistan.html

[37] http://www.politico.com/news/stories/0711/60199.htmlixzz2NUC4UwYa

APPENDIX

TO MAY 16, 2012 STATEMENT FOR THE RECORD SUBMITTED TO THE SENATE COMMITTEE ON ARMED SERVICES BY ROSA BROOKS

The Constitutional and Counterterrorism Implications of Targeted Killing
Testimony Before the Senate Judiciary Subcommittee on the
Constitution, Civil Rights, and Human Rights

April 23, 2013

Statement for the Record Submitted By
Rosa Brooks

Professor of Law, Georgetown University Law Center
Bernard L. Schwartz Senior Fellow, New America Foundation

Chairman Durbin, Ranking Member Cruz, members and staff of the subcommittee, thank you for giving me the opportunity to testify today about the constitutional and counterterrorism implications of U.S. drone wars and targeted killing policy. I appreciate your commitment to fostering a rigorous and transparent dialogue on this tough issue.

I am currently a Professor of Law at Georgetown University Law Center, where I teach courses on international law, constitutional law and national security issues. I am also a Bernard L. Schwartz Senior Fellow at the New America Foundation, and I write a weekly column for *Foreign Policy* magazine. From April 2009 to July 2011, during a public service leave of absence from Georgetown, I had the privilege of serving as Counselor to the Undersecretary of Defense for Policy at the Department of Defense. This testimony reflects my personal views only, however.

Mr. Chairman, the mere mention of drones tends to arouse strong emotional reactions on both sides of the political spectrum, and last week's tragic events in Boston have raised the temperature still further. Some demonize drones, denouncing them for causing civilian deaths or enabling long-distance, "video game-like" killing, even as they ignore the fact that the same (or worse) could equally be said of many other weapons delivery systems. Others glorify drones, viewing them as a low- or no-cost way to "take out terrorists" wherever they may be found, with little regard for broader questions of strategy or the rule of law.

I believe it is important to take a closer look both at what is and what *isn't* new and noteworthy about drone technologies and the activities they enable. Ultimately, "drones" *as such* present us with few new issues—but the manner in which the United States has been using drone strikes raises serious questions about their strategic efficacy and unintended consequences. Just as troubling -- particularly with regard to this subcommittee's mandate -- the legal theories used by the Obama Administration to justify many U.S. drone strikes risk undermining the rule of law.

It does not have to be this way, however. I believe that the president and Congress can and should take action to place U.S. targeted killing policy on firmer legal ground, and at the end of this testimony I will offer some suggestions for how this might be accomplished.

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TO MAY 16, 2012 STATEMENT FOR THE RECORD SUBMITTED TO THE SENATE COMMITTEE ON ARMED SERVICES BY ROSA BROOKS

In the first part of this testimony, I will first address some of the most common but *unfounded* criticisms of U.S. drone strikes. In the second section, I will discuss some of the perceived *advantages* of drones, focusing on the ways in which drone technologies lower the cost of using lethal force across borders. In the third section, I will highlight some of the strategic costs of current U.S. drone policy. In the fourth section, I will first discuss the concept of the rule of law and the legal framework in which U.S. drone strikes occur, then look specifically at the law of armed conflict and finally at the international law of self-defense, highlighting the ways in which existing legal frameworks offer only ambiguous guidance with regard to the legality of U.S. targeted killings. In the fifth section, I will briefly address the question of what precedent U.S. targeted killing policy is setting for other nations. In the sixth and final section, I will turn to the question of reform. While it is beyond the scope of this testimony to fully examine the many possible routes to improving oversight and accountability, I will briefly highlight a number of possible ways for Congress to ensure that U.S. targeted killing policy does not undermine rule of law norms.

1. What's *not* wrong with drones

Many of the most frequently heard criticisms of drones and drone warfare do not hold up well under serious scrutiny – or, at any rate, there's nothing uniquely different or worse about drones, compared to other military technologies. Consider the most common anti-drone arguments.

First, critics often assert that U.S. drone strikes are morally wrong because the kill innocent civilians. This is undoubtedly both true and tragic -- but it is not really an argument against drone strikes as such. *War* kills innocent civilians, period. But the best available evidence suggests that U.S. drone strikes kill civilians at no higher a rate, and almost certainly at a lower rate, than most other common means of warfare.

Much of the time, the use of drones actually permits far greater precision in targeting than most traditional manned aircraft. Today's unmanned aerial vehicles (UAVs) can carry very small bombs that do less widespread damage, and UAVs have no human pilot whose fatigue might limit flight time. Their low profile and relative fuel efficiency combines with this to permit them to spend more time on target than any manned aircraft. Equipped with imaging technologies that enable operators even thousands of miles away to see details as fine as individual faces, modern drone technologies allow their operators to distinguish between civilians and combatants far *more* effectively than most other weapons systems.

That does not mean civilians never get killed in drone strikes. Inevitably, they do, although the covert nature of most U.S. strikes and the contested environment in which they occur makes it impossible to get precise data on civilian deaths. This lack of transparency inevitably fuels rumors and misinformation. However, several credible organizations have sought to track and analyze deaths due to U.S. drone strikes. The British Bureau of Investigative Journalism analyzed examined reports by "government, military and intelligence officials, and by credible media, academic and other sources," for instance, and came up with a range,

suggesting that the 344 known drone strikes in Pakistan between 2004 and 2012 killed between 2,562 and 3,325 people, of whom between 474 and 881 were likely civilians.[38] (The numbers for Yemen and Somalia are more difficult to obtain.) The New America Foundation, with which I am affiliated, came up with slightly lower numbers, estimating that U.S. drone strikes killed somewhere between 1,873 and 3,171 people overall in Pakistan, of whom between 282 and 459 were civilians. [39]

Whether drones strikes cause "a lot" or "relatively few" civilian casualties depends what we regard as the right point of comparison. Should we compare the civilian deaths caused by drone strikes to the civilian deaths caused by large-scale armed conflicts? One study by the International Committee for the Red Cross found that on average, 10 civilians died for every combatant killed during the armed conflicts of the 20th century.[40] For the Iraq War, estimates vary widely; different studies place the ratio of civilian deaths to combatant deaths anywhere between 10 to 1 and 2 to 1.[41]

The most meaningful point of comparison for drones is probably manned aircraft. It's extraordinarily difficult to get solid numbers here, but one analysis published in the *Small Wars Journal* suggested that in 2007 the ratio of civilian to combatant deaths due to coalition air attacks in Afghanistan may have been as high as 15 to 1.[42] More recent UN figures suggest a far lower rate, with as few as one civilian killed for every ten airstrikes in Afghanistan.[43] But drone strikes have also gotten far less lethal for civilians in the last few years: the New America Foundation concludes that only three to nine civilians were killed during 72 U.S. drone strikes in Pakistan in 2011, and the 2012 numbers were also low.[44] In part, this is due to technological advances over the last decade, but it's also due to far more stringent rules for when drones can release weapons.

Few details are known about the precise targeting procedures followed by either U.S. armed forces or the Central Intelligence Agency with regard to drone strikes. The Obama Administration is reportedly finalizing a targeted killing "playbook,"[45] outlining in great detail the procedures and substantive criteria to be applied. I believe an unclassified version of this should be should be made public, as it may help to diminish concerns reckless or negligent targeting decisions. Even in the absence of specific details, however, I believe we can have confidence in the commitment of both military and intelligence personnel to avoiding civilian casualties to the greatest extent possible. The Obama Administration has stated that it regards both the military and the CIA as bound by the law of war when force is used for the purpose of

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[38] See http://www.thebureauinvestigates.com/category/projects/drones/
[39] http://counterterrorism.newamerica.net/drones
[40] See http://www.nytimes.com/2010/10/23/world/middleeast/23casualties.html?_r=3 ; www.icrc.org/eng/assets/files/other/irrc-872-wenger-mason.pdf
41 See http://en.wikipedia.org/wiki/Casualties_of_the_Iraq_War
42 See http://smallwarsjournal.com/jrnl/art/close-air-support-and-civilian-casualties-in-afghanistan
43 See http://www.navytimes.com/article/20130219/NEWS/302190304/U-N-Afghan-civilian-deaths-in-airstrikes-down; http://unama.unmissions.org/Default.aspx?tabid=12254&ctl=Details&mid=15756&ItemID=36445&language=en-U.S.
44 See http://counterterrorism.newamerica.net/drones
[45] See http://articles.washingtonpost.com/2012-10-24/world/35499428_1_drone-strikes-brennan-obama-administration; http://www.usnews.com/debate-club/has-obama-gone-too-far-with-his-drone-policies/brennan-and-obamas-drone-playbook-must-be-debated-publicly

targeted killing.[46] (I will discuss the applicable law of war principles in section IV of this statement). What is more, the military is bound by the Uniform Code of Military Justice.

Concern about civilian casualties is appropriate, and our targeting decisions, however thoughtfully made, are only as good as our intelligence—and only as wise as our overall strategy. Nevertheless, there is no evidence supporting the view that drone strikes cause disproportionate civilian casualties relative to other commonly used means or methods of warfare. On the contrary, the evidence suggests that if the number of civilian casualties is our metric, drone strikes do a better job of discriminating between civilians and combatants than close air support or other tactics that receive less attention.

Critics of U.S. drone policy also decry the fact that drones enable U.S. personnel to kill from a safe distance, which seems to be viewed as somehow "unsavory." But long-distance killing" is neither something to automatically condemn nor something unique to drone technologies. Military commanders naturally seek ways to kill enemies without risking the lives of our own troops – and if drone technologies enable us to reduce the danger to our own personnel, all things being equal this is surely a good thing, not a bad thing. No one would argue that we should strip troops of body armor just to level the playing field.

It is also important to consider drone strikes in the context of the evolution of warfare. After all, drones are hardly the only technology that has facilitated killing from a distance. In this sense, drones don't present any "new" issues not already presented by aerial bombing -- or by guns or bows and arrows, for that matter. The crossbow and later the long bow were considered immoral in their day. In 1139, the Second Lateran Council of Pope Innocent II is said to have "prohibit[ed] under anathema that murderous art of crossbowmen and archers, which is hateful to God."[47] In the early 1600s, Cervantes took a similar view of artillery, which he called a "devilish invention" allowing "a base cowardly hand to take the life of the bravest gentleman," with bullets coming –like drones-- "nobody knows how or from whence."[48]

Other critics have decried what they called "the PlayStation mentality" created by drone technologies. I cannot see, however, that drones any more "video game-like" than, say, having cameras in the noses of cruise missiles. Regardless, there's little evidence that drone technologies "reduce" their operators' awareness of human suffering. If anything, drone operators may be far more keenly aware of the suffering they help inflict than any sniper or bomber pilot could be, precisely because the technology enables such clear visual monitoring. Increasingly, there is evidence that drone pilots, just like combat troops, can suffer from post-traumatic stress disorder. A recent Air Force study found that 29 percent of drone pilots suffered from "burnout," with 17 percent "clinically distressed."[49]

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[46] See http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf

[47] See http://www.ewtn.com/library/COUNCILS/LATERAN2.HTM

[48] See JFC Fuller, Armament and History: The Influence of Armament on History from the Dawn of Classical Warfare to the End of the Second World War, 1998, at http://books.google.com/books?id=hECRavhisUIC&pg=PA91&lpg=PA91&dq=cervantes+artillery+base+devilish&source=bl&ots=ZlFDFmgJuh&sig=2E4lVzuBqOREKoVokbnfUpRG3fs&hl=en" \l "v=onepage&q=cervantes%20artillery%20base%20devilish&f=false

[49] See http://www.npr.org/2011/12/19/143926857/report-high-levels-of-burnout-in-u-s-drone-pilots

2. The perceived advantages of drone strikes

For every critic who demonizes drones while ignoring their similarities to other less-demonized technologies, there are as many others who seem to regard drones as a near-panacea – an almost magical new technology that will allow us to economically stave off foreign threats from the comfort and safety of home – or even, perhaps, find some new "fix" to the thorny problems posed by "homegrown" attacks such as those on the Boston Marathon.

But the advantages of drones are as overstated and misunderstood as the problems they pose—and in some ways, their very perceived advantages cause new problems. Drone technologies temptingly lower or disguise the costs of lethal force, but their availability can blind us to the potentially dangerous longer-term costs and consequences of our strategic choices.

Armed drones lower the perceived costs of using lethal force in at least three ways. First, drones reduce the dollar cost of using lethal force inside foreign countries.[50] Most drones are economical compared with the available alternatives.[51] Manned aircraft, for instance, are quite expensive:[52] Lockheed Martin's F-22 fighter jets cost about $150 million each; F-35s are $90 million; and F-16s are $55 million. But the 2011 price of a Reaper drone was approximately $28.4 million, while Predator drones cost only about $5 million to make.[53]As with so many things, putting a dollar figure on drones is difficult; it depends what costs are counted, and what time frame is used. Nevertheless, drones continue to be *perceived* as cheaper by government decision-makers.

Second, relying on drone strikes rather than alternative means reduces the domestic political costs of using lethal force. Sending manned aircraft or special operations forces after a suspected terrorist places the lives of U.S. personnel at risk, and full-scale invasions and occupations endanger even more American lives. In contrast, using armed drones eliminates all short-term risks to the lives of U.S. personnel involved in the operations.

Third, by reducing accidental civilian casualties,[54] precision drone technologies reduce the perceived moral and reputational costs of using lethal force. The U.S. government is extraordinarily concerned about avoiding unnecessary civilian casualties, and rightly so. There are moral and legal reasons for this concern, and there are also pragmatic reasons: civilian casualties cause pain and resentment within local populations and host-country governments and alienate the international community.

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[50] See https://www.deloitte.com/assets/Dcom-Australia/Local%20Assets/Documents/Industries/Government%20Services/Public%20Sector/Deloitte_DefenseUAV_DI_CaseStudy_2Apr2012.pdf

[51] See http://www.economist.com/node/14299496

[52] See http://fpc.state.gov/documents/organization/180677.pdf

[53] See http://www.nationaldefensemagazine.org/archive/2012/February/Pages/AirForceF-35s,DronesMaySquareOffinBudgetBattle.aspx

[54] See http://www.nytimes.com/2012/07/15/sunday-review/the-moral-case-for-drones.html

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It is of course not a bad thing to possess military technologies that are cost little, protect American lives and enable us to minimize civilian casualties. When new technologies appear to reduce the costs of using lethal force, however, the threshold for deciding to use lethal force correspondingly drops, and officials will be tempted to use lethal force with greater frequency and less wisdom.

Over the last decade, we have seen U.S. drone strikes evolve from a tool used in extremely limited circumstances to go after specifically identified high-ranking al Qaeda officials to a tool relied on in an increasing number of countries to go after an eternally lengthening list of putative bad actors, with increasingly tenuous links to grave or imminent threats to the United States. Some of these suspected terrorists have been identified by name and specifically targeted, while others are increasingly targeted on the basis of suspicious behavior patterns.

Increasingly, drones strikes have targeted militants who are lower and lower down the terrorist food chain,[55] rather than terrorist masterminds.[56] Although drone strikes are believed to have killed more than 3,000 people since 2004,[57] analysis by the New America Foundation and more recently by a the McClatchy newspapers suggests that only a small fraction of the dead appear to have been so-called "high-value targets."[58] What's more, drone strikes have spread ever further from "hot" battlefields, migrating from Pakistan to Yemen to Somalia (and perhaps to Mali[59] and the Philippines as well).[60]

This increasing use of drone strikes to go after individuals with more and more tenuous links to Al Qaeda and the 9/11 attacks pushes the furthest boundaries of Congress' 2011 Authorization for use of Military Force. The AUMF authorized the president to "[U]se all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons."

The AUMF's language appears to restrict the use of force both with regard to who can be targeted (those with some culpability for the 9/11 attacks) and with regard to the purpose for which force is used (to prevent future attacks against the U.S.). As drone strikes expand beyond Al Qaeda targets (to go after, for instance, suspected members of Somalia's al Shabaab), it grows increasingly difficult to justify such strikes under the AUMF. Do we believe al Shabaab was in any way culpable for the 9/11 attacks? Do we believe al Shabaab, an organization with primarily local and regional ambitions, has the desire or capability to engage in acts of international terrorism against the United States?

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[55] See http://articles.cnn.com/2012-09-05/opinion/opinion_bergen-obama-drone_1_drone-strikes-drone-attacks-drone-program
[56] See http://www.washingtonpost.com/wp-dyn/content/article/2011/02/20/AR2011022002975.html
[57] See http://counterterrorism.newamerica.net/drones
[58] See http://www.washingtonpost.com/wp-dyn/content/article/2011/02/20/AR2011022002975.html
[59] See http://www.longwarjournal.org/threat-matrix/archives/2012/06/did_the_us_launch_a_drone_stri.php
[60] See http://www.brookings.edu/research/opinions/2012/03/05-drones-philippines-ahmed

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3. The true costs of current US drone policy

When we come to rely excessively on drone strikes as a counterterrorism tool, this has potential costs of its own. Drones strikes enable a "short-term fix" approach to counterterrorism, one that relies excessively on eliminating specific individuals deemed to be a threat, without much discussion of whether this strategy is likely to produce long-term security gains.

Most counter-terrorism experts agree that in the long-term, terrorist organizations are rarely defeated militarily. Instead, terrorist groups fade away when they lose the support of the populations within which they work. They die out when their ideological underpinnings come undone – when new recruits stop appearing—when the communities in which they work stop providing active or passive forms of assistance—when local leaders speak out against them and residents report their activities and identities to the authorities.

A comprehensive counterterrorist strategy recognizes this, and therefore relies heavily on activities intended to undermine terrorist credibility within populations, as well as on activities designed to disrupt terrorist communications and financing. Much of the time, these are the traditional tools of intelligence and law enforcement. Kinetic force undeniably has a role to play in counterterrorism in certain circumstances, but it is rarely a magic bullet.

In addition, overreliance on kinetic tools at the expense of other approaches can be dangerous. Drone strikes -- lawful or not, justifiable or not – can have the unintended consequence of increasing both regional instability and anti-American sentiment. Drone strikes sow fear among the "guilty" and the innocent alike,[61] and the use of drones in Pakistan and Yemen has increasingly been met with both popular and diplomatic protests. Indeed, drone strikes are increasingly causing dismay and concern within the U.S. population.

As the Obama administration increases its reliance on drone strikes as the counterterrorism tool of choice, it is hard not to wonder whether we have begun to trade tactical gains for strategic losses. What impact will U.S. drone strikes ultimately have on the stability of Pakistan, Yemen, or Somalia?[62] To what degree -- especially as we reach further and further down the terrorist food chain, killing small fish who may be motivated less by ideology than economic desperation -- are we actually creating new grievances within the local population – or even within diaspora populations here in the United States?[63] As Defense Secretary Donald Rumsfeld asked during the Iraq war, are we creating terrorists faster than we kill them?[64]

At the moment, there is little evidence that U.S. drone policy – or individual drone strikes—result from a comprehensive assessment of strategic costs and benefits, as opposed to a shortsighted determination to strike targets of opportunity, regardless of long-term impact. As a military acquaintance of mine memorably put it, drone strikes remain "a tactic in search of a strategy."

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[61] See http://www.economist.com/node/21561927
[62] See http://www.guardian.co.uk/world/2012/jun/05/al-qaida-drone-attacks-too-broad
[63] See http://www.washingtonpost.com/world/middle_east/in-yemen-us-airstrikes-breed-anger-and-sympathy-for-al-qaeda/2012/05/29/gJQAUmKI0U_story.html
[64] See http://www.usatoday.com/news/washington/executive/rumsfeld-memo.htm

4. Drones and the rule of law

Mr. Chairman, I would like to turn now to the legal framework applicable to U.S. drone strikes. Both the United States and the international community have long had rules governing armed conflicts and the use of force in national self-defense. These rules apply whether the lethal force at issue involves knives, handguns, grenades or weaponized drones. When drone technologies are used in traditional armed conflicts—on "hot battlefields" such as those in Afghanistan, Iraq or Libya, for instance – they pose no new legal issues. As Administration officials have stated, their use is subject to the same requirements as the use of other lawful means and methods of warfare.[65]

But if drones used in traditional armed conflicts or traditional self-defense situations present no "new" legal issues, some of the activities and policies *enabled and facilitated* by drone technologies pose significant challenges to existing legal frameworks.

As I have discussed above, the availability of perceived low cost of drone technologies makes it far easier for the U.S. to "expand the battlefield," striking targets in places where it would be too dangerous or too politically controversial to send troops. Specifically, drone technologies enable the United States to strike targets deep inside foreign states, and do so quickly, efficiently and deniably. As a result, drones have become the tool of choice for so-called "targeted killing" – the deliberate targeting of an individual or group of individuals, whether known by name or targeted based on patterns of activity, inside the borders of a foreign country. It is when drones are used in targeted killings outside of traditional or "hot" battlefields that their use challenges existing legal frameworks.

Law is almost always out of date: we make legal rules based on existing conditions and technologies, perhaps with a small nod in the direction of predicted future changes. As societies and technologies change, law increasingly becomes an exercise in jamming square pegs into round holes. Eventually, that process begins to do damage to existing law: it gets stretched out of shape, or broken. Right now, I would argue, U.S. drone policy is on the verge of doing significant damage to the rule of law.

A. The Rule of Law

At root, the idea of "rule of law" is fairly simple, and well understood by Americans familiar with the foundational documents that established our nation, such as the Declaration of

[65] See http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf; Harold H. Koh, Keynote Address at the Annual Meeting of the American Society of International Law, Washington, DC (Mar. 25, 2010), Eric Holder, Address at Northwestern University School of Law, Chicago, IL (Mar. 5, 2011), http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html.http://www.state.gov/s/l/releases/remarks/139119.htm.; John O. Brennan, Address at Program on Law and Security, Harvard Law School, Cambridge, MA: Strengthening our Security by Adhering to our Values and Laws (Sep. 16, 2011), http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an; John O. Brennan, Address at Woodrow Wilson International Center for Scholars, Washington, DC: The Ethics and Efficacy of the president's Counterterrorism Strategy (Apr. 30, 2012), http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy.

Independence, the Constitution and the Bill of Rights. The rule of law requires that governments follow transparent, clearly defined and universally applicable laws and procedures. The goal of the rule of law is to ensure predictability and stability, and to prevent the arbitrary exercise of power. In a society committed to the rule of law, the government cannot fine you, lock you up, or kill you on a whim -- it can restrict your liberty or take your property or life only in accordance with pre-established processes and rules that reflect basic notions of justice, humanity and fairness.

Precisely what constitutes a fair process is debatable, but most would agree that at a minimum, fairness requires that individuals have reasonable notice of what constitutes the applicable law, reasonable notice that they are suspected of violating the law, a reasonable opportunity to rebut any allegations against them, and a reasonable opportunity to have the outcome of any procedures or actions against them reviewed by some objective person or body. These core values are enshrined both in the U.S. Constitution and in international human rights law instruments such as the International Covenant on Civil and Political Rights, to which the United States is a party.

In ordinary circumstances, this bundle of universally acknowledged rights (together with international law principles of sovereignty) means it is clearly unlawful for one state to target and kill an individual inside the borders of another state. Recall, for instance, the 1976 killing of Chilean dissident Orlando Letelier in Washington DC. When Chilean government intelligence operatives planted a car bomb in the car used by Letelier, killing him and a U.S. citizen accompanying him, the United States government called this an act of murder—an unlawful political assassination.

B. Targeted Killing and the Law of Armed Conflict

Of course, sometimes the "ordinary" legal rules do not apply. In war, the willful killing of human beings is permitted, whether the means of killing is a gun, a bomb, or a long-distance drone strike. The law of armed conflict permits a wide range of behaviors that would be unlawful in the absence of an armed conflict. Generally speaking, the intentional destruction of private property and severe restrictions on individual liberties are impermissible in peacetime, but acceptable in wartime, for instance. Even actions that a combatant knows will cause civilian deaths are lawful when consistent with the principles of necessity, humanity, proportionality,[66] and distinction.[67]

It is worth briefly explaining these principles. The principle of necessity requires parties to a conflict to limit their actions to those that are indispensible for securing the complete submission of the enemy as soon as possible (and that are otherwise permitted by international law). The principle of humanity forbids parties to a conflict to inflict gratuitous violence or employ methods calculated to cause unnecessary suffering. The principle of proportionality requires parties to ensure that the anticipated loss of life or property incidental to an attack is not

[66] See generally the U.S. Army's Operational Law Handbook, 2012, at http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2012.pdf ; http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14
[67] See generally the U.S. Army's Operational Law Handbook, 2012, at http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2012.pdf ; http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule1

excessive in relation to the concrete and direct military advantage expected to be gained. Finally, the principle of discrimination or distinction requires that parties to a conflict direct their actions only against combatants and military objectives, and take appropriate steps to distinguish between combatants and non-combatants.[68]

This is a radical oversimplification of a very complex body of law.[69] But as with the rule of law, the basic idea is pretty simple. When there is no war -- when ordinary, peacetime law applies -- agents of the state aren't supposed to lock people up, take their property or kill them, unless they have jumped through a whole lot of legal hoops first. When there is an armed conflict, however, everything changes. War is not a legal free-for-all[70] -- torture, rape are always crimes under the law of war, as is killing that is willful, wanton and not justified by military necessity[71] -- but there are far fewer constraints on state behavior.

Technically, the law of war is referred to using the Latin term "*lex specialis*" – special law. It is applicable in—and *only* in -- special circumstances (in this case, armed conflict), and in those special circumstances, it supersedes "ordinary law," or "*lex generalis*," the "general law" that prevails in peacetime. We have one set of laws for "normal" situations, and another, more flexible set of laws for "extraordinary" situations, such as armed conflicts.

None of this poses any inherent problem for the rule of law. Having one body of rules that tightly restricts the use of force and another body of rules that is far more permissive does not fundamentally undermine the rule of law, as long as we have a reasonable degree of consensus on what circumstances trigger the "special" law, and as long as the "special law" doesn't end up undermining the general law.

To put it a little differently, war, with its very different rules, does not challenge ordinary law as long as war is the exception, not the norm -- as long as we can all agree on what constitutes a war -- as long as we can tell when the war begins and ends -- and as long as we all know how to tell the difference between a combatant and a civilian, and between places where there's war and places where there's no war.

Let me return now to the question of drones and targeted killings. When all these distinctions I just mentioned are clear, the use of drones in targeted killings does not necessarily present any great or novel problem. In Libya, for instance, a state of armed conflict clearly existed inside the borders of Libya between Libyan government forces and NATO states. In that context, the use of drones to strike Libyan military targets is no more controversial than the use of manned aircraft.

That is because our core rule of law concerns have mostly been satisfied: we know there is an armed conflict, in part because all parties to it agree that there is an armed conflict, in part because observers (such as international journalists) can easily verify the presence of uniformed

[68] See generally the U.S. Army's Operational Law Handbook, 2012, at http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2012.pdf
[69] See http://ihl.ihlresearch.org/index.cfm?fuseaction=page.viewpage&pageid=2083
[70] See http://www.law.cornell.edu/uscode/text/18/2441
[71] See http://www1.umn.edu/humanrts/instree/iccelementsofcrimes.html

military personnel engaged in using force, and in part because the violence is, from an objective perspective, widespread and sustained: it is not a mere skirmish or riot or criminal law enforcement situation that got out of control. We know *who* the "enemy" is: Libyan government forces. We know *where* the conflict is and is not: the conflict was in Libya, but not in neighboring Algeria or Egypt. We know *when* the conflict began, we know who authorized the use of force (the UN Security Council) and, just as crucially, we know whom to hold *accountable* in the event of error or abuse (the various governments involved).[72]

Once you take targeted killings outside hot battlefields, it's a different story. The Obama Administration is currently using drones to strike terror suspects in Pakistan, Somalia, Yemen, and –perhaps—Mali and the Philippines as well. Defenders of the administration's increasing reliance on drone strikes in such places assert that the U.S. is in an armed conflict with "al Qaeda and its associates," and on that basis, they assert that the law of war is applicable -- in any place and at any time -- with regard to any person the administration deems a combatant.

The trouble is, no one outside a very small group within the U.S. executive branch has any ability to evaluate who is and who isn't a combatant. The war against al Qaeda and its associates is not like World War II, or Libya, or even Afghanistan: it is an open-ended conflict with an inchoate, undefined adversary (who exactly are al Qaeda's "associates"?). What is more, targeting decisions in this nebulous "war" are based largely on classified intelligence reporting. As a result, Administration assertions about who is a combatant and what constitutes a threat are entirely non-falsifiable, because they're based wholly on undisclosed evidence. Add to this still another problem: most of these strikes are considered covert action, so although the U.S. sometimes takes public credit for the deaths of alleged terrorist leaders, most of the time, the U.S. will not even officially acknowledge targeted killings.

This leaves all the key rule-of-law questions related to the ongoing war against al Qaeda and its "associates" unanswered.[73] Based on what criteria might someone be considered a combatant or directly participating in hostilities? What constitutes "hostilities" in the context of an armed conflict against a non-state actor, and what does it mean to participate in them? And just where is the war? Does the war (and thus the law of war) somehow "travel" with combatants? Does the U.S. have a "right" to target enemy combatants anywhere on earth, or does it depend on the consent of the state at issue? Who in the United States government is authorized to make such determinations, and what is the precise chain of command for such decisions?

I think the rule of law problem here is obvious: when "armed conflict" becomes a term flexible enough to be applied both to World War II and to the relations between the United States and "associates" of al Qaeda such as Somalia's al Shabaab, the concept of armed conflict is not very useful anymore. And when we lack clarity and consensus on how to recognize "armed conflict," we no longer have a clear or principled basis for deciding how to categorize U.S. targeted killings. Are they, as the U.S. government argues, legal under the laws of war? Or are they, as some human rights groups have argued, unlawful murder?

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[72] In my previous scholarly work, I have written extensively about the challenges posed by geographically dispersed terrorist organizations to traditional legal categories. See, e.g., Rosa Brooks, *War Everywhere: Rights, National Security Law, And The Law Of Armed Conflict In The Age Of Terror*, 153 U. Pa. L. Rev. 675 (2004).
[73] See http://www.hrw.org/news/2011/12/19/q-us-targeted-killings-and-international-law

C. Targeted Killing and the International Law of Self-Defense

When faced with criticisms of the law of war framework as a justification for targeted killing, Obama Administration representatives often shift tack, arguing that international law rules on national self-defense provide an alternative or additional legal justification for U.S. targeted killings. Here, the argument is that if a person located in a foreign state poses an "imminent threat of violent attack" against the United States, the U.S. can lawfully use force in self-defense, provided that the defensive force used is otherwise consistent with law of war principles.

Like law of war-based arguments, this general principle is superficially uncontroversial: if someone overseas is about to launch a nuclear weapon at New York City, no one can doubt that the United States has a perfect right (and the president has a constitutional duty) to use force if needed to prevent that attack, regardless of the attacker's nationality.

But once again, the devil is in the details. To start with, what constitutes an "imminent" threat? Traditionally, both international law and domestic criminal law understand that term narrowly: [74] to be "imminent," a threat cannot be distant or speculative.[75] But much like the Bush Administration before it, the Obama Administration has put forward an interpretation of the word "imminent" that bears little relation to traditional legal concepts.

According to a leaked 2011 Justice Department white paper[76]—the most detailed legal justification that has yet become public-- the requirement of imminence "does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future." This seems, in itself, like a substantial departure from accepted international law definitions of imminence.

But the White Paper goes even further, stating that "certain members of al Qaeda are continually plotting attacks...and would engage in such attacks regularly [if] they were able to do so, [and] the U.S. government may not be aware of all... plots as they are developing and thus cannot be confident that none is about to occur." For this reason, it concludes, anyone deemed to be an operational leader of al Qaeda or its "associated forces" presents, by definition, an imminent threat even in the *absence* of any evidence whatsoever relating to immediate or future attack plans. In effect, the concept of "imminent threat" (part of the international law relating to self-defense) becomes conflated with identity or status (a familiar part of the law of armed conflict).

That concept of imminence has been called Orwellian, and although that is an overused epithet, in this context it seems fairly appropriate. According to the Obama Administration,

[74] The most restrictive traditional formulation of the term imminent in international law can be seen in the famous 1837 Exchange of letters between U.S. Secretary of State Daniel Webster and Lord Ashburton, Foreign Secretary of Great Britain, relating to the case of the SS Caroline, explaining "imminent attack" as one that is "instant, overwhelming, leaving no choice of means, and no moment for deliberation." More recent approaches have been somewhat more flexible. See, e.g, United Nations Secretary-General's High-level Panel on Threats, Challenges and Change: "A More Secure World: Our Shared Responsibility," at http://www.un.org/secureworld/

[75] See http://opiniojuris.org/2012/03/07/why-preventive-self-defense-violates-the-un-charter/

[76] See http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf

"imminent" no longer means "immediate," and in fact the very *absence* of clear evidence indicating specific present or future attack plans becomes, paradoxically, the basis for assuming that attack may *perpetually* be "imminent."

The 2011 Justice Department White Paper notes that the use of force in self-defense must comply with general law of war principles of necessity, proportionality, humanity, and distinction. The White Paper offers no guidance on the specific criteria for determining when an individual is a combatant (or a civilian participating directly in hostilities), however. It also offers no guidance on how to determine if a use of force is necessary or proportionate.

From a traditional international law perspective, this necessity and proportionality inquiry relates both to imminence and to the gravity of the threat itself, but so far there has been no public Administration statement as to how the administration interprets these requirements. Is *any* threat of "violent attack" sufficient to justify killing someone in a foreign country, including a U.S. citizen? Is *every* potential suicide bomber targetable, or does it depend on the gravity of the threat? Are we justified in drone strikes against targets who might, if they get a chance at some unspecified future point, place an IED that might, if successful, kill one person? Ten people? Twenty? 2,000? How grave a threat must there be to justify the use of lethal force against an American citizen abroad -- or against non-citizens, for that matter?

As I have noted, it is impossible for outsiders to fully evaluate U.S. drone strikes, since so much vital information remains classified. In most cases, we know little about the identities; activities or future plans of those targeted. Nevertheless, given the increased frequency of U.S. targeted killings in recent years, it seems reasonable to wonder whether the Administration conducts a rigorous necessity or proportionality analysis in all cases.

So far, the leaked 2011 Justice Department White Paper represents the most detailed legal analysis of targeted killings available to the public. It is worth noting, incidentally, that this White Paper addresses only the question of whether and when it is lawful for the U.S. government to target U.S. citizens abroad. We do not know what legal standards the Administration believes apply to the targeting of non-citizens. It seems reasonable to assume, however, that the standards applicable to non-citizens are less exacting than those the Administration views as applicable to citizens.

Defenders of administration targeted killing policy acknowledge that the criteria for determining how to answer these many questions have not been made public, but insist that this should not be cause for concern. The Administration has reportedly developed a detailed "playbook" outlining the targeting criteria and procedures,[77], and insiders insist that executive branch officials go through an elaborate process in which they carefully consider every possible issue before determining that a drone strike is lawful.[78]

No doubt they do, but this is somewhat cold comfort. Formal processes tend to further normalize once-exceptional activities -- and "trust us" is a rather shaky foundation for the rule of

[77] See http://www.uta.edu/faculty/story/2311/Misc/2013,4,1,DronesTargetedKillingWhoCanWeKill.pdf;
[78] See http://www.state.gov/s/l/releases/remarks/139119.htm, http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html, http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all

law. Indeed, the whole point of the rule of law is that individual lives and freedom should *not* depend solely on the good faith and benevolence of government officials.

As with law of war arguments, stating that U.S. targeted killings are clearly legal under traditional self-defense principles requires some significant cognitive dissonance. Law exists to restrain untrammeled power. It is no doubt possible to make a plausible legal argument justifying each and every U.S. drone strike -- but this merely suggests that we are working with a legal framework that has begun to outlive its usefulness.

The real question isn't whether U.S. drone strikes are "legal." The real question is this: Do we really want to live in a world in which the U.S. government's justification for killing is so malleable?

5. Setting Troubling International Precedents

Here is an additional reason to worry about the U.S. overreliance on drone strikes: Other states will follow America's example, and the results are not likely to be pretty. Consider once again the Letelier murder, which was an international scandal in 1976: If the Letelier assassination took place today, the Chilean authorities would presumably insist on their national right to engage in "targeted killings" of individuals deemed to pose imminent threats to Chilean national security -- and they would justify such killings using precisely the same legal theories the U.S. currently uses to justify targeted killings in Yemen or Somalia. We should assume that governments around the world—including those with less than stellar human rights records, such as Russia and China—are taking notice.

Right now, the United States has a decided technological advantage when it comes to armed drones, but that will not last long. We should use this window to advance a robust legal and normative framework that will help protect against abuses by those states whose leaders can rarely be trusted. Unfortunately, we are doing the exact opposite: Instead of articulating norms about transparency and accountability, the United States is effectively handing China, Russia, and every other repressive state a playbook for how to foment instability and –literally -- get away with murder.

Take the issue of sovereignty. Sovereignty has long been a core concept of the Westphalian international legal order.[79] In the international arena, all sovereign states are formally considered equal and possessed of the right to control their own internal affairs free of interference from other states. That's what we call the principle of non-intervention -- and it means, among other things, that it is generally prohibited for one state to use force inside the borders of another sovereign state. There are some well-established exceptions, but they are few in number. A state can lawfully use force inside another sovereign state with that state's

[79] See http://www.towson.edu/polsci/irencyc/sovreign.htm

invitation or consent, or when force is authorized by the U.N. Security Council, pursuant to the U.N. Charter,[80] or in self-defense "in the event of an armed attack."

The 2011 Justice Department White Paper asserts that targeted killings carried out by the United States don't violate another state's sovereignty as long as that state either consents or is "unwilling or unable to suppress the threat posed by the individual being targeted." That sounds superficially plausible, but since the United States views itself as the sole arbiter of whether a state is "unwilling or unable" to suppress that threat, the logic is in fact circular.

It goes like this: The United States -- using its own malleable definition of "imminent" -- decides that Person X, residing in sovereign State Y, poses a threat to the United States and requires killing. Once the United States decides that Person X can be targeted, the principle of sovereignty presents no barriers, because either 1) State Y will *consent* to the U.S. use of force inside its borders, in which case the use of force presents no sovereignty problems or 2) State Y will *not* consent to the U.S. use of force inside its borders, in which case, by definition, the United States will deem State Y to be "unwilling or unable to suppress the threat" posed by Person X and the use of force again presents no problem.

This is a legal theory that more or less eviscerates traditional notions of sovereignty, and has the potential to significantly destabilize the already shaky collective security regime created by the U.N. Charter.[81] If the U.S. is the sole arbiter of whether and when it can use force inside the borders of another state, any other state strong enough to get away with it is likely to claim similar prerogatives. And, of course, if the U.S. executive branch is the sole arbiter of what constitutes an imminent threat and who constitutes a targetable enemy combatant in an ill-defined war, why shouldn't other states make identical arguments—and use them to justify the killing of dissidents, rivals, or unwanted minorities?

6. Towards solutions: ensuring that US targeted killing policy does not undermine the rule of law.

I have suggested in this testimony that while the law of war and the international law of self-defense *may* provide justification for U.S. targeted killing policy, it is, in practice, difficult to say for sure. This is because decisions about who is a combatant, what threats are imminent and so on are inherently fact specific. Since U.S. targeted killings take place under a cloak of secrecy, it is impossible for outsiders to evaluate the facts or apply the law to specific facts.

I have also suggested that we face a problem that is deeper still: we are attempting to apply old law to novel situations. As I noted earlier, the law of war evolved in response to traditional armed conflicts, and cannot be easily applied to relations between states and geographically diffuse non-state terrorist organizations. When we try to apply the law of war to

[80] See http://www.un.org/en/documents/charter/chapter7.shtml
[81] See generally Rosa Brooks, Be Careful What You Wish For: Changing Doctrines, Changing Technologies, and the Lower Cost of War, 106 Am. Soc'y Int'l L. Proc. 106 (2012) and The Strange Convergence of Sovereignty-Limiting Doctrines in Human Rights and National Security Law Discourses, Georgetown J. Int'l Affairs, Issue 13-2, 2012.

modern terrorist threats, we encounter numerous translation problems. Most disturbingly, it becomes nearly impossible to make a principled decision about when the law of war is applicable in the first place, and when it is not.

As I noted earlier, law is almost always out of date: legal rules are made based on the conditions and technologies existing at the time, and as societies and technologies change, law increasingly becomes an exercise in jamming square pegs into round holes. Up to a point, this works, but eventually, that process begins to do damage to existing law: it gets stretched out of shape, or broken. At that point, we need to update our laws and practices before too much damage is done.

This is a daunting project, and I do not have any simple solutions to offer. In a sense, the struggle to adapt old legal frameworks and institutions to radically new situations will be the work of generations. But the complexity of the problem should not be an excuse for ignoring it. In that spirit, I will suggest several potential means to improve on the existing state of affairs and enhance oversight, transparency and accountability. Congress can implement some of these recommendations, while others would require Administration acquiescence. Fully evaluating the pros and cons of potential reforms is beyond the scope of this testimony, but I hope that this will be the subject of future hearings.

1. Congress should encourage Administration transparency and public debate by continuing to hold hearings on targeted killing policy, its relationship to (and impact on) broader U.S. counterterrorism, national security and foreign policy goals, and appropriate mechanisms for improving oversight, accountability and conformity to U.S. rule of law values. Congress should also consider hearings on the longer-term challenge of adapting the law of war and law of self-defense to 21st century threats.

2. Congress should also encourage Administration transparency through the imposition of reporting requirements. Congress could require that the executive branch provide thorough reports on any uses of force not expressly authorized by Congress and/or outside specified regions, and require that such reports contain both classified sections and unclassified sections in which the Administration provides a legal and policy analysis of any use of force in self-defense or other uses of force outside traditional battlefields.

3. Congress should consider repealing the 2001 AUMF. The Obama administration's domestic legal justification for most drone strikes relies on the AUMF, which it interprets to authorize the use of force not only against those individuals and organizations with some real connection to the 9/11 attacks, but also against all "associates" of al Qaeda. This flexible interpretation of the AUMF creates few constraints, and has lowered the threshold for using force. Repealing the AUMF would not deprive the president of the ability to use force if necessary to prevent or respond to a serious armed attack: the president would retain his existing discretionary power, as chief executive and commander in chief, to protect the nation in emergencies. Repealing the 2001 AUMF would, however, likely reduce the frequency with which the president resorts to targeted killings.

APPENDIX

TO MAY 16, 2012 STATEMENT FOR THE RECORD SUBMITTED TO THE SENATE COMMITTEE ON ARMED SERVICES BY ROSA BROOKS

4. The Constitution gives Congress the power to "define and punish offenses against the law of nations." Without tying the president's hands, Congress can pass a resolution clarifying that the international law of self-defense requires a rigorous imminence, necessity and proportionality analysis, and that the use of cross-border military force should be reserved for situations in which there is concrete evidence of grave threats to the United States or our allies that cannot be addressed through other means.

5. Congress and/or the Executive branch should create a non-partisan blue ribbon commission made up of senior experts on international law, national security, human rights, foreign policy and counterterrorism. Commission members should have or receive the necessary clearances to review intelligence reports and conduct a thorough policy review of past and current targeted killing policy, evaluating the risk of setting international precedents, the impact of U.S. targeted killing policy on allies, and the impact on broader U.S. counterterrorism goals.

   In the absence of a judicial review mechanism, such a commission might also be tasked with reviewing particular strikes to determine whether any errors or abuses have taken place. The commission should release a public, unclassified report as well as a classified report made available to executive branch and congressional officials, and the report should continue detailed recommendations, including, if applicable, recommendations for changes in law and policy and recommendations for further action of any sort, including, potentially, compensation for civilians harmed by U.S. drone strikes. The unclassified report should contain as few redactions as possible.

6. Congress should urge the president to publicly acknowledge all targeted killings outside traditional battlefield within a reasonable time period, identifying those who were targeted, laying out (with the minimal number of appropriate redactions) the legal and factual basis for the decision to target, and identifying, to the best of available knowledge, death, property damage and injury resulting from the strike(s).

7. Congress should urge the president to release unclassified versions of all legal memoranda relating to targeted killing policy. In particular, U.S. citizens have a right to understand the government's views on the legality of targeting U.S. citizens; there is no conceivable justification for failing to make this information public.

8. Congress should urge the president to also provide the public with information about the process through which targeting decisions outside traditional battlefields are made, the chain of command for such decisions, and internal procedures designed to prevent civilian casualties. Most military operational and legal manuals are publicly available, and this issue should be no different. If reports of a targeted killing "playbook" are accurate, an unclassified version should be released to the public.

9. Congress should urge the administration should convene, through appropriate diplomatic and track II channels, an international dialogue on norms governing the use of drone technologies and targeted killings. The goal should be to develop consensus and a code of conduct on the legal principles applicable to targeted killing outside a state's territory,

including those relating to sovereignty, proportionality and distinction, and on appropriate procedural safeguards to prevent and redress error and abuse.

10. Congress should consider creating a judicial mechanism, perhaps similar to the existing Foreign Intelligence Surveillance Court, to authorize and review the legality of targeted killings outside of traditional battlefields. While the Administration may argue that such targeting decisions present non-justiciable political questions because of the president's commander-in-chief authority, the use of military force outside of traditional battlefields and against geographically dispersed non-state actors straddles the lines between war and law enforcement. While the president must clearly be granted substantial discretion in the context of armed conflicts, the *applicability* of the law of armed conflict to a particular situation requires that the law be interpreted and applied to a particular factual situation, and this is squarely the type of inquiry the judiciary is bested suited to making.

    It is also worth noting that the practical concerns militating against justiciability in the context of traditional wartime situations do not exist to the same degree here. On traditional battlefields, imposing due process or judicial review requirements on targeting decisions would be unduly burdensome, as many targeting decisions must be made in situations of extreme urgency. In the context of targeted killings outside traditional battlefields, this is rarely the case. While the window of opportunity in which to strike a given target may be brief and urgent, decisions about whether an individual may lawfully be targeted are generally made well in advance.

    A judicial mechanism designed to ensure that U.S. targeted killing policy complies with U.S. law and the law of armed conflict might take any of several forms. Most controversially, a court might be tasked with the ex ante determination of whether a particular individual could lawfully be targeted.

    This approach is likely to be strenuously resisted by the Administration on separation of powers grounds, and it also raises potential issues about whether the Constitution's case and controversy requirement could be satisfied, insofar as proceedings before such a judicial body would, of necessity, be in camera and ex parte.82 This is also true for the existing FISA court, however, and its procedures have generally been upheld on Fourth Amendment grounds. It would seem odd to permit ex parte proceedings in an effort to ensure judicial approval for surveillance, but reject such proceedings as insufficiently protective of individual rights when an individual has been selected for lethal targeting rather than mere search and seizure.

    I believe it would be possible to design an ex ante judicial mechanism that would pass constitutional and practical muster. It would be complex and controversial, however, and there is an alternative approach that might offer many of the same benefits with far fewer of the difficulties. This alternative approach would be to develop a judicial mechanism that conducts a post hoc review of targeted killings, perhaps through a statute creating a cause of action for damages for those claiming wrongful injury or death as a result of

[82] See http://www.lawfareblog.com/2013/02/why-a-drone-court-wont-work/

unlawful targeted killing operations. This would add additional incentives for executive branch officials to abide by the law, without placing the judiciary in the troubling role of authorizing or rejecting the use of military force in advance. While proceedings might need to be conducted at least partially in camera, judicial decisions in these cases could be released in redacted form.

It is not possible for this testimony to fully address the many permutations of potential judicial review mechanisms for targeted killing, but I hope this is an issue that will generate further discussion and inquiry in this sub-committee. To that end, it is worth noting that the notion of judicial review of targeted killing is one that has been validated by the courts of one of our closest allies, Israel.

The Israeli Supreme Court addressed the issue of targeted killing in a 2006 decision, and roundly rejected the view that targeted killing presents a non-justiciable issue.83 The court insisted that the legality of each targeted killing decision must be individually considered in light of domestic and international legal requirements. It determined that while the conflict between Israel and Palestinian terrorist organizations was an international armed conflict, individual terrorist suspects were civilians who become targetable by virtue (and only by virtue) of their direct participation in hostilities, a concept the court analyzed in detail. The court also noted that international law requires independent investigations when civilians are targeted because of their suspected participation in hostilities. While specific judicial review mechanisms in the U.S. might reasonably be expected to vary from those in place in Israel, the Israeli experience strongly suggests that there is no inherent reason judicial review of targeted killings could not occur.

Conclusion

Mr. Chairman, Senator Cruz and members and staff of the subcommittee, we need to start talking honestly about drones, the activities they enable and the strategic and legal frameworks in which these activities take place. Drone critics need to end their irrational insistence on viewing drones as somehow inherently "immoral." But drone strike boosters also need to engage in a more honest conversation, and grapple with the argument that although drone strikes appear to offer cheap and low-risk "quick fix" approach to counterterrorism, they may well be doing the U.S. as much harm as good.

In particular, we need to address the rule of law implications of U.S. targeted killing policy. Every individual detained, targeted, and killed by the U.S. government may well deserve his fate. But when a government claims for itself the unreviewable power to kill anyone, anywhere on earth, at any time, based on secret criteria and secret information discussed in a secret process by largely unnamed individuals, it undermines the rule of law.

[83] See http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.HTM

APPENDIX

TO MAY 16, 2012 STATEMENT FOR THE RECORD SUBMITTED TO THE SENATE COMMITTEE ON ARMED SERVICES BY ROSA BROOKS

One can argue, as the Obama Administration does, that current U.S. drone policy is entirely lawful, and perhaps this is so, if we're willing to take virtually everything about the strikes on faith, and don't mind jamming square pegs into round holes. But "legality" is not the same as morality or common sense. Current U.S. drone policy offers no safeguards against abuse or error, and sets a dangerous precedent that other states are sure to exploit.

Thank you once again for affording me this opportunity to testify. There is nothing preordained about how we use new technologies, but by lowering the perceived costs of using lethal force, drone technologies enable a particularly invidious sort of mission creep. When covert killings are the rare exception, they do not pose a fundamental challenge to the legal, moral, and political framework in which we live. But when covert killings become a routine and ubiquitous tool of U.S. foreign policy, we cannot afford to let them remain in the legal and moral shadows.

We need an honest conversation about how to bring targeted killings under a rule of law umbrella, by creating more transparent rules and more robust checks and balances. I am grateful to all of you for helping to foster such an honest conversation.

Chairman LEVIN. Thank you very much.
Mr. Corn?

STATEMENT OF MR. GEOFFREY CORN, PROFESSOR OF LAW, SOUTH TEXAS COLLEGE OF LAW

Mr. CORN. Mr. Chairman and members of the committee, thank you for the opportunity to share my views on these important questions. I should note at the outset that these views are informed significantly by my own personal background, having spent 22 years in the Army both as an intelligence officer and as a judge advocate, including my last year as the Army's senior advisor on the law of war.

The authority for, the scope of, and the means used to prosecute the armed conflict with al Qaeda, the Taliban, and associated forces are clearly impacted by complex considerations of law, policy, strategy, intelligence, and diplomacy. The AUMF reflects the combined will of our Nation's political branches to include the full might of the U.S. Armed Forces within the range of available options for addressing this threat.

Although the AUMF provides a very general grant of authority, this authority is not unlimited or a blank check to wage war anywhere in the world against any group or perhaps individual who is hostile against the United States. Instead, I believe the scope, methods, and means are all rationally framed by both the authorization's language and its implicit incorporation of the law of armed conflict.

Because I do not believe there is inconsistency between the nature of U.S. operations to date and these inherent limitations, I do not believe it is necessary at this point in time to modify the AUMF. Instead, I believe that Congress should continue to engage in oversight to remain fully apprised of the strategic, operational, and at times tactical decisionmaking processes that result in the employment of U.S. combat power pursuant to the statute, enabling Congress to ensure that such use falls within the scope of an authorization targeted at al Qaeda, intended to protect the Nation from future terrorist attacks, and that these operations reflect unquestioned commitment to the principles of international law that regulate the use of military force during any armed conflict.

I believe the AUMF effectively addresses the belligerent threat against the United States posed by terrorist groups. I emphasize the term "belligerent" for an important reason. It is obvious that the AUMF has granted authority to use the Nation's military power against threats falling within its scope. Therefore, only those organizations that pose a risk of sufficient magnitude to justify invoking the authority associated with armed conflict should be included within that scope as a result of their affiliation with al Qaeda. Determining what groups properly fall within this scope is, therefore, both critical and challenging.

The AUMF provides the President with the necessary flexibility to tailor U.S. operations to the evolving nature of this unconventional enemy, maximizing the efficacy of U.S. efforts to deny al Qaeda the freedom of action they possessed in Afghanistan prior to Operation Enduring Freedom.

In reaction to this evolution, the United States has employed combat power against what the prior panel referred to as associated forces or co-belligerents of al Qaeda, belligerent groups assessed to adhere to the overall terrorist objectives of the organization and engage in hostilities alongside al Qaeda directed against the United States or its interests.

The focus on shared ideology, tactics, and indicia of connection between high-level group leaders seems both logical and legitimate for including these offshoots of al Qaeda within the scope of the AUMF as co-belligerents, a determination that, based on publicly available information, has to date been limited to groups seeking the sanctuary of the Afghanistan-Pakistan border areas, Yemen, or Somalia.

If Congress does, however, choose to revise the AUMF, I do not believe that the revision should incorporate an exclusive list of defined co-belligerent groups, a geographic scope limitation, or some external oversight of targeting decisions, all of which would undermine the efficacy of U.S. operations by signaling to the enemy limits on U.S. operational and tactical reach.

It is an operational and tactical axiom that insurgent and nonstate threats rarely seek the proverbial toe-to-toe confrontation with clearly superior military forces. Al Qaeda is no different. Indeed, their attempts to engage in such tactics in the initial phases of Operation Enduring Freedom proved disastrous. Incorporating such limitations into the AUMF would, therefore, be inconsistent with the operational objective of seizing and retaining the initiative against this unconventional enemy and the strategic objective of preventing future terrorist attacks against the United States.

Finally, I believe to target decisionmaking during armed conflict is a quintessential command function and that the President, acting in his own capacity or through subordinate officers, should make these decisions. He and his subordinates bear an obligation to ensure compliance with the law of armed conflict and other principles of international law when employing U.S. combat power. Every subordinate officer in the chain of command is sworn to uphold and defend the Constitution which, by implication, also requires compliance with this law.

I believe the level of commitment to ensuring such compliance in structure, process, education, training, and internal oversight is more significant today than at any time in our Nation's history. As one familiar with all these aspects of the compliance process, I am discouraged by the common assertion that there is insufficient oversight for targeting decisions.

Furthermore, I believe few people better understand the immense moral burden associated with a decision to order lethal attack than experienced military leaders who never take these decisions lightly. If our confidence in these leaders to make sound military decisions is sufficient to entrust to them the lives of our sons and daughters—and on this point, again I must admit my self-interest as my son is a second-year cadet in the U.S. Air Force Academy and my brother is a serving colonel in the United States Army—I believe it must be sufficient to judge when and how to employ lethal combat power against an enemy. These leaders spend their entire professional careers immersed in the operational,

moral, ethical, and legal aspects of employing combat power. I just do not believe some external oversight mechanism or a Federal judge is more competent to make these extremely difficult and weighty judgments as the people that this Nation entrusts for that responsibility.

Finally, I would like to make one comment on the very hotly discussed issue of associated forces and the scope of the AUMF. In my view, when the administration refers to an associated or affiliated force, it is referring to a process of mutation that this organization undergoes. Obviously, we are dealing with an enemy that is going to seek every asymmetric tactic to avoid the capability of the United States to disrupt or disable its operations. Part of that tactic, I think, is to recruit and grow affiliated organizations.

I certainly understand the logic of wanting to include those organizations within the scope of a revised AUMF. My concern echoes that of Senator Inhofe, where the risk is if you open that Pandora's box, what other changes to this authority might be included in the statute which, I believe, could denigrate or limit the effectiveness of U.S. military operations. So while I believe Congress absolutely has an important function to ensure that the use of force under the statute is consistent with the underlying principles that frame the enactment of the AUMF, which is to defeat al Qaeda as an entity in the corporate sense and protect the United States from future terrorist attacks, I do not believe at this point in time it is necessary to modify the statute.

Thank you.

[The prepared statement of Mr. Corn follows:]

PREPARED STATEMENT BY MR. GEOFFREY S. CORN

The authority for, scope of, and means used to prosecute the armed conflict with al Qaeda are all critically important questions for our Nation, our Armed Forces, and elected officials responsible for establishing U.S. national security policy. As in the prosecution of any armed conflict, each of these issues is impacted by complex considerations of law, policy, strategy, intelligence, and diplomacy. The Authorization for the Use of Military Force (AUMF) enacted by Congress in response to the attacks on September 11, 2001, has served and continues to serve as the key source of constitutional authority for the conduct of military operations directed against these belligerent opponents. This Joint Resolution expressly manifests the combined will of our Nation's political branches to include the full might of the U.S. Armed Forces within the range of available options for addressing this threat. It does not, however, explicitly define the scope of such military operations, nor limitations on the methods or means of warfare utilized during the course of such operations. This is consistent with past practice of providing similar authorizations for the conduct of armed hostilities, and is therefore unsurprising.

The undefined scope does not, however, suggest an unlimited grant of authority, or what some have characterized as a "blank check" to wage war anywhere in the world against any group (or perhaps individual) deemed by the President to present a threat of future terrorist attacks. Instead, as I will explain in more detail below, the scope, methods, and means are all rationally framed by both the authorization's language and its implicit incorporation of the law of armed conflict. Because I do not believe there is sufficient indication of any inconsistency between the nature of U.S. military operations conducted pursuant to the AUMF and these inherent limitations, I respectfully oppose any effort to modify the Joint Resolution. Instead, I believe that Congress should work with both the executive and the Department of Defense to remain fully appraised of the strategic, operational, and at times tactical decisionmaking process that results in the employment of U.S. combat power pursuant to the AUMF. This will enable Congress to ensure that these operations continue to fall within the scope of an authorization targeted at al Qaeda, the specific terrorist belligerent group assessed as responsible for the September 11 terrorist attacks, and that these operations reflect unquestioned commitment to the principles

of international law that regulate the use of military force, namely the law of armed conflict.

In support of this opinion, I will address the questions provided by the committee, although I note that in some cases I have paraphrased these questions.

1. What persons and organizations are covered by the existing AUMF and does it cover al Qaeda and associated forces that may have had nothing to do with the terrorist attacks of September 11th, 2001?

I believe the AUMF, properly interpreted, covers al Qaeda as a belligerent organization, including offshoots of what is generally understood to be the "original" al Qaeda. Determining enemy "order of battle" (identifying the enemy organization) is a complex endeavor in any armed conflict, but is an essential foundation for effective threat identification. In the current conflict, this process has apparently resulted in the determination that al Qaeda, as an organization, has evolved since the enactment of the AUMF. In reaction to this evolution, the United States has employed combat power against new iterations of al Qaeda, and also against "associated forces," or cobelligerents, of al Qaeda—belligerent groups that adhere to the overall terrorist objectives of the organization and engage in hostilities "alongside" al Qaeda [quoting Jeh Johnson] intended to further these objectives (including threats directed against the United States, its Armed Forces, and its interests abroad)—in Pakistan, the Arabian peninsula, and the Horn of Africa. I believe this is both operationally logical and consistent with the AUMF. By providing authority to use all "necessary and appropriate" force against those groups responsible for the September 11 attacks in order to prevent future attacks, the AUMF provided the President with the necessary flexibility to tailor U.S. operations to the evolving nature of this unconventional threat. In this asymmetric struggle, the authority in the AUMF provided a logical method to ensure that the efforts of al Qaeda both to morph in response to the overwhelming U.S. combat capability and to seek sanctuary in locations that they believe provide the freedom of action they possessed in Afghanistan prior to Operation Enduring Freedom would not hinder the efficacy of the U.S. response. In short, just as the nature of the threat has evolved, the scope of military operations conducted pursuant to the AUMF must also evolve.

Identifying a group as a "co-belligerent" with al Qaeda is therefore the critical intelligence determination that justifies subjecting that group (and its belligerent operative members) to operations pursuant to the AUMF. In my opinion, the executive has acted rationally and in good faith in making these assessments. While I am not privy to this decisionmaking process, open source information indicates that the al Qaeda co-belligerent determination has been limited to groups seeking sanctuary in Afghanistan/Pakistan border areas, Yemen, and Somalia. It should be obvious that this co-belligerent determination cannot be based on traditional indicia of co-belligerency applicable in inter-state hostilities, such as mutual defense treaties or involvement in hostilities of regular armed forces. The focus on shared ideology, tactics, and indicia of connection between high-level group leaders therefore seems to emphasizes both logical and legitimate intelligence indicators of which offshoots of al Qaeda fall into the category of co-belligerent, and therefore within the scope of the AUMF. For example, in prosecuting Somali terrorist Ahmed Warsame, Federal prosecutors stated in court papers that leaders of the Shabaab group in Somali had sent Warsame to Yemen for training with the "core" al Qaeda offshoot, al Qaeda in the Arabian Peninsula. This is an example of reliance on indicia of collaboration in training and operational tactics as factors that would demonstrate co-belligerent status.

Finally, I do not believe the AUMF should be amended to incorporate either a list of defined co-belligerent groups or the co-belligerent assessment criteria. This would undermine the efficacy of U.S. threat identification efforts by signaling to this unconventional enemy exactly where to seek sanctuary and how to avoid the consequence of falling within the scope of the AUMF. In so doing, it would unnecessarily provide a windfall to al Qaeda and enhance enemy freedom of action, a consequence that would be fundamentally inconsistent with the strategic and operational military objective of keeping this enemy constantly off balance and retaining initiative for U.S. forces.

2. Does the AUMF appropriately cover current threats against the United States, and should it be expanded to cover terrorist groups that are not associated with al Qaeda?

Based on publically available information, and the fact that President Obama has not publically asserted a need to expand the scope of the AUMF, I believe the AUMF does currently address the belligerent threat against the United States posed by terrorist groups. I emphasize the term belligerent for an important reason. It is obvious that the AUMF is a grant of authority to use the Nation's combat power

against threats falling within its scope. As such, it should be limited to only those organizations that, as the result of both the organization and intensity of their threat capabilities, justify crossing the threshold from law enforcement response to armed hostilities. I do not believe that the existence of a terrorist threat to the United States alone justifies crossing this threshold. The United States has for decades confronted terrorist threats that fall below this threshold, and will certainly continue to confront such threats in the future. Expanding the AUMF to include such threats would be inconsistent with the fundamental structure of the law of armed conflict, which seeks to limit situations of armed conflict to those that indicate a level of intensity that indicates a de facto departure from peacetime law enforcement response authorities. I emphasize, however, that this opinion is based on publically available information. If classified information were to indicate that other terrorist groups represent a threat of analogous magnitude to that of al Qaeda, including them within the scope of the AUMF would be legitimate.

From the inception of the military response against al Qaeda, even the inclusion of this group within the scope of the AUMF created substantial legal controversy, controversy that continues to this day. Many legal scholars, and some of our closest allies, reject the U.S. position that a nation may properly claim to be engaged in an armed conflict against a transnational terrorist group like al Qaeda. While I disagree with this interpretation of international law, and believe that for the United States this is no longer subject to debate, I do not believe that there is a legitimate justification to characterize the response to all terrorist threats—existing or emerging—as armed conflicts.

Accordingly, while it is almost certain that there are indeed some terrorist threats that do not fall within the scope of the AUMF (because they are not properly characterized as members of the Taliban, al Qaeda, or co-belligerents), this does not mean the AUMF is either under-inclusive or that it should be amended to include all such groups within its scope. If these groups are not considered by the commander in chief to be co-belligerents, they are properly excluded from the scope of the authorization. Nor should the AUMF be amended to include within its scope any jihadist motivated terrorist group. First, no terrorist group should be considered for incorporation into the authority provided by the AUMF unless and until it poses a threat of analogous magnitude as that associated with al Qaeda—considerations that, as noted above, would justify incorporating them within the scope of the AUMF (assuming also that such groups posed a threat of sufficient magnitude and imminence to trigger the inherent right of self-defense pursuant to the jus ad bellum). Second, if at some point either the President and/or Congress believes that although not affiliated with al Qaeda, a terrorist group manifests a level of organization and risk that justifies subjecting it to this authority, then at that point they can addressed through a distinct authorization for the use of force, assuming the use of such force would satisfy international law requirements. Such a response would be equally applicable if and when the threat to an ally posed by such a group was considered of such significance as to necessitate a U.S. military response.

Finally, responses to this question must also incorporate the President's authority to always act to defend the Nation from an actual or imminent threat of armed attack against the Nation or its Armed Forces overseas (and to rescue Americans threatened overseas). This authority extends to threats posed by non-state groups, including terrorist organizations that are not considered al Qaeda co-belligerents. The conclusion that "other" terrorist threats do not fall within the scope of the AUMF therefore does not subject the Nation to any type of risk that has not existed for decades. On the contrary, the consensus government view that a terrorist threat may trigger this inherent defensive authority (an interpretation that while not unprecedented, was not nearly as clear before the terrorist attacks of September 11) suggests that this risk is less substantial today than before enactment of the AUMF.

3. What is the geographic scope of the AUMF and under what circumstances may the United States attack belligerent targets in the territory of another country?

In my opinion, there is no need to amend the AUMF to define the geographic scope of military operations it authorizes. On the contrary, I believe doing so would fundamentally undermine the efficacy of U.S. counterterrorism military operations by overtly signaling to the enemy exactly where to pursue safe-haven and de facto immunity from the reach of U.S. power. This concern is similar to that associated with explicitly defining co-belligerents subject to the AUMF, although I believe it is substantially more significant. It is an operational and tactical axiom that insurgent and non-state threats rarely seek the proverbial "toe to toe" confrontation with clearly superior military forces. Al Qaeda is no different. Indeed, their attempts to engage in such tactics in the initial phases of Operation Enduring Freedom proved disastrous, and ostensibly caused the dispersion of operational capabilities that then

necessitated the co-belligerent assessment. Imposing an arbitrary geographic limitation of the scope of military operations against this threat would therefore be inconsistent with the strategic objective of preventing future terrorist attacks against the United States.

I believe much of the momentum for asserting some arbitrary geographic limitation on the scope of operations conducted to disrupt or disable al Qaeda belligerent capabilities is the result of the commonly used term "hot battlefield." This notion of a "hot" battlefield is, in my opinion, an operational and legal fiction. Nothing in the law of armed conflict (LOAC) or military doctrine defines the meaning of "battlefield." Contrary to the erroneous assertions that the use of combat power is restricted to defined geographic locations such as Afghanistan (and previously Iraq), the geographic scope of armed conflict must be dictated by a totality assessment of a variety of factors, ultimately driven by the strategic end state the Nation seeks to achieve. The nature and dynamics of the threat—including key vulnerabilities—is a vital factor in this analysis. These threat dynamics properly influence the assessment of enemy capabilities and vulnerabilities, which in turn drive the formulation of national strategy, which includes determining when, where, and how to leverage national power (including military power) to achieve desired operational effects. Thus, threat dynamics, and not some geographic "box", have historically driven and must continue to drive the scope of armed hostilities. The logic of this premise is validated by (in my opinion) the inability to identify an armed conflict in modern history where the scope of operations was legally restricted by a conception of a "hot" battlefield. Instead, threat dynamics coupled with policy, diplomatic considerations and, in certain armed conflicts the international law of neutrality, dictate such scope. Ultimately, battlefields become "hot" when persons, places, or things assessed as lawful military objectives pursuant to the LOAC are subjected to attack.

I do not, however, intend to suggest that it is proper to view the entire globe as a battlefield in the military component of our struggle against al Qaeda, or that threat dynamics are the only considerations in assessing the scope of military operations. Instead, complex considerations of policy and diplomacy have and must continue to influence this assessment. However, suggesting that the proper scope of combat operations is dictated by a legal conception of "hot" battlefield is operationally irrational and legally unsound. Accordingly, placing policy limits on the scope of combat operations conducted pursuant to the legal authority provided by the AUMF is both logical and appropriate, and in my view has been a cornerstone of U.S. use of force policy since the enactment of the AUMF. In contrast, interpreting the LOAC to place legal limits on the scope of such operations to "hot" battlefields, or imposing such a legal limitation in the terms of the AUMF, creates a perverse incentive for the belligerent enemy by allowing him to dictate when and where he will be subject to lawful attack.

I believe this balance between legal authority and policy and diplomatic considerations is reflected in what is commonly termed the "unable or unwilling" test for assessing when attacking an enemy belligerent capability in the territory of another country is permissible. First, it should be noted that the legality of an attack against an enemy belligerent is determined exclusively by the LOAC when the country where he is located provides consent for such action (is the target lawful within the meaning of the law and will attack of the target comply with the targeting principles of distinction, proportionality, and precautions in the attack). In the unusual circumstance where a lawful object of attack associated with al Qaeda and therefore falling within the scope of the AUMF is identified in the territory of another country not providing consent for U.S. military action, policy, and diplomacy play a decisive role in the attack decisionmaking process. Only when the United States concludes that the country is unable or unwilling to address the threat will attack be authorized, which presupposes that the nature of the target is determined to be sufficiently significant to warrant a non-consensual military action in that territory. I believe the executive is best positioned to make these judgments, and that to date they have been made judiciously. I also believe that imposing a statutory scope limitation would vest terrorist belligerent operatives with the benefits of the sovereignty of the state they exploit for sanctuary. It strikes me as far more logical to continue to allow the President to address these sovereignty concerns through diplomacy, focused on the strategic interests of the Nation.

4. What role should Congress play in the designation of organizations against which—and countries in which—lethal force may be used? Should there be a formal requirement to notify Congress of new designations and should such designations be subject to congressional approval of disapproval?

I believe Congress plays an essential constitutional role in authorizing the use of U.S. military force. When confronting a conventional state threat, it is obvious that in exercising this role, Congress will designate the object of such an authorization. However, even in this situation, Congress has not designated the "groups" falling within the scope of the authorization. Instead, that determination is left to the President in his capacity as commander in chief. Nor would Congress ordinarily dictate the scope of such operations, but rather, as noted above, allows the President to respond appropriately to threat dynamics. This authorization modality is obviously more complicated when the object is a non-state transnational organization. However, I believe that the nature of such a threat in no way justifies deviation from this modality. The AUMF did not identify any single group or location as the object of the U.S. military response to the terror attacks of September 11, 2001, instead leaving to the executive the responsibility to "take care that the law be faithfully executed" by assessing the intelligence related to those attacks and rendering judgments as to what type of response was "necessary and appropriate." I believe that process continues in full force to this day, and has provided the necessary strategic and operational flexibility to meet the threat effectively and efficiently.

I do believe Congress, in exercising its authorization function, does have both a right and a responsibility to remain seized of the nature of operations conducted pursuant to the AUMF. In so doing, Congress will be better able to continually assess whether the link between the objectives of the authorization and the nature of U.S. operations conducted pursuant thereto remains sufficient. In this regard, Congress always retains an "approval/disapproval" process through its ability to amend or even repeal the AUMF. Thus, while I encourage continued efforts to inform Congress of such operations, I believe that altering the current statutory framework should only be considered if and when Congress believes this link has become unjustifiably attenuated.

5. What is the duration of the AUMF and how will we know when this conflict is over?

As long as the AUMF is in force, and the executive determines that al Qaeda and/or al Qaeda co-belligerents continue to represent viable threats to the Nation, the AUMF will provide legal authority for military operations executed to disable and/or disrupt such threats. When this conflict will be over is a far more complex question. Ultimately, I believe the answer must be dictated by the assessment—ideally made cooperatively between the President and Congress—that the nature of the threat falling within the scope of the AUMF has been degraded to such an extent that there is no longer a legitimate necessity to utilize U.S. combat power as a responsive measure. Lacking the insight into the threat dynamics that I believe are essential to make this assessment, I cannot opine as to the appropriate indicia to justify this conclusion.

6. Has the AUMF lost its legal force, is it still relevant to the current conflict, or would it be better to modify or repeal it?

It is evident from my prior answers that I believe the AUMF has not lost its legal force and that it is indeed still relevant to the current conflict. The use of U.S. military capability in a manner that implicitly relies on the LOAC to justify the methods and means of operations can be justified only pursuant to such an authorization or in the exercise of self-defense against an actual or imminent attack against the Nation or its Armed Forces. Accordingly, the AUMF continues to provide the principal source of authority to attack enemy belligerent operatives and their capabilities, to detain them upon capture, and to subject them to trial by military commission for violations of the laws and customs of war.

It is equally evident from my answers above that I do not believe that it is necessary or logical to repeal or amend the AUMF.

7. Detention authority and the AUMF.

I believe that the enactment of section 1021 of the National Defense Authorization Act for Fiscal Year 2012 is relevant to the limited extent that it reaffirmed congressional support for both the AUMF and the need to utilize authority derived from the LOAC to address the al Qaeda threat. Would military detention authority be affected if Congress were to enact a new AUMF? The answer must be yes, but the nature of the authorization would dictate how. First, should such an authorization expand the scope of groups subject to the use of force, then captured members of these groups would arguably fall within the scope of military detention authority, as this expansion would presumably indicate a U.S. determination that armed conflict exists with these additional groups (unless Congress chose to restrict detention, which seems illogical and improbable). Second, such authorization might also explicitly authorize detention of captured members of groups within its scope. While I do

not believe such express authority would be necessary to justify such detention, it would certainly strengthen the requisite legal basis. Finally, such authorization might include actual detention criteria, which could either expand or constrict existing military detention authority separately from an express authorization or limitation on that authority.

Assuming that Congress chooses not to modify the existing AUMF, the question of enhanced process for individuals subjected to long-term preventive detention seems especially significant. Although this detention is based on in large measure on the unquestioned authority of belligerents to prevent captive enemy operatives from returning to hostilities, the unconventional nature of this conflict does raise troubling questions about the legitimacy of extending this authority to a functionally indefinite conflict. It should, however, be recognized that the existing detention authorization and review process has incorporated a level of procedural protection against arbitrary detention that is truly unprecedented in any prior armed conflict in U.S. history. Should more process be incorporated? If doing so would facilitate a more effective assessment of continued detention necessity, and enhance the perception of legitimacy, I believe the answer is yes. What that additional process should be is a much more difficult question. One idea might be to adopt a presumptive detention termination point, requiring the government to rebut a presumption of termination in an adversary proceeding by an appropriately weighty burden of proof. In my view, if such a process were adopted, the tribunal should be composed primarily of military officers, presided over by a judicial officer—although inclusion of several civilian legal or judicial experts might also be logical—and should provide detainees with a right to appellate review.

8. Remotely piloted vehicles (RPV) and controlling legal authority.

Despite the substantial controversy surrounding the increased use of RPVs to attack belligerent operatives, I believe that this weapon system need not be analyzed or critiqued differently from any other weapon system. Simply stated, RPVs are just weapons, and good ones. The way they are employed must be dictated by the type of careful targeting analysis that is required for any deliberate attack against a lawful object of attack during an armed conflict. To that end, all the principles of the LOAC are applicable to their use: they must only be used to attack lawful military objectives; such attacks must be cancelled when the commander anticipates that the collateral damage or incidental injury (to non-combatants) will be excessive in relation to the concrete and direct military advantage anticipated (the so called proportionality principle); they must not be otherwise indiscriminate (an unlikely risk considering the precision of such weapons) or cause unnecessary suffering; and commanders must take all feasible precautions to mitigate the risk to civilians and civilian property (including making best efforts to confirm the nature of the nominated target).

In my opinion, these principles do in fact guide our targeting process, irrespective of the weapon systems employed. It is no exaggeration to state that at no time in history have legal advisors been more integrated into this process than today. If anything, use of RPVs, because they are normally utilized in a deliberate (as opposed to time sensitive) targeting process, will almost inevitably involve multiple layers of operational and legal review. Commanders ultimately make targeting judgments, but these judgments are guided consistently by the legal principles summarized above in order to ensure, as best as possible under the conditions prevailing at the time of decision, that employing deadly combat power is operationally and legally justified.

This process should not be modified if the target is not in an area of active combat operations involving U.S. ground forces. As noted above, I reject the idea that the notion of a "hot" battlefield limits belligerent targeting authority against lawful objects of attack during armed conflict. Once the strategic decision is made to address a target in that armed conflict with combat power outside of such an area, these principles provide the appropriate and logical measure of attack authority. The location of the nominated target is irrelevant in this process, however. Certainly, relative proximity to ongoing combat operations is a relevant factor in the target analysis process. Accordingly, while I am not privy to the target decisionmaking process currently utilized by the United States, I believe it is fair to assume that when a potential target is located outside an area of ongoing active combat operations, compliance with these principles almost certainly demands a greater degree of certitude that the individual in fact qualifies as a lawful target. Ultimately, however, once an individual is assessed as an enemy belligerent operative, his location may influence the decision to utilize the full scope of armed conflict targeting authority, but that authority is in no way altered as a result. Rather, targeting authority is dictated by this status determination, and not by location.

9. How should we decide who is an appropriate military target outside an area of active combat operations, and should "imminence" be an aspect of this determination?

As evidenced by my answer to the prior question, I believe the answer is clear: the decision that an individual qualifies as "an appropriate military target" should be re-characterized: does the individual qualify as a lawful object of attack pursuant to the law of armed conflict? If the answer is yes, that individual's proximity to an area of "active combat operations" in no way alters the legal authority to attack (although as noted above it may result in self-imposed limitations based on policy and/or diplomatic considerations). Proximity to such an area of operations is better understood as just one of a range of threat identification criteria that impact a totality analysis of lawful target.

Imminence is simply not an element of this target decisionmaking legal equation. Instead, when attacking an individual, the key analytical focal point is whether that individual is properly identified as a member of an enemy belligerent group. If so, that status alone triggers lawful attack authority. This is perhaps the most fundamental difference between peacetime and armed conflict use of force authority. In peacetime, the use of deadly force is limited to a measure of last resort, and justified only when the individual's conduct manifests an actual threat that necessitates that use of force. Thus, employing deadly force is justified only when the individual poses an "imminent" threat of death or grievous bodily harm. In contrast, once an individual is identified as a member of an enemy belligerent group in armed conflict, that individual is presumed to represent a threat justifying attack by virtue of that status alone. Thus, unless and until that individual is removed from the control of enemy belligerent leadership (either by capture or physical incapacitation), attack with combat power creating a high probability of causing death is legally justified.

This target validation process obviously involves a complex and at times challenging analysis of a variety of factors that indicate an individual is in fact a belligerent operative of al Qaeda or other enemy forces. Because of the unconventional and dispersed nature of al Qaeda operations, this threat identification process must, by necessity, focus on indicia that are less obvious than those relied on to positively identify enemy belligerent operatives in the context of more conventional inter-state hostilities. It is, however, erroneous to suggest that threat identification, even in the conventional conflict context, is "easy." On the contrary, the intensity and pace of modern warfare make threat identification challenging in any type of armed conflict. It is, however, obvious that the complexity of threat identification is magnified in an armed conflict with an unconventional and highly dispersed enemy belligerent group. It is therefore logical and appropriate to rely on multiple factors to guide threat identification of this enemy. These factors will almost certainly include patterns of activity, association, location, signals and human intelligence indicating activities and intentions, and the nature of the individual's contribution to the belligerent objectives of al Qaeda.

While reliance on such factors may appear to be a significant departure from "traditional" threat identification methodology, this is not the case. Similar methodologies and indicia have been used in prior conflicts involving unconventional enemy opponents. Indeed, having begun my military career as a tactical intelligence officer in Panama in the mid-1980s, I can personally attest to the reliance on such indicia in other contexts. Assigned to one of the few Army commands focused almost exclusively on what is today called counterinsurgency operations (at that time called low intensity conflict), our forces routinely trained to engage unconventional enemies in low- to mid-intensity hostilities. Unable to rely on traditional threat identification criteria such as uniforms or obvious military equipment, threat identification instead focused on similar indicia as those ostensibly used today. Ultimately, whether engaged in armed conflict with a conventional or unconventional belligerent opponent, the process for and legal authority resulting from positive threat identification is identical: a determination of enemy belligerent status triggering the authority derived from the LOAC to attack such individuals based solely on this belligerent status. Even when the threat identification criteria rely heavily, by necessity, on an individual's conduct, the ultimate question was and remains a determination of status.

The nature of this question seems to reflect what has been an increasingly vocal aversion to exercising belligerent attack authority outside of the so-called "hot" battlefield. Indeed, I believe this aversion has been a driving force behind the creation of the "geography of war" fiction discussed above. This aversion is fundamentally flawed as a matter of law. Although, as noted above, the threat identification process may be more complex due to the individual's attenuation from an area of active combat operations, that attenuation in no way modifies or restricts the attack authority resulting from this determination.

I believe it is important to bear in mind that U.S. forces involved in hostilities against an unconventional enemy engage in this complex threat identification process on a daily basis in Afghanistan, a process that is not constrained by a requirement to assess the imminence of the threat. It seems somewhat ironic that proponents of an "imminence" requirement outside the so-called "hot" battlefield seem untroubled by reliance on the same threat identification criteria they consider insufficient to justify attack when it is utilized to make difficult targeting decisions in the "hot" battlefield. This irony is magnified because the extent of deliberation and layers of review associated with attacks outside the "hot" battlefield might actually produce increased certainty as to the nature of the target. If we trust our commanders to make complex targeting judgments in the context of a "hot" battlefield, I find it perplexing that we would impose an additional attack criteria—one drawn from the peacetime use of force legal framework and never intended to limit belligerent attack authority—on analogous decisions simply because the nominated target is geographically attenuated from that battle space.

10. What is our obligation to ensure lethal military force is directed only at appropriate military targets, and do we need to legislate or codify the principles that guide these decisions?

My prior answers clearly indicate that I believe it is the law of armed conflict, brought into force as the result of the armed conflict between the United States and al Qaeda, that provides the authority to attack persons, places, or things as a measure of first resort. Accordingly, as noted above, this attack authority is triggered by determinations that a proposed target qualifies as a lawful military objective pursuant to that law. The LOAC mandates compliance with the obligations of distinction, proportionality and precautions, as explained above.

I see no value in attempting to codify the principles of the LOAC in an amended or new AUMF. The President is obligated to ensure respect for this law once the United States is engaged in an armed conflict, as are all subordinate officers of the Department of Defense, each military department, and all other government agencies. Department of Defense Directive, incorporated into the Chairman of the Joint Chiefs of Staff Standing Rules of Engagement, mandates compliance with these principles during all military operations, which is reinforced by military doctrinal manuals related to the targeting process, and professional military education. Legal advisors at every echelon of command are educated in this law and fully integrated into the targeting process. Even during the initial phase of U.S. belligerent detention operations, when the executive took the position that the detainees did not fall within the scope of the humane treatment obligation of Common Article 3 to the Geneva Conventions of 1949, there was never any assertion that targeting operations were exempt from compliance with these LOAC principles.

Finally, in my view the obligation to comply with the LOAC is already inherent in the AUMF authorization to use "appropriate" force. This, coupled with the fact that the U.S. considers itself engaged in an armed conflict not of an international character (a situation that triggers customary LOAC principles as a matter of law), leads me to reject the question's assertion that these principles have heretofore been applied only as a matter of policy. To the contrary, from the inception of this armed conflict, I believe they have applied (and have been understood to apply) as a matter of law.

11. Who should sign off on such targeting decisions? What degree of confidence should be required? Should judicial or some other independent review be required for these decisions?

I believe that once the United States is engaged in an armed conflict, target decisionmaking is a quintessential commander in chief function. This function is applicable in an armed conflict authorized by Congress, or when responding to an attack thrust upon the Nation pursuant to the President's inherent constitutional authority to defend the Nation. Accordingly, I believe that it is the President, acting in his own capacity or through subordinate officers, who is responsible for making decisions to attack a nominated target during armed conflict.

Accordingly, I believe any attempt to subject this decisionmaking process to judicial or some other type of external review would represent a genuine and unjustified intrusion into the President's express Article II powers. Nor do I believe there is any legitimate justification for such review. The obligation to "take care that the law be faithfully executed" includes, by implication, ensuring compliance with the LOAC when engaged in hostilities. Every subordinate officer in the chain of command is sworn to uphold and defend the Constitution, which by implication also requires compliance with the LOAC during hostilities. As noted in several prior questions, the level of commitment to ensuring such compliance—in structure, process, education, training, and internal oversight—is more significant today than at any time

in our history. As one intimately familiar with all of these aspects of the compliance process, I am perplexed at the common assertion that there is insufficient oversight for targeting decisions.

Even a cursory review of the deliberate target decisionmaking process indicated multiple levels of review. Furthermore, Department of Defense Directives mandate investigation into any credible indication of a violation of the law of armed conflict, and the Uniform Code of Military Justice provides a highly credible mechanism for holding individuals accountable for such violations. This mosaic of process, training, and accountability is more than sufficient to mitigate any risk of abuse of power. Furthermore, the obligation imposed by the LOAC both to attack only military objectives (which includes enemy belligerents) and to make all feasible efforts to mitigate the risk to civilians by implication imposes an obligation to limit attack to only individuals reasonably assessed to qualify as enemy belligerents. While the law does not include an express articulation of a "burden of proof" that must be satisfied to justify attack, it is relatively clear that to qualify as reasonable, the decision must be made on the best available information and must at least render it more likely than not that the individual is not a civilian.

I certainly understand why there may be those who question the efficacy of this process, and who call for some external review and/or authorization mechanism. There are no more momentous decisions than those resulting in the taking of human life, and those who worry about abuse of authority understandably demand greater transparency and oversight. However, our division of constitutional authority entrusts the executive branch with these decisions, and transparency will always present increased risk of disclosing sensitive information. It strikes me that vesting trust to leverage the Nation's combat power wisely and lawfully in those trained and devoted to the process of leading military forces represents a logical balance of interests.

I also recognize how the undisputed evidence that innocent civilians are killed during attacks on belligerent targets may seem to many to be inconsistent with the law. This, however, is not the case. The LOAC regulates armed hostilities, an endeavor that involves the use of highly destructive combat power and the inevitable suffering associated with such use. While the law obligates parties to a conflict to take all feasible measures to mitigate this suffering, especially when civilians are the potential victims, it also includes a necessary recognition that when unavoidable and justified pursuant to proportionality analysis, such suffering may occur. Likewise, the consternation that it is too "easy" to decide who is a lawful target is, in my view, fundamentally flawed. I would suggest that few people who have not experienced the human cost of armed conflict better understand the immense moral burden associated with a decision to order a lethal attack than experienced military leaders. These are the individuals who must live with these difficult decisions, and to suggest that they take this responsibility lightly is unfortunately ill informed.

In this regard, I find it particularly ironic that our Nation entrusts these same leaders with the judgment to make decisions to place our own sons and daughters into harm's way. Yet there is no suggestion that these decisions must be subject to some external review process. If our trust in their judgment to make sound military decisions is sufficient enough to entrust our sons and daughters to them, how is it insufficient when the potential consequence is an attack on an enemy belligerent? These leaders spend their entire professional careers immersed in the operational, moral, ethical, and legal aspects of employing combat power to "fight and win" the Nation's wars. They also rise through the ranks, demonstrating the expertise and judgment necessary to achieve selection for the highest levels of authority, including Senate confirmation. How a Federal judge, or some external oversight mechanism, could be more competent to make these difficult decisions than these leaders is perplexing.

I do not question the ability of those tasked with such external oversight to master the complexities of the law of armed conflict. However, I believe that these individuals could rarely (if ever) match the type of contextual understanding—namely expertise in the planning and execution of military operations for the purpose of achieving strategic, operational, and tactical objectives—essential for truly understanding the proper application of this law. Ultimately, it should be those whom our Nation trains and prepares to command the execution of military operations that are entrusted with the awesome responsibility of target selection and engagement.

12. What is the legal authority for targeting a U.S. person and should a different legal standard or process apply to such targeting?

I do not believe that citizenship is a relevant factor in assessing the legality of attacking a nominated target in the context of an armed conflict. Instead, like any other individual, the LOAC dictates when a U.S. citizen is the lawful object of at-

tack. It is certainly not unprecedented for U.S. citizens to join the ranks of enemy belligerent forces, and when they do so they become subject to lawful attack pursuant to the identical legal criteria applicable to their belligerent comrades. Thus, when a U.S. citizen who has been properly identified as such a member is subject to attack with lethal combat power, that citizen has received the process he is due.

Of course, there may be compelling policy considerations that warrant narrowing the scope of this targeting authority. There is nothing unusual about imposing such policy restrictions on otherwise lawful belligerent targeting. Rules of engagement are utilized routinely to impose such restrictions where the President or subordinate commanders determine that the cost/benefit equation justifies such restriction. Accordingly, requiring satisfaction of an additional layer of policy-based considerations—such as a requirement to exhaust all feasible, less harmful means to subdue the individual—as a precondition to targeting known U.S. citizens with lethal combat power is certainly not inconsistent with the law of armed conflict. It is not, however, legally mandated, and therefore should be left to the realm of policy.

13. Should use of RPVs and other methods and means of employing combat power be restricted to Department of Defense operations, and if not, should the same legal authorities apply to such operations?

In my opinion, the LOAC establishes the controlling legal framework for "lethal targeting" regardless of which entity employs combat power on behalf of the United States. No individual should be subject to attack with potentially deadly combat power unless that individual is legitimately determined to be an enemy belligerent operative or a civilian taking a direct part in hostilities in the context of an armed conflict. In all other contexts, I do not believe that domestic law, policy, or international law permit government agents to resort to deadly force as a measure of first resort.

It is also my opinion that the conduct of such operations should be restricted to the Department of Defense. However, I do not believe that I, or anyone else lacking access to highly classified information, can legitimately claim to know with certainty the nature of ongoing operations involving other U.S. Government agencies. Although there is what I consider to be substantial speculation on the nature of these operations, there may be aspects of them (for example, joint target analysis and selection, or integration of DOD assets into the operational capabilities of other agencies) that ensure significant DOD involvement in the targeting process.

Nor do I feel competent to comment on potentially sensitive and complex issues of diplomacy and policy that may necessitate utilization of other government agencies to conduct such operations. However, I strongly believe that if this is in fact occurring, those agencies and the President bear a legal obligation to ensure the use of a targeting process that fully complies with the law of armed conflict. Ultimately, my opinion that these operations are best left in the hands of the Department of Defense is based on the same considerations that lead me to object to calls for external review or oversight of targeting decisions—namely my inherent confidence in the culture and processes embedded within DOD to ensure that such operations comply with the law of armed conflict. While I have the greatest respect for the professionalism and valor of the devoted patriots who serve in other government agencies—service that often involves equal if not greater personal risk than their DOD counterparts—I simply do not believe that these organizations are built on the type of warfighting culture that exists in the military. From the inception of a military officer's professional career, he or she is immersed in a culture that focuses on developing morally grounded warriors—individuals who understand the unfortunate necessity to employ combat power on behalf of the Nation but also understand that doing so in a manner that is legally compliant and morally sound is essential to strategic success. I believe leaders developed in this culture are best-suited to make use of force decisions on behalf of our Nation.

14. Under what circumstances could lethal military force be used in the United States and is such use authorized by the AUMF?

I believe this question is largely hypothetical in nature. To my knowledge, there has been no indication by the executive branch of an intent to employ, or even consideration of employing, combat power within the territory of the United States. Even during the Bush administration, during oral argument in the case of Jose Padilla, when Justice Kennedy challenged the acting Solicitor General on whether Padilla could have been shot while exiting a commercial aircraft in Chicago airport, the response emphatically disavowed any such consideration.

Is it conceivable that a situation in extremis might lead a President to determine that it was necessary to utilize such force to protect the Nation from a threat within our territory? Although I believe the answer is yes, I also believe that no President would resort to such a response unless it was a genuine option of last resort. I be-

lieve the immediate response to the September 11th terrorist attacks provides a useful example of such a situation in extremis. In response to the uncertainty regarding the potential for further aviation-borne suicide attacks, military aircraft were ordered to shoot down, if necessary, commercial aircraft flying in restricted airspace above New York or Washington, DC. In my view, this was a lawful order, based on the fact that the executive assessed that the Nation was under attack (which indicated the existence of an armed conflict), and that such aircraft would have qualified as lawful objects of attack pursuant to the law of armed conflict. In no other situation has there been any suggestion of resorting to combat power to respond to a terrorist threat within U.S. territory, which I believe indicates that while such use is theoretically possible, situations triggering such use are highly unlikely to arise. Nonetheless, were the Nation subject to an attack of a sufficient magnitude to render a law enforcement response ineffective, conducted by members of al Qaeda or co-belligerent forces, I believe the AUMF would authorize a military response to defend the Nation.

15. What is the role of Congress in overseeing the use of lethal force pursuant to the AUMF, and can the process be made more transparent without compromising operational security?

As noted in several prior questions, I believe Congress has an essential role in ensuring that ongoing military operations fall within the proper scope of the AUMF. Central to this role is the need to ensure consistency between the scope of authority provided by the AUMF and principles of international law related to the use of military force to protect vital U.S. national interests, principles that have guided such uses of force by our Nation from inception. Accordingly, Congress must respond cautiously and judiciously to any call for expanding the scope of the AUMF, and must be animated by analogous prudence in response to calls to revoke this statute. Furthermore, Congress must ensure that any expansion to the scope of the AUMF is consistent with principles of international law, and therefore only consider such expansion to cover terrorist groups that present a threat level sufficient to reasonably justify characterizing the U.S. response as an armed conflict.

I also believe Congress, through close coordination and collaboration with the executive, must contribute to dialogue regarding when the nature of the al Qaeda threat has been degraded sufficiently to justify reversion back to a pure law enforcement modality for addressing this threat. However, I do not believe that congressional oversight extends to review of specific targeting decisions or imposing any type of oversight mechanism that would require congressional endorsement of these decisions. In short, Congress should allow the executive, acting principally through the Department of Defense, to continue to plan and execute operations for the purpose of disrupting and/or disabling the al Qaeda threat, but should also periodically review such operations, and the process associated with them, to ensure the AUMF is being faithfully executed.

In terms of increased transparency, it is my opinion that Congress should be extremely cautious in demanding public disclosure of aspects of the targeting process beyond those that have already been disclosed by the executive. To that end, I believe it is important to note that the executive has disclosed substantial aspects of this process. In fact, in my 30 years of military and academic service, I cannot recall a period of time where executive officials have been anywhere as open in disclosing strategic and operational decisionmaking processes than during this conflict. I believe demanding more transparency poses significant operational risk, and is, at this point in time, unjustified and unnecessary.

While calls for greater transparency are certainly understandable, I believe each additional layer of disclosure risks compromising the effectiveness of U.S. operations. Ultimately, it is this effectiveness that must remain the priority interest in the transparency debate. It must also be noted that this risk is exacerbated by the nature of the threat and the threat identification methodology. Disclosing target identification methodology to a conventional enemy poses little risk—that enemy knows exactly what indicia of threat identification friendly forces will rely on, and cannot modify that indicia. With an unconventional enemy, this is not the case. Instead, disclosure of these indicia will enable the enemy to alter patterns of behavior in order to avoid attack. In my view, Congress certainly has a legitimate interest in being made aware of such indicia in a forum that ensures operational security. However, like so many wartime decisions, the public appetite for greater insight into these processes must yield to considerations of operational success.

Chairman LEVIN. Thank you very much, Mr. Corn.
Mr. Goldsmith.

STATEMENT OF MR. JACK GOLDSMITH, PROFESSOR OF LAW, HARVARD LAW SCHOOL

Mr. GOLDSMITH. Thank you, Senator Levin, Senator Inhofe, members of the committee. Thank you for inviting me to testify.

I have been thinking, talking, and arguing about the AUMF for a long time and on the need for Congress to reengage with the meaning of that statute, the scope, and its operation. Nothing could have demonstrated that need more than the testimony on the last panel which made clear that the enemy we face has changed quite a lot since September 11, that al Qaeda itself has become dispersed geographically and organizationally, and that the United States has, both the military and the CIA, changed to meet this threat. The war is now taking place in many countries around the world, as acknowledged today. The Secretary tried to wind it back a little bit at the end, but he said that at one point the AUMF included force against groups in Mali, Libya, Syria, and Congo. He walked it back a little bit at the end by saying he did not necessarily mean that there was authority under the AUMF. He did not deny that there was, just it did not necessarily mean that. This war has changed quite dramatically since September 11.

I believe that the basic principles of interpretation that the executive branch has been using to expand the AUMF are legitimate. I believe that co-belligerency is a basis for extending the scope of the AUMF. I think that is a traditional basis in our history.

But through a series of steps, each of which are legitimate, we have come to a place that is quite different from where we began. The question is: is Congress on board for that? A lot of the Senators seemed surprised at the scope of the AUMF, as it has been interpreted by DOD. Indeed, I learned more in this hearing about the scope of the AUMF than in all of my study in the last 4 or 5 years. I learned that the war under the AUMF is probably going to go on for 10 or 20 years, that in fact, as I suspected, the enemy is murky and difficult to pin down, and the organizational structures are changing a lot and it is difficult to know which groups are associated with al Qaeda and not.

I think it is very important that Congress engage this issue. If nothing else, I think asking these questions and all the questions you asked in your request to this panel were interesting. All those questions are important to be answered in one form or another. I think it is more important to ask those questions and to surface the answers than it is to reach any particular resolution.

Let me just say briefly there are two potential avenues for reform. One is: what do you think about the AUMF and how it has been interpreted? Are you satisfied with the process whereby the executive branch interprets it to extend to places as the first panel suggested? It seems to me that is the first order of business, to figure out what is going on under the AUMF and whether you are satisfied that the process of expansion of the war is appropriate, is legally appropriate, and that you understand what is happening.

The second question is: what to do with entities that fall outside of the AUMF, extra-AUMF threats? Frankly, as Senator King said,

if you interpret the AUMF broadly enough, you do not need to worry about extra-AUMF threats. So when the panelists from DOD were saying they are very satisfied with current authorities, one would like to know what that means, how broadly are they interpreting the AUMF, how broadly are they interpreting Article II to be satisfied?

It seems to me that the first question is the AUMF and then the question of extra-AUMF threats should be addressed especially since DOD said that this war will be going on for 10 or 20 years at least.

With regard to extra-AUMF threats, I have suggested proposals about how to deal with them. The basic question is: are you satisfied with the President's Article II powers to address extra-AUMF threats. I believe and this panel, to my surprise, appears to robustly believe, that the President has robust Article II powers to exercise self-defense against emerging threats. I think those powers are robust. I do not think they are appropriate for long-term conflict against the same set of groups. So if a group arises that we are in armed conflict with that presents a persistent threat, I do not believe it is outside the AUMF. I do not believe that Article II will suffice for that. I think Congress needs to engage and authorize that.

I will stop there. Thank you very much.

[The prepared statement of Mr. Goldsmith follows:]

PREPARED STATEMENT BY MR. JACK GOLDSMITH

Chairman Levin, Ranking Member Inhofe, and members of the committee, thank you for the opportunity to testify.

The committee's 15 questions cover a wide range of topics that do not admit of simple or brief answers. I will try to get at some of the relevant issues in three parts. I will first explain how the nature of the war against Islamist terrorists has changed in the past dozen years. Then I will then explain why these changes warrant Congress's reconsideration of the contours of and oversight for the war. I will finally discuss particular reforms.

I. HOW THE WAR HAS CHANGED

On September 14, 2001, Congress passed the Authorization for the Use of Military Force (AUMF). The AUMF, as it is called, 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, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons."

The AUMF focused on entities responsible for September 11. In the fall of 2001 those entities, including al Qaeda, were located primarily in Afghanistan. In the last dozen years, al Qaeda has undergone what Professor Robert Chesney describes as an "extraordinary process of simultaneous decimation, diffusion, and fragmentation, one upshot of which has been the proliferation of loosely-related regional groups that have varying degrees of connection to the remaining core al Qaeda leadership."[1] The executive branch expanded the kinetic and intelligence war beyond Afghanistan to other places around the globe against al Qaeda affiliates that were not in existence on September 11, much less responsible for the September 11 attacks.

Both legal and organizational innovations accompanied and made possible the expansion of the war. On the legal side, the executive branch interpreted the AUMF to extend to organizations associated or affiliated with al Qaeda, under the theory that they are co-belligerents. It also interpreted the AUMF—which, unlike some prior congressional approvals of military force, lacks geographical limitation—to au-

[1] Robert Chesney, Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism, 112 Mich. L. Rev. (forthcoming 2013) (available at http://ssrn.com/abstract=2138623)

thorize force in many nations outside Afghanistan where affiliated or associated al Qaeda forces are found.[2]

On the organizational side, both the Central Intelligence Agency (CIA) and the Defense Department changed quite a lot. The CIA became committed to targeted killing via unmanned aerial vehicles, or "drones", and reorganized its intelligence mission to support drone warfare. The Defense Department's Joint Special Operations Forces (JSOC) grew rapidly and engaged in an expanded array of stealth operations (including but not limited to drone fire operations) and intelligence missions (including human intelligence missions) needed to support these operations.

These innovations have undergirded a mostly officially secret geographical expansion of the "war on terrorism" since the fall of 2001. This committee presumably knows the details of this "shadow war," including its lethal force elements and any rendition, proxy detention, proxy force, and related elements. But U.S. citizens know very few details, at least from official U.S. Government channels, because the operations are highly classified and often covert. Presidential Reports under the War Powers Resolutions were designed to ensure that Congress and the American people were aware of presidential expansions of war. But these Reports now regularly contain classified annexes, and they do not purport to cover CIA operations in any event. As a result, the American people know about the shadow war primarily through journalistic accounts. These accounts report that the United States has since September 11 engaged in military or paramilitary operations in at least a dozen countries, and probably a much higher number.[3]

President Obama proclaimed in his second inaugural address that a "decade of war is now ending."[4] It does appear that heavy-footprint war against the Taliban in Afghanistan is winding down. Two former senior legal officials in the Obama administration have given speeches that some interpret to indicate that the shadow war outside Afghanistan is also winding down or will end soon.[5] I do not know the intelligence basis for these speeches. I nonetheless do not believe the shadow war will end any time soon.

Consider a few recent news reports. The United States has engaged in over a dozen drone strikes this year in Pakistan and Yemen; it is expanding its drone capabilities in North Africa to address the growing Islamist (including al Qaeda affiliate) threats there; JSOC now has boots-on-the-ground in Mali (among many other places); the United States is training Syrian opposition forces; U.S. Special Operations Command is planning to significantly increase its presence in Africa, Asia and Latin America; the Obama administration is debating whether the AUMF extends to Ansar al-Sharia in Libya and the al-Nusra Front in Syria; it is also debating whether the AUMF extends not just to associates of al Qaeda, but also to "associates of associates."[6]

These and similar reports suggest that the shadow war against Islamist terrorist threats is morphing but not winding down. I will proceed on this assumption—an assumption I believe is implicit in most of the questions this committee asked the panelists to address.

II. WHY CONGRESS MUST ENGAGE

Congress' main engagement with the shadow war is the AUMF, which is nearly a dozen years old. It is long past time for Congress as a body to scrutinize the shad-

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[2] I believe both interpretive moves are legitimate. See Curtis A. Bradley & Jack L. Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L. Rev. 2047, 2107–2127 (2005).

[3] See, e.g., Mark Mazzetti, The Way of the Knife, The CIA, a Secret Army, and a War at the Ends of the Earth (2013); Daniel Klaidman, Kill or Capture: The War on Terror and the Soul of the Obama Presidency (2012); David Sanger, Confront and Conceal: Obama's Secret Wars and Surprising Use of American Power (2012).

[4] Inaugural Address by President Barack Obama, January 21, 2013.

[5] Harold Hongju Koh, "How to End the Forever War," Speech to the Oxford Union, May 7, 2013, http://www.lawfareblog.com/wp-content/uploads/2013/05/2013–5–7-corrected-koh-oxford-union-speech-as-delivered.pdf; Jeh Charles Johnson, Jr., "The Conflict Against Al Qaeda and its Affiliates: How Will It End?," Speech to the Oxford Union, November 30, 2012, http://www.lawfareblog.com/2012/11/jeh-johnson-speech-atthe-oxford-union/.

[6] See New America Foundation, The Year of the Drone, available at http://counterterrorism.newamerica.net/drones; Craig Whitlock, Pentagon Deploys Small Number of Troops in War Torn Mali, Washington Post, April 30, 2013; Thom Shanker, Military Sees Broader Role for Special Operations Forces, in Peace and War, New York Times, April 2, 2013; Bradley Klapper, U.S. training Syrian Forces in Jordan, Associated Press, March 26, 2013; Craig Whitlock, Drone Base in Niger Gives U.S. a Strategic Foothold in West Africa, Washington Post, March 21, 2013; Greg Miller and Karen DeYoung, Administration Debates Stretching 9/11 Law to Go After New al-Qaeda Offshoots, Washington Post, March 6, 2013.

ow war fought pursuant to the AUMF and to clarify publicly its legal basis and proper oversight mechanisms.

The AUMF is out of date in two ways. First, through a series of executive branch interpretations, each legitimate in itself, the AUMF is now deemed to authorize a war that is quite different from the one Congress contemplated a dozen years ago. As Senator Durbin recently said, "I don't believe many, if any, of us believed when we voted for [the AUMF] that we were voting for the longest war in the history of the United States and putting a stamp of approval on a war policy against terrorism that, 10 years plus later, we're still using."[7] To the extent Senator Durbin's views are widely shared, Congress should determine whether it approves of the shadow war being fought pursuant to the AUMF, including the method by which the AUMF conflict expands.

Second, emerging al Qaeda-inspired Islamist terrorist organizations are increasingly difficult to fit within the AUMF. Michael Leiter, the former Director of the National Counterterrorism Center, recently testified: "With the continued evolution of the terror threat and most notably its increasing distance from the September 11 attacks and core al Qaeda, I believe it is the time to re-evaluate the AUMF to better fit today's threat landscape."[8] Similarly, an unnamed senior Obama administration official recently told the Washington Post that "[t]he farther we get away from September 11 and what this legislation was initially focused upon . . . we can see from both a theoretical but also a practical standpoint that groups that have arisen or morphed become more difficult to fit in." The official added that the waning relevance of the AUMF is "requiring a whole policy and legal look."[9] That policy and legal look should not only take place in secret within the executive branch. It should also take place in Congress and in public.

Another reason why Congress should now engage is that its authorizing and oversight processes are outdated. The CIA component of the shadow war is conducted pursuant to a very thin legal framework for covert action that was not designed to be a central legitimating tool for warfare and that contains open-ended reporting requirements and no identified substantive constraints. Congress should determine whether this framework suffices for modern stealth warfare, and if not, how it should be changed. Congress should similarly consider this committee's even-less-specified oversight mechanisms for Defense Department operations. I am told that the members of this committee are satisfied with these mechanisms. But the mechanisms are mostly grounded in secret custom, not public law, and the American people cannot assess them and thus cannot know whether to have confidence in them.

This last consideration points to another reason why Congress should engage: the shadow war is unnecessarily—and, increasingly, self-defeatingly—secretive. There are growing indications, and complaints, that our heavy reliance on drones is a strategic failure. This is obviously a vital issue for the Nation, but it cannot be debated intelligently in public because our drone operations are classified. More broadly, excessive executive branch secrecy is weakening trust in the administration's conduct of the shadow war. A good deal of the misplaced concern about drone strikes in the homeland against Americans has resulted from the administration's stilted explanations about the legal limits and secret processes for killing U.S. citizen al Qaeda suspects. These stilted explanations, in turn, are driven by the requirements of classified information and covert action. Excessive secrecy also underlies growing mistrust and doubts—at home, and abroad—about the administration's claims about the rate of civilian casualties, the soundness of its legal analyses, and the quality of its internal deliberations. Congress can and should help the executive branch bring the shadow war out of the shadows, even if it makes the conduct of the war harder abroad.

The final reason why Congress should engage on this issue is constitutional. The precise constitutional allocation of warpowers between the first two branches of government is contested. But one need not resolve that constitutional issue to conclude that Congress has important constitutional powers and duties in this area, and that pursuant to them Congress (and not some subset of the institution) should engage in fundamental review, guidance, and approval of the basic conduct of a war at least every dozen or so years.

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[7] Senator Durbin on the Budget, Social Security, Drones, Washington Wire, Wall Street Journal, March 20, 2013, available at http://blogs.wsj.com/washwire/2013/03/20/transcript-sen-durbin-on-the-budget-social-security-drones/.

[8] The Honorable Michael E. Leiter, Testimony before the United States Senate Committee on Foreign Relations Counterterrorism Policies and Priorities: Addressing the Evolving Threat, March 20, 2013, at http://www.foreign.senate.gov/imo/media/doc/Michael—Leiter—Testimony.pdf.

[9] Miller and DeYoung, Supra note 5.

III. REFORMS

It is much more important for Congress to engage in a thorough and open review of the United States' shadow war than that it adopt any specific reform. Moreover, it is very difficult to make firm reform recommendations without detailed intelligence information about the nature of the threat that the public lacks. With these large caveats in mind, below I outline what I think are the contours of proper reform.

A. AUMF Threats

The executive branch appears to have interpreted the AUMF to extend to the Haqqani network in Pakistan, al Qaeda in the Arabian Peninsula in Yemen, and perhaps to al Qaeda in Iraq and al Shabaab in Somalia (or at least to some elements of these latter groups). The administration is reportedly debating whether the AUMF should further extend to the al-Nusra Front in Syria and Ansar al-Sharia in Libya, and to extend its reach to associates of associates of al Qaeda.[10]

There are legal advantages to continuing to tie the expansion of the shadow war to the AUMF, because the link to September 11, however tenuous, puts a potential substantive limit on the expansion of the war. But Congress must play a more extensive role in this process of expansion, which threatens to continue indefinitely on the basis of secret executive branch interpretations even as those interpretations become more tenuous. At a minimum Congress should state whether it approves this piecemeal expansion of the AUMF; whether it agrees that the proper standard for expansion is co-belligerency; and what the standard for co-belligerency should look like precisely. Congress could also adopt a more extensive role in approving any expansion of the war under the AUMF to new groups. It could do this by requiring the administration to inform it of proposed groups to be added under the AUMF, subject to an approval process in Congress. Or it could establish an administrative process for expansion within the executive branch, built on the model of the State Department's Foreign Terrorist Organization designation process.

B. Extra-AUMF Threats

Newly threatening terrorist groups inspired by al Qaeda but insufficiently tied to it to come under the AUMF present a growing and difficult legal problem. What to do about this threat depends on the severity, scope, and resilience of the threat. To the extent an extra-AUMF group presents a discrete and non-recurring threat of attack to the United States, the President's traditional Article II authorities to use self-defensive force probably suffice. To the extent the extra-AUMF group presents a more persistent and dangerous threat that rises to armed conflict or imminently threatened armed conflict, and to the extent it thus requires long-term U.S. military engagement, constitutional principle and political prudence counsel Congress to assess the threat and approve military force. Congress should also assess and approve the basic authorities entailed by such force, including whether the nature of a specific armed conflict and our strategic and tactical interests warrant authority for law-of-war military detention. There are several architectural options here, including discrete group-by-group congressional authorization (either with or without a process of executive branch recommendation), or a general congressional articulation of the standard for the use of force combined with a congressionally-sanctioned administrative designation process and significant ex post scrutiny by Congress.[11]

C. Statutory Accoutrements

With regard to both statutory guidance for AUMF threats and a potentially new statutory authorization for extra-AUMF threats, Congress should clarify a number of contentious matters. One matter, already mentioned, is the availability and scope of detention authority. Congress should also weigh in on whether American citizens are included within the use of force, whether the use of force extends to the homeland, and under what circumstances force is warranted in either context. These important matters, on which Americans are divided, should not be left to the device of secret legal interpretation by administration lawyers. Congress should also calibrate whether the AUMF applies anywhere outside the United States where covered persons are found, any appropriate limiting criteria, and whether standards for targeting and detention are identical. I also recommend a sunset provision for any clar-

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[10] Id.

[11] I and others discuss the complicated pros and cons of these approaches in Robert Chesney, Jack Goldsmith, Matthew C. Waxman, and Benjamin Wittes, A Statutory Framework for Next-Generation Terrorist Threats, Jean Perkins Task Force on National Security and Law, pp. 8–12, at http://media.hoover.org/sites/default/files/documents/Statutory-Framework-for-Next-Generation-Terrorist-Threats.pdf.

ification of the AUMF or authorization of force against extra-AUMF threats. A sunset provision belies the notion of temporally unlimited war, and ensures renewed congressional engagement in light of new information.

D. Accountability and Openness

The shadow war is inherently secret, and secrecy is the enemy of accountability. Secrecy is often necessary to make operations abroad more effective or more acceptable to the foreign government. But it comes at a cost to democratic self-governance at home. It also adversely affects trust in the war and in the presidency to the extent that it prevents open and candid explanation of what is going on in the war.

Congress should push the executive branch to disclose more fully those matters that can be discussed openly, including the number of strikes and operations, their geographic sweep, estimates of civilian casualties, and the basis for these estimates. It should demand maximum feasible openness about the procedural elements for listing groups as covered entities and for targeting determinations, as well as the legal opinions or at least legal determinations that underlie the war framework. Congress can also do more—as it has done in the last few years in the Foreign Intelligence Surveillance Act context—to require detailed classified reporting and auditing from relevant department and agency inspectors general as to both the vitality of internal processes and the integrity of the intelligence underlying the listings and claims about civilian and enemy deaths.

These proposals may portend to some an erosion of traditional presidential authority to conduct war, but I do not see them that way. The conflict we are engaged in is entirely novel in its unusual enemy, its temporal and geographic scope, and its myriad stealth aspects. The legal regime for the conflict—including the accountability and openness mechanisms for that regime—needs to reflect these realities.

Chairman LEVIN. Thank you very much, Mr. Goldsmith.

Mr. Roth?

STATEMENT OF MR. KENNETH ROTH, EXECUTIVE DIRECTOR, HUMAN RIGHTS WATCH

Mr. ROTH. Thank you very much, Chairman Levin, Senator Inhofe, and members of the committee.

My organization, Human Rights Watch, monitors rights in about 90 countries around the world, including basically in every situation where there is an armed conflict where we have people on the ground. My testimony today is going to be from a rights perspective, and I have to say that from that perspective, probably the most important distinction is the one between war and peace.

In peace, one can still kill if you are a law enforcement agent, but only if necessary to meet an imminent lethal threat. One can still detain but only with full due process.

In war, in many cases those rules are significantly liberalized. One can kill a combatant on a battlefield. One can detain often without charge or trial.

So the basic rights to life and liberty are at stake in this war/peace distinction. That is especially true with the kind of threat that this Nation faces where there is not a traditional battlefield or traditional enemy to limit the application of warpowers.

With that in mind, while I fully recognize the seriousness of the threats facing this Nation, I also want to stress the importance of pursuing those threats in a way that maximizes the protection of our rights. I am concerned here not simply about the actions of the U.S. Government but also about the precedents that the U.S. Government sets for other governments that may pay much less attention to the rights of their citizens or others.

Just to illustrate the concern, there are many serious security threats that are out in the world, not just terrorism, but also drug traffickers, international criminal gangs, and the like. What is to

stop a nation from simply declaring a war against, say, a drug trafficking organization, not the metaphorical war against drugs that we are all used to, but a real war? I think we have to be careful in the precedents that we set in going after terrorist groups that may pose a threat but that may be more appropriately pursued through more traditional law enforcement means rather than resort to exceptional warpowers.

This is not just a concoction in my mind. China already came very close to using a drone to summarily kill a drug trafficker that it was trying to pursue. In the end, it captured him. But it is easy to imagine the Chinas or the Russias of the world deciding to declare war on the Dalai Lama and his splittists or Uighur nationalists or Chechen nationalists and the like. We have to be very careful about the precedents set when the United States sets aside the traditional rights associated with law enforcement and resorts to the exceptional treatment of rights that exist in time of war.

Now, there is going to come a time when the AUMF's authority will end. There was a debate this morning about how soon that is, but it is quite foreseeable that the war with the Taliban is going to end fairly quickly. Certainly the core al Qaeda is close to being decimated. The definition of associated forces, the topic of much debate this morning, I think if properly understood, is limited to co-belligerents and clearly does not include groups like al Nusra which, despite their ideological affinity with al Qaeda, there is zero evidence that they are pursuing the United States in a threatening manner.

So I think we have to be very careful about extending or expanding warpowers unnecessarily because of the rights costs involved.

So my recommendation would be, first of all, to note that there is plenty that the President and the U.S. Government have to defend ourselves without extending those warpowers. Certainly our intelligence and monitoring capacities are greatly bolstered since September 11, 12 years ago. We have had much discussion about the inherent authority of self-defense or Article II powers. I would add to that simply the police powers the President has to use law enforcement means, including lethal force in appropriate circumstances. The President certainly has not asked for any extended war authorization, and what we do not want, I think, is any kind of revamp of the AUMF which would amount to an open-ended forever-war authority, one in which war becomes routine rather than exceptional.

The proposal that new groups be periodically listed I think would be very difficult given the morphing character of many of these groups, and I worry very much about one of the proposals that has been bandied about, that Congress, in essence, writes a blank check allowing the administration to write in the names over time of the latest security threat. I actually think that would put Congress in a weaker authority with respect to its warpowers rather than insisting on the President coming and asking for authority to pursue any particular group not currently covered by the AUMF.

I want to take a moment, if I could, to address the drone issue because I fully recognize that the use of drones can actually be an improvement from the perspective of protecting civilians, given their precision, given the ability to linger before actually firing,

they do have that capacity. But my concern is with the lack of a clear articulation by the administration of what the rules are limiting its ability to mount these lethal attacks. We certainly did not hear it this morning. There were lots of vague references to the laws of armed conflict, but there is no transparency, no clear definition about what cannot be done. So as a result, we have deep concerns about whether the drones in fact are being deployed lawfully.

There was mention of the reported signature strikes. Assistant Secretary Sheehan said that was only for core leaders, but there is considerable evidence that is not the case, that the factors going into making one a signature strike target include things like bearing arms openly or hanging out with the wrong people, which frankly are attributes of many, many people in places like Yemen, Somalia, or northwestern Pakistan. Drivers, cooks, doctors, and financiers in these areas could all very well be associated with the local al Qaeda or al Shabaab. They could very well be appropriate terrorist concerns, but they would not be combatants under the laws of armed conflicts. I am very concerned that this loose definition of signature strikes is allowing these people who may have criminal associations to be treated as combatants and summarily killed when they should not be.

There is also the question as to combatants against whom. Even if some of these people are combatants, there is very little evidence that we have seen that they are plotting against the United States rather than against the Yemeni Government or the Somali Government, and I think many Americans would be surprised to learn that the drone attacks are being launched in defense of other nations rather than in defense of ourselves. We do not know any of this for sure because of the shroud of secrecy, but there is deep reason for concern.

I want to stress that you do not need a war to use drones. The policing power allows drones to be used to meet an imminent threat. But there is a real question as to whether even that limitation is being respected, given the lack of transparency and the vague standards being used.

A final point on Guantanamo. I think it is fair to say that Guantanamo at this stage is an unmitigated disaster for the United States. It is hurting, not helping, our security. I would not want to do anything in extending or amending the AUMF that makes it easier to keep Guantanamo open. I think we have seen by now that Federal trials are much tougher and a much more certain way of prosecuting terrorist suspects. There is a much lesser recidivism rate of people who have gone through the U.S. criminal justice system as terrorist suspects as opposed to people who have gone through Guantanamo. Guantanamo is not a long-term solution. Even the Bush administration felt pressure to release people. We have to recognize that given the difficulties of military commission prosecutions, we are going to face the moment sooner rather than later when a war theory is no longer going to allow detention at Guantanamo, and if we have squandered the opportunity for criminal prosecutions in the regular courts, the United States is going to be less safe, not more safe.

So again, coming back to the core issue, this is yet one more reason why I think our aim should be to wind down the AUMF as quickly as possible, certainly not to expand it or amend it further.

Thank you.

[The prepared statement of Mr. Roth follows:]

PREPARED STATEMENT BY MR. KENNETH ROTH

Chairman Levin, Ranking Member Inhofe, other members of the committee, thank you for the opportunity to testify at this important hearing. My name is Kenneth Roth. I am the executive director of Human Rights Watch, an independent nongovernmental organization operating in some 90 countries worldwide for the purpose of investigating and reporting on human rights conditions and defending basic rights. Human Rights Watch holds governments and others to the standards of international human rights law and, in times of armed conflict, to international humanitarian law, or the laws of war. In this testimony, I will address three main issues: (1) how the 2001 Authorization for the Use of Military Force (AUMF) should be understood today and whether it should be extended or modified; (2) what laws should govern drone attacks; and (3) what should be done about Guantanamo and long-term detention without trial.

THE AUTHORIZATION FOR THE USE OF MILITARY FORCE

When it comes to our most basic rights, there is probably no more important distinction than the line between peace and war. In peacetime, the government can use lethal force only if necessary to stop an imminent threat to life, and it can detain only after according full due process. But in wartime, the government can kill combatants on the battlefield, and it has greatly enhanced power to detain people without charge or trial. So, safeguarding the right to life and liberty depends in important part on ensuring that the government is not operating by wartime rules when it should be abiding by peacetime rules.

Human Rights Watch does not ordinarily take positions on whether a party to a conflict is justified in taking up arms. Rather, once armed conflict breaks out, we generally confine ourselves to monitoring how both sides to the conflict fight the war, with the aim of enforcing international standards protecting noncombatants. In the Latin terms used among legal experts, we focus on jus in bello, not jus ad bellum.

However, the combination of a declared global war and the newly enhanced capacity to kill individual targets far from any traditional battlefield poses new dangers to basic rights—ones that will only grow as the U.S. role in the Afghan armed conflict winds down. That leaves only al Qaeda and similar armed groups but without the elements that traditionally limit use of the war power: the control of territory and a recognizable battlefield. To paint the problem most starkly, might a government that wants to kill a particular person simply declare "war" on him and shoot him, circumventing the basic due-process rights to which the target would ordinarily be entitled? Or, might a government intent on wiping out a drug gang simply declare "war" on its members? If a government wants to be less draconian but still avoid the burden of mounting a criminal prosecution, might it declare "war" on drug trafficking and detain without trial any participants it picks up?

These are not fanciful scenarios. Drug traffickers pose a violent threat to many Americans and are almost certainly responsible for more American deaths than terrorism. Already we talk of a metaphorical war on drugs. Why not a real war?

I hope we cringe at that thought. Detested as drug traffickers are, I hope we recoil at the thought of summarily killing or detaining them. But that is the risk if we allow the government unhindered discretion to decide when to apply war rules instead of peace rules. This threat of an end run around key constitutional rights highlights the need to articulate clear limits to any war related to terrorism.

Some have suggested that mere transparency around the war-peace distinction should be enough—that Congress might authorize ongoing war against terrorist groups present and future so long as the administration states clearly at any given moment the groups with which it is at war. But that open-ended authorization is dangerous, because governments will be tempted to take the easy path of war rules over the more difficult path of respecting the full panoply of rights that prevail in peacetime. We cannot trust that public scrutiny is enough to restrain abuse given how easy it is to vilify alleged terrorist groups.

If a particular group poses such a serious threat that it can be met only with war, focused war authorization can be sought. But an open invitation to live by war rules makes it too easy for the government to circumvent key rights.

Indeed, it is perilous enough when the government entrusted with the power to set aside certain peacetime rights is the United States. But once the U.S. Government takes this step, we can be certain that governments with far less sensitivity to rights will follow suit. The Chinas and Russias of the world will be all too eager to seize this precedent to pursue their enemies under war rules, be they "splittist" Tibetans or "subversive" dissidents.

Even without the AUMF, the United States is hardly defenseless against the scourge of terrorism. Since the September 11 attacks nearly a dozen years ago, the United States has vastly enhanced its intelligence, surveillance, and prosecutorial capacities. Should these tools prove insufficient to meet a particular threat, the right of self-defense still allows resort to military force. However, because of the fundamental rights at stake, war should be an option of necessity, not a blank check written in advance, as some are proposing for a revamped AUMF. Now that the Afghan war is winding down, it is time to retire the AUMF altogether.

DRONE ATTACKS

The problem of excessive reliance on the rules of war for using deadly force is illustrated by the use of drones to kill suspects. Drone attacks do not necessarily violate international human rights or humanitarian law. Indeed, given their ability to survey targets for extended periods and to fire with pinpoint accuracy, drones may pose less of a threat to civilian life than many alternatives. Still, their use has become controversial because of profound doubts about whether the Obama administration is abiding by the proper legal standards to deploy them. For example, killing Taliban and al Qaeda forces fighting U.S. troops may be lawful in a traditional armed conflict like the one still underway in Afghanistan, but what is the justification for killing people who are not part of these groups in places like Yemen and Somalia? Where does northwestern Pakistan fit?

The Obama administration has offered several possible legal rationales for drone strikes, but with little clarity about the concrete, practical limits, if any, under which it purports to operate. Beyond the risk to people in these countries who face possible wrongful targeting, the lack of clarity denies Congress and the American public the ability to exercise effective oversight. It also makes it easier for other countries that are rapidly developing their own drone programs to interpret that ambiguity in a way that is likely to lead to serious violations of international law.

One possible rationale for drone strikes comes from international humanitarian law governing armed hostilities. The Obama administration has formally dropped the Bush administration's use of the phrase "global war on terror," but its interpretation of the AUMF as authorizing "war with al Qaeda, the Taliban, and associated forces" looks very similar. This expansive view of the "war" currently facing the United States cries out for a clear statement of its limits. Does the United States really have the right to attack anyone it might characterize as a combatant against the United States anywhere in the world? We would hardly accept summary killing if the target were walking the streets of London or Paris.

John Brennan has said that as a matter of policy the administration has an "unqualified preference" to capture rather than kill all targets. But what are the factors leading the administration to decide that this preference can be met? Will it kill simply because convincing another government to arrest a suspect may be difficult? If so, how much political difficulty will it put up with before launching a drone attack? Will it kill simply because of the risk involved if U.S. soldiers were to attempt to arrest the suspect? If so, how much risk is the administration willing to accept before pulling the kill switch? The truth is that we have no idea. We don't know whether these decisions are being made with appropriate care or not. We do know that other governments are likely to interpret this ambiguity in ways that are less respectful than we would want of the fundamental rights involved.

Moreover, away from a traditional battlefield, international human rights law requires the capture of enemies if possible. As noted, failing to apply that law encourages other governments to circumvent it as well—to summarily kill suspects simply by announcing a "war" against their group without there being a traditional armed conflict anywhere in the vicinity. Imagine the mayhem that Russia could cause by killing alleged Chechen "combatants" throughout Europe, or China by killing Uighur "combatants" in the United States. In neither case is the government where the suspect is located likely to cooperate with arrest efforts. These precedential fears are real: China recently considered using a drone to kill a drug trafficker in Burma.

Even leaving aside the scope of the "war" in which the United States is engaged, the existence of armed conflict entitles the warring parties to shoot at only the other side's combatants, not civilians. Indeed, under the laws of war, all feasible precautions must be taken to avoid harm to civilians, and in case of doubt a person

must be considered a noncombatant. How does the Obama administration square these legal limitations with its alleged use of "signature strikes," that is, its attacks on people whose identities are unknown but who are seemingly deemed to be combatants by virtue of behavior that is shared by people who are not directly participating in hostilities against the United States. For example, in places like Yemen or Somalia, many people carry weapons openly without being part of any combat force, let alone one challenging the United States. Nor does a person become a combatant merely by associating with others who might be planning to attack Americans, given that international humanitarian law recognizes many such people—drivers, cooks, doctors, financiers—as noncombatants. The administration's lack of transparency means we have no idea whether or not in launching drone attacks it is applying a legally defensible definition of a combatant.

There is also the question of whose war the United States is fighting. Most assume that it is targeting only people plotting to attack the United States, but there are reasons to doubt that assumption. The vagueness of the signature-strike criteria means it is quite possible that the people being targeted are at war with the Governments of Yemen or Pakistan, not the United States. In one recently reported case, the United States appeared to target someone in Pakistan whom the Pakistani Government wanted to eliminate but who was not engaged in any hostilities against the United States; the killing reportedly occurred as a quid pro quo for allowing the Central Intelligence Agency (CIA) to operate its drone program in Pakistan.[1] There is no law barring the United States from fighting other nations' wars, but that is not what most Americans think the drone program is doing.

Even in the absence of a combatant at war with the United States, the U.S. Government is entitled to use lethal force in certain limited circumstances under international human rights law. A police officer on the streets of Washington, for example, is entitled to shoot a suspect if it is the last feasible resort to avoid an "imminent" threat to life—such as when a hostage-taker is holding a gun to a victim's head. That same standard might justify targeting people overseas as well (leaving aside questions of sovereignty, which would depend on the consent of the relevant government).

At times, the Obama administration has used this language of imminence but it has done so in a way that seems to render it infinitely elastic. The administration has argued that it should not have to wait until the last possible moment to avert a planned attack—a fair point—but in certain circumstances it appears to be lethally striking targets where no reasonable claim of an imminent threat can be made. The alleged use of signature strikes provides perhaps the clearest illustration of the problem. The lack of clarity and transparency surrounding the drone program leaves the impression that people are being targeted for no more than carrying weapons and associating with unsavory people. The administration's unwillingness in many cases to articulate anything remotely resembling an imminent threat makes it seem that human rights standards on policing, insofar as they are being relied upon to justify drone strikes, are being flouted.

GUANTANAMO

International human rights law prohibits prolonged detention without charge or trial, yet many detainees have been held in Guantanamo for 11 years without charge. For many of them, the administration says it has no plan ever to prosecute. The administration sought to justify these detentions at first by reference to international law governing armed conflict between governments, but the conflict between the United States and Afghanistan ended in 2002. The administration now clings to the AUMF, but the factual predicate for it—U.S. involvement in the conflict with the Taliban and al Qaeda—is also coming to an end. In any event, people detained in the context of an armed conflict between a government and an armed group—such as the current conflict in Afghanistan—should be charged and tried, not detained. The administration's misuse of the AUMF to rationalize prolonged detention without trial in Guantanamo is another reason why the AUMF should not be extended.

Moreover, when it comes to combatants in an armed conflict, the power to detain can easily be linked to the power to kill. If the United States is going to claim the right to detain "combatants" without end on the basis of a global war unconnected to a traditional battlefield, against a non-state enemy that does not control any substantial territory, other nations will undoubtedly make similar claims. Once govern-

[1] Jonathan Landay, "Obama's drone war kills 'others,' not just al Qaeda leaders," McClatchy Newspapers, April 9, 2013; Mark Mazetti, "A secret deal on drones, sealed in blood," The New York Times, April 6, 2013.

ments identify people as combatants, however wrongful that may be, they will inevitably claim the power not only to detain them without charge or trial but also to kill them. Although the United States currently detains many people who are clearly not combatants—those drivers, cooks, doctors and financiers, among others—it should be mindful of how its policies can be interpreted.

The best solution is still to try suspects in regular Federal courts, with their entrenched procedural protections designed to provide fair trials. Security concerns can reasonably be handled; for example, if trials in the regular U.S. Courthouse for the Southern District of New York are deemed too difficult despite its long history of trying dangerous criminals such as drug czars and mafia dons, trials could be held securely and with little disruption on nearby Governor's Island. However, the United States has already tried former CIA- and Guantanamo-detainee Ahmed Ghailani without incident in the regular courthouse for the Southern District of New York.

By contrast, Congress' insistence on using military commissions at Guantanamo has been an unmitigated disaster. The only two convictions obtained after full trials have both been overturned by the United States Court of Appeals for the District of Columbia Circuit; the five other convictions obtained were by plea bargain. During the same time that the military commissions have obtained these seven convictions, Federal courts have prosecuted some 500 terrorism suspects. In addition, there are profound and legitimate concerns about the fairness of a system that, among other things, permits the introduction into evidence of coerced statements from witnesses, allows the military to hand-pick the jury pool, and severely compromises the attorney-client privilege.

Roughly half of the Guantanamo detainees have theoretically been approved for transfer to their home or third countries, and those transfers can proceed if the administration certifies that appropriate security arrangements have been made. The administration should accelerate its efforts to make those arrangements.

However, the administration also claims that there remains a category of detainees who are "too dangerous" to release but who cannot be tried because either there is insufficient admissible evidence to prosecute them or their acts did not amount to a chargeable crime. The administration purports to hold these men under the above-described war powers. But even under war rules, the purpose of detention is to keep the enemy from returning to the battlefield. As the U.S. involvement in the Afghan war winds down, it is not clear what war the men released from Guantanamo would return to. If the fear is that they would join in criminal activity, the answer lies in criminal prosecution, including for such inchoate crimes as conspiracy or attempt, not the "Minority Report" approach of detaining them for crimes that they might at some future point plan to commit.

Given Guantanamo's enormous stain on America's reputation, there is good reason to believe that these continuing detentions are causing more harm than good to America's security and counterterrorism efforts. President Obama himself has stated that keeping Guantanamo open weakens U.S. national security. For the same reasons that long-term detention without trial is wrong and counterproductive in Guantanamo, it would be wrong and counterproductive if moved to the United States. That would simply replicate Guantanamo in another locale.

One of Congress' most solemn duties is to protect human rights, especially the fundamental rights to life and liberty. War is sometimes necessary, but before embarking on that dangerous path, the risk to rights should be weighed carefully. This nation has now been on a war footing for an extraordinarily long time. Security risks will never be eliminated. But, as the Afghan war winds down, we have arrived at the stage where those risks can be managed without the danger to rights that further declared "war" entails. It is time to retire the AUMF and the unlawful practices it has spawned and sustained.

Chairman LEVIN. Thank you very much, Mr. Roth.

Mr. Stimson.

STATEMENT OF MR. CHARLES STIMSON, MANAGER, NATIONAL SECURITY LAW PROGRAM, THE HERITAGE FOUNDATION

Mr. STIMSON. Thank you, Mr. Chairman and Senator Inhofe and distinguished members of the committee for inviting me here today.

I found particularly helpful the 15 questions that the committee put to all the witnesses. I have tried to weave answers to many of

the themes running throughout those questions in my written responses, and I am going to focus on one aspect of that today.

My views are informed much like Professor Corn's by my 20-plus years in uniform as a Navy Judge Advocate General, but also as my time as a Deputy Assistant Secretary of Defense in charge of detainee policy when I had the privilege in the second part of the Bush administration to testify before this committee regarding the Army field manual on interrogations and detainee policy.

I want to explain and defend why I believe it would be unwise, at least at this time, to amend or repeal the AUMF and suggest some principles going forward for any additional legislation aimed at those organizations or entities that pose a substantial terrorist threat to our country but who are not specifically covered by the current AUMF.

Let me just say as a third generation Navy man, let me be blunt. Nobody, especially anybody in the U.S. military, wants to be in the state of armed conflict. Any authorization for use of military force, be it from legislation or even Article II powers or both, must be done only when absolutely necessary and only as a last resort.

Both the Bush and Obama administrations have concluded that our country is at war and that it is, indeed, engaged in an armed conflict with al Qaeda. The 2001 AUMF directed the President in the preamble to, "protect the United States citizens both at home and abroad," and authorized him to use all necessary and appropriate force against—and then the chairman quoted it in the beginning of his comments—"those nations, organizations, or persons he determined planned, authorized, committed, or aided the terrorist attacks on September 11 or aided or harbored same."

I take Senator King's point about the past tense. But I would say to that that the U.S. Supreme Court has affirmed our engagement in an armed conflict, and consistent with the law of armed conflict, the United States may use force, including lethal force, against its enemies. The AUMF, as you heard from the first panel, has and continues to act as the legal framework for, among other things, detention and targeting decisions.

I want to address something that Senator King brought up and I think is floating around the room about the AUMF. The AUMF is actually self-limiting.

First, it is limited to al Qaeda, the Taliban, and persons and forces associated with those organizations. It is not a mandate to use force against any terrorist organization or other entity that may threaten U.S. national security.

Second, it is limited by the principle that force should be deployed only, "in order to prevent any future acts of international terrorism against the United States." That comes from the AUMF itself.

Third, as you have heard from the first panel, it is limited by the law of armed conflict. Both administrations have taken the rather realistic and unremarkable position that there is no geographic limit to the AUMF. The enemy is where the enemy is.

The current AUMF is consistent with the law of armed conflict and our national and international obligations. It is not, as some have argued, a boundless source of tyranny and infringement upon other nations' sovereignty.

Now, I would be remiss if I did not point out the obvious—that we have made, obviously, great strides in defeating or at least degrading the capacity of the narrow class of groups and individuals subject to the AUMF. But until and unless those subject to the AUMF no longer pose a substantial national security threat to the United States, the AUMF should remain in place. Repealing or amending the AUMF prematurely would be unwise. It will, hopefully, obsolete itself as al Qaeda and the Taliban and associated forces are eventually defeated, which I think we can all agree on is a worthy goal.

At the same time, I would commend the committee to read additional materials, especially the one proposed by Professor Goldsmith and some colleagues, to start thinking about what comes after the AUMF because the day when it will no longer be sufficient to meet the evolving terrorist threat I think is approaching. I think we can debate how long or how close we are, but I think it is approaching. Assessing that evolving terrorist threat, as I detail more in my written comments, is a critical first step. If that particular evolving terrorist threat from groups that do not fall within the narrow bounds of the AUMF poses a substantial national security threat to the United States, then acting under the principle of national self-defense, Congress may, and I stress the word "may", need to consider additional legislation to confront that threat.

I would respectfully suggest keeping these principles in mind when considering additional legislation, which I go into more detail in my written submission to the committee.

One, any additional legislation must grow out of an actual national security threat to the United States and a need for that legislation.

Two, it should follow the substance of the current AUMF and authorize the President to use, "all necessary and appropriate force." I want to pick up on Professor Corn's comments to that regard.

Three, crafting the legislation consistent with Youngstown Sheet & Tube should be done in a way that is an open and transparent manner and brings the three branches of the Government, or at least the two branches of the Government, together.

Finally, I want to touch on something Mr. Roth said. We must not forget that we have greatly enhanced our Nation's capability to confront international terrorist threats since September 11. Any additional legislation must be measured against the already existing intelligence gathering, law enforcement, and other capacities we have as a country and then only authorized if necessary.

In closing, I want to commend this committee for holding the hearing. Counterterrorism strategy and the defense of our country should not be a partisan issue. We can and must debate these different approaches, but we need to do so in a civil, apolitical manner. The threat of international terrorism is indeed real. I commend the committee for trying to work together to craft answers to these 15 tough questions and others the committee may have.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Stimson follows:]

PREPARED STATEMENT BY MR. CHARLES STIMSON

Chairman Levin, Ranking Member Inhofe, and members of the committee, thank you for inviting me to testify on the law of armed conflict, the use of military force, and the 2001 Authorization for Use of Military Force (AUMF). My name is Charles Stimson, and I am a Senior Legal Fellow and Manager of the National Security Law Program at in the Kathryn and Shelby Cullom Davis Institute for International Studies at The Heritage Foundation. Before joining the Davis Institute in May 2013, I served as Heritage's Chief of Staff, and as a Senior Legal Fellow in Heritage's Center for Legal and Judicial Studies. I have written, lectured, testified, and debated widely on subjects including the law of armed conflict, military commissions, detention and interrogation policy, and other pressing national security policies. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

Prior to joining Heritage in 2007, I served as the Deputy Assistant Secretary of Defense for Detainee Affairs, where I advised both Secretary Rumsfeld and Secretary Gates on global detention policy and matters regarding the detainees within the custody or effective control of the Department of Defense, including those in Iraq, Afghanistan, and Guantanamo Bay. During my tenure at the Pentagon, we finalized and eventually published the overarching Department of Defense instruction related to detainees,[1] drafted the Military Commissions Act of 2006, republished the Army Field Manual on interrogations,[2] accepted transfer of the 14 High Value Detainees from the Central Intelligence Agency to Guantanamo Bay, presented the United States' Second Periodic Report to the United Nations Committee Against Torture, and undertook many other crucial actions dealing with detainee policy.

I have also served as a local, State, Federal, and military prosecutor and defense counsel, most recently having served as an Assistant U.S. Attorney for the District of Columbia, where I was a homicide/violent crimes prosecutor. I currently serve as the Deputy Chief Trial Judge and Executive Officer for the Navy-Marine Corps Trial Judiciary, Reserve component, where I hold the rank of Commander. In my 20 years in the Navy Judge Advocate General's Corps (JAG), I have served three tours on active duty, including one assignment overseas. Additionally, in the spring of 2000, I deployed as Force Judge Advocate with Commander of Amphibious Group Two to East Africa as part of Operation Natural Fire, a joint military training exercise. In the spring of 2001, I deployed with the Navy SEALS as part of Naval Special Warfare Group Two as their Joint Special Operations Task Force JAG to take part in joint task force exercise. The views I express here are mine, and do not necessarily reflect those of the Departments of Defense or Navy, or the U.S. Navy JAG Corps.

Today's topics are particularly timely given the fact that over a decade has passed since the September 11, 2001, attacks and the September 18, 2001, AUMF joint resolution came into force. I commend this committee for holding this hearing and for putting together a thoughtful set of questions for today's witnesses. It is an honor to appear before you with my co-panelists, all of whom are experts in this field. It is vitally important that this committee and Congress as a whole take stock of the current terrorist threats to our security and provide those tools necessary and lawful to those charged with its defense, consistent with the principles of oversight and accountability.

The committee's invitation included 15 interrelated questions that cover a broad range of topics, from the scope and duration of AUMF to its current efficacy and the principles underlying the use of remotely piloted aircraft. Providing thorough answers to these important questions could easily take up several law review articles. Given the committee's focus and the limited time to prepare for this hearing, I have focused my testimony on several themes that run throughout the committee's questions.

A PRIMER ON THE LAW OF ARMED CONFLICT

Both the Obama and Bush administrations have concluded that our country is at war—in particular, that it is engaged in an "armed conflict" with al Qaeda and associated forces. President Obama reiterated the point during his first inaugural speech, and his administration has since repeatedly restated that position. The Supreme Court has affirmed our engagement in an armed conflict in, among other de-

[1] Department of Defense Instructions 2310.01E, found here: http://www.defense.gov/pubs/pdfs/Detainee—Prgm—Dir—2310—9–5–06.pdf

[2] Formally known as FM 2–22.3 (FM 34–52), Human Intelligence Collector Operations, published September 2006. Electronic copy here: https://www.fas.org/irp/doddir/army/fm2–22–3.pdf

cisions, that of *Hamdi* v. *Rumsfeld* in 2004. A country in a state of armed conflict may resort to that body of law called the law of armed conflict.

Those who study the law of armed conflict come to know and understand the basic principles and purposes of that rich body of law. It is worth reviewing those basic principles for purposes of setting the stage for the questions posed by the committee. I studied the law of war as a JAG, and refer the committee to the Army's Operational Law Handbook,[3] wherein it states:

> The law of war is defined as that part of international law that regulates the conduct of armed hostilities. It is often termed the law of armed conflict. The fundamental purposes of the law of war are humanitarian and functional in nature. The humanitarian purposes include:
>
> (1) Protecting both combatants and noncombatants from unnecessary suffering;
> (2) Safeguarding persons who fall into the hands of the enemy; and
> (3) Facilitating the restoration of peace.
>
> The functional purposes include:
>
> (1) Ensuring good order and discipline;
> (2) Fighting in a disciplined manner consistent with national values; and
> (3) Maintaining domestic and international public support.
>
> The law of war rests on four basic principles:
>
> (1) The principle of necessity—which authorizes that use of force required to accomplish the mission;
> (2) The principles of distinction or discrimination—the requirement that combatants be distinguished from non-combatants, and that military objectives be distinguished from protected property or protected places;
> (3) The principle of proportionality—the concept that the anticipated loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained; and
> (4) The principle of humanity or unnecessary suffering—a military force must minimize unnecessary suffering and is forbidden from employing arms or materials calculated to cause unnecessary suffering.

These principles are particularly important to keep in mind when, for example, discussing the committee's questions concern the use of remotely piloted aircraft, or "drones." Although the technology may be new, drones are simply tools subject to the same principles for deployment as any other weapons system employed under the law of armed conflict. As my colleague Steven Groves has explained in an exhaustively detailed report on the legal basis for drone warfare, the Obama administration's framework for carrying out targeted strikes with drones appears to adhere to recognized principles of the law of war described above.[4] Indeed, drones may allow a greater degree of distinction than previous generations of weapons technology, reducing expected collateral damage and injuries. In this way, the United States may carry out the necessities of warfare in a highly efficient and targeted fashion.

I also agree with the point raised by the Brookings Institution's Benjamin Wittes that any thoughtful discussion of drone warfare must distinguish between policy and means. Much criticism of drone warfare is actually criticism of broader policies, such as the application of the law of armed conflict to the present conflict, geographical limitations on such conflict, and targeting decisions. Whether a strike is carried out by a drone or an airplane (with the pilot in the vehicle itself) has little or no bearing on these broader policy issues.[5] As Wittes explains, drone use is appropriate in the context of an armed conflict:

The ability to target the enemy in an armed conflict with lethal force is a simple, and lawful, operational necessity in a world in which enemy organizations in countries and locations impossible to reach by law enforcement continue to threaten the United States. The fact of armed conflict—and the consequent availability of targeting—does not mean automatic recourse to hostilities, of course. There are many

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[3] Operational Law Handbook, International and Operational Law Department, The Judge Advocate General's Legal Center & School, U.S. Army. 2007. Pages 12–16. Link found here: http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA469294

[4] See Steven Groves, Drone Strikes: The Legality of U.S. Targeting Terrorists Abroad, Heritage Foundation Backgrounder No. 2788, April 10, 2013, at http://www.heritage.org/research/reports/2013/04/drone-strikes-the-legality-of-us-targeting-terrorists-abroad.

[5] See generally Benjamin Wittes, Drones and the War on Terror: When Can the U.S. Target Alleged American Terrorists Overseas? Testimony Before the House Committee on the Judiciary, February 27, 2013, at http://www.brookings.edu/~/media/Research/Files/Testimony/2013/02/27%20drones %20wittes/Feb%2027%20Drones%20Wittes%20Testimony.pdf.

places in the world where the United States can and does pursue terrorists through law enforcement, interdiction of terrorist financing, and other non-hostilities-based tools of counterterrorism. But there are other places in the world that are weakly governed, ungoverned, or simply hostile to the United States, where terrorist groups responsible for September 11 have fled, or in which associated terrorist groups or cells have arisen and joined the conflict against the United States. The armed conflict framework, and the inherently-tied authority to target the enemy with lethal force, is essential to reaching these actors and denying them sanctuary from which to attack this country.[6]

I agree, as well, with Wittes's conclusion that this point should engender no particular controversy.

The law of armed conflict, in addition to authorizing a country to use force against its enemies—which, by the way, may consist of both state and non-state actors—also authorizes the country to detain such enemies for the duration of the hostilities, without criminally charging them. The fact that we do not know when the hostilities against al Qaeda will end does not change the fact that the United States has the legal authority to hold captured al Qaeda members during ongoing hostilities. As a practical matter, however, the United States has transferred or released the vast majority of captured al Qaeda and Taliban combatants, even as we kill or capture others.

THE SEPTEMBER 18, 2001, AUTHORIZATION FOR USE OF MILITARY FORCE

In response to the devastating attacks against our Homeland, Congress passed a joint resolution a week after the attack, on September 18, 2001. The preamble to the AUMF directs the President "to protect U.S. citizens both at home and abroad." The operative text authorizes 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 aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons."

This authorization for the use of force has acted, and still acts, as the legal framework for, among other things, targeting and detention operations. Two administrations have relied on the AUMF to engage those actors who were responsible for, aided, or harbored those responsible for September 11.

Ninety-eight Senators voted for the Joint Resolution along with 420 members of the House of Representatives. The AUMF has served the country well. It has enabled our warfighters, intelligence professionals, and other stakeholders to carry out their work, knowing that Congress has given express authorization for the use of appropriate and proportional force to confront an enemy that was responsible for the worst attack against our country since Pearl Harbor.

It is important to note the ways in which the AUMF is self-limiting. First, it is limited to al Qaeda, the Taliban, and persons and forces associated with those "organizations." It is not a mandate to use force against any terrorist organization or other entity that may threaten U.S. national security.[7] Second, it is limited by the principle that force should be deployed only "in order to prevent any future acts of international terrorism against the United States." Third, as described above, it incorporates and is limited by the law of armed conflict. In these respects, the AUMF is consistent with prior force authorizations that have targeted non-state actors.[8]

The AUMF, by its own language, does not have an expiration date, nor should it. While it is true that over the decade we have made hard-fought gains against the al Qaeda leadership, and key members of the Taliban and associated forces, other elements of those organizations still pose a continuing threat to the United States. I base this opinion not on current intelligence briefings—to which I no longer have access—but my reading of open source materials. That said, Congress does have access to classified intelligence briefings, and I encourage a thorough and dispassionate evaluation of the current threats by Congress.

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[6] Ibid. at 6.

[7] Note that Congress considered and rejected the Bush administration's initial request for authority to "deter and pre-empt any future acts of terrorism or aggression against the United States," without regard to the entities involved. See generally Curtis Bradley & Jack Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L. Rev. 2047, 2079 (2005).

[8] See, e.g., Pub. L. 15–101, 3 Stat 532, 532–33 (1819) (authorizing force against slavers); Pub. L. 15–77, 3 Stat. 510, 510–11 (1819) (authorizing force against pirates); Pub. L. 17–7, 3 Stat. 721 (1823) (same); 33 U.S.C. §§ 381–82 (same).

As to the committee's question regarding the geographic scope of the AUMF, both administrations have taken the unremarkable position that by its terms, and in practice, there is no geographic limit or scope to the AUMF. Rather, the AUMF gives the President the authority to confront the enemy wherever he deems the enemy resides. Just last year, in a major address at Northwestern University, Attorney General Eric Holder stated, "Our legal authority is not limited to the battlefields in Afghanistan. Indeed, neither Congress nor our Federal courts have limited the geographic scope of our ability to use force to the current conflict in Afghanistan."[9]

The notion that we are at war, and that the war (and by implication the AUMF) has no geographical boundaries is anathema to some, but is nevertheless lawful and consistent with the law of armed conflict and our national and international obligations. It is also not the boundless source of tyranny and infringement upon other nations' sovereignty that detractors profess; rather, the national security power of the politically accountable branches are subject to all of the checks and balances within our constitutional form of government, as well as the more modern checks detailed by fellow witness Jack Goldsmith in his book Power and Constraint. It is commensurate, in this case, with the enemy, an international terrorist movement that does not respect political or any other boundaries and that considers the people and assets of the United States and its allies, wherever they may be, to be its targets.

As to the committee's question regarding whether the AUMF should be modified, or by implication repealed, I would suggest that repealing the AUMF prematurely would be unwise. Repealing the AUMF would signal, legally, that the war against al Qaeda is over, at a time when al Qaeda and associated forces continue, in fact, to wage war against the United States. It may have more specific consequences, for example, involving the continued detention of those terrorists currently in captivity and not subject to military commission or Federal court proceedings.

Repealing or substantially narrowing the existing AUMF could also have substantial repercussions on other sensitive operations, including but not limited to the targeted killing program.

In short, the current AUMF should remain in place unless and until the narrow class of persons under its scope no longer poses a substantial threat to our national security. Keeping the current AUMF does not authorize a permanent state of war, as some critics have alleged. It merely retains the legal framework that has worked and served us well, to date, and acknowledges that those subject to the AUMF, although greatly diminished in number and efficacy, should not be allowed to regain their footing.

In the context of the AUMF, keeping the AUMF as is does not necessarily mean that the executive branch, this one or the next, will want to or need to employ the full extent of its authority. We cannot foresee with precision when or if the threats posed by those subject to the narrow jurisdiction of the AUMF will be defeated or become so insignificant as to not warrant this particular AUMF.

THE AUMF AND DETENTION AUTHORITY

Despite the fact that the express language of the AUMF does not include the words "detention," each of the three branches of the Federal Government, including the executive branch across two administrations, has recognized that the AUMF necessarily includes the power to detain those subject to the boundaries of the AUMF.

In June 2002, the Bush administration argued in its brief before the Fourth Circuit in the case of *United States* v. *Hamdi*, that the authority to detain Yasser Hamdi flowed from the Commander in Chief's Article II powers and from the "statutory authorization from Congress... Furthermore, the President here is acting with the added measure of the express statutory backing of Congress." It cited the AUMF.

Similarly, in its brief before the Supreme Court in Hamdi in 2004, the Bush administration argued that its detention authority stemmed, in part, from the AUMF as that authority "comes from the express statutory backing of Congress."

As is well known by now, the Supreme Court held in Hamdi that "Congress has in fact authorized Hamdi's detention, through the AUMF." As the Court explained, citing longstanding, consistent executive practice and the law of war, "detention of individuals [who fought against the United States as part of the Taliban], for the duration of the particular conflict in which they were captured, is so fundamental

[9] Address at Northwestern School of Law of March 5, 2012. Text found here: http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html

and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."[10] The Bush administration relied on the AUMF's detention authority in subsequent cases, including those regarding Jose Padilla and Ali Saleh Kahlah al-Marri.

The Obama administration has continued to rely on the AUMF for detention authority. In its first brief before a court on the matter—here, in the context of habeas litigation from three Guantanamo detainees—the administration argued that "The United States bases its detention authority as to such persons on the Authorization for the Use of Military Force."[11] Their brief went on to say that "detention authority conferred by the AUMF is necessarily informed by principles of the laws of war,"[12] which is a position also taken by the Bush administration and the courts in numerous instances. In particular, it arrived at the following "definitional framework," premised on the application of the law of armed conflict to the AUMF, that has subsequently been upheld by the U.S. Court of Appeals for the DC Circuit:

The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.[13]

Congress, in turn, ratified that framework in section 1021 of the 2012 National Defense Authorization Act (NDAA). That provision "affirms" the authority of the President under the AUMF to detain certain "covered persons":

(1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.

(2) A person who was a part of or substantially supported al Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.

Although there have been differences between the two administrations in terms of their reliance on Article II powers and detention authority, the fact remains that both administrations have consistently relied on the AUMF to justify detention of members of al Qaeda, the Taliban, and associated forces.

Furthermore, both administrations have relied on the AUMF as a lawful basis for its targeted killing programs. Such a program, under proper supervision within the executive branch and appropriate oversight from Congress, is a necessary and invaluable tool.

ASSESSING THE THREAT

Al Qaeda today remains a threat. The organization has evolved substantially from the relatively insular group that planned and carried out the September 11 attacks. Over the past decade, al Qaeda has "franchised" its name, its techniques, and its terrorist mission to any number of associated groups, including al Qaeda in the Arabian Peninsula and al Qaeda in the Islamic Maghreb. That period has also seen the rise of a number of terrorist groups with similar goals and varying relationships to the "core" al Qaeda organization. They include al Shabaab, Boko Haram, Jabhat al-Nusra, and Lebanese Hizballah.

Robert Chesney's 2012 law review article entitled "Beyond the Battlefield, Beyond al Qaeda: The Destabilizing Legal Architecture of Counterterrorism" describes the strategic and legal complexity of the terrorist battlefield today. At the same time that al Qaeda itself has splintered, a number of groups have allied themselves with its mission, its techniques, and only sometimes al Qaeda itself. A few examples are illustrative of this trend:

> Al Qaeda has been linked in relatively unspecified ways to a group of Islamist extremists in northern Nigeria known as Boko Haram. The Algerian extremist group formerly known as the Salafist Group for Call and Combat has embraced the al Qaeda brand more formally, becoming "al Qaeda in the Islamic Maghreb," and has recently seized territory in Northern Mali working in close concert with a local armed group of extremists

[10] *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 518 (2004).
[11] See http://www.justice.gov/opa/documents/memo-re-det-auth.pdf
[12] Ibid.
[13] Ibid.

> known as Ansar Dine ("Defenders of the Faith"). Multiple al Qaeda-linked groups have emerged in the area of the Sinai Peninsula in Egypt, including a group calling itself the Mujahideen Shura Council and another called Ansar al Jihad. Iraq famously became the home of al Qaeda in Iraq in the years following the U.S. invasion, and was famously (and foolishly) reluctant to conform its operations to the dictates of al Qaeda's senior leadership in Pakistan in its first iteration; after nearly being eliminated a few years ago, it is now enjoying a substantial resurgence. As the civil war in Syria unfolds, there are claims in the media regarding the presence of "al Qaeda" fighters appearing, though whether this represents an influx of al Qaeda in Iraq members, of homegrown extremists appropriating al Qaeda's brand, something else, or mere propaganda is far from clear at this time. The point being, each of these groups may differ markedly from one another in terms of their actual degree of connection to al Qaeda itself, their interest in conducting operations targeting American or other western targets outside the confines of the state in which they usually operate, and in terms of their own organizational coherence.[14]

As Chesney concludes, al Qaeda has embraced an increasingly decentralized model, while seeking ties to already existing regional terrorist actors. The trend makes ever more tenuous the assumption underlying the AUMF that al Qaeda-style terrorism necessarily bears any direct or substantial relationship to al Qaeda itself, as is necessary to fall under the terms of the AUMF. As this trend continues, the day will come when substantial threats to the United States are no longer encompassed within the existing force authorization. For the present, however, al Qaeda's enormous organizational flexibility—perhaps its chief strength—has allowed us to defer addressing that issue.

ADDITIONAL AUTHORITIES TO CONFRONT THE EVOLVING THREAT

Still, it is not too early to begin thinking about what comes after the AUMF, because the day when it will no longer be sufficient to meet the terrorist threat is approaching. At this stage, the most important thing may be to frame how we approach this problem. In general, I commend to your attention a recent white paper by the Hoover Institution's Task Force on National Security and Law entitled "A Statutory Framework for Next-Generation Terrorist Threats"[15] co-authored by fellow panelist Jack Goldsmith. In particular, a few key points are worth discussing here:

First, the central consideration on whether to enact additional authorizations for the use of military force must be our national security needs. As al Qaeda continues to splinter, and new groups unassociated with al Qaeda proliferate, threats beyond the scope of the AUMF will become increasingly prevalent. At the outset, these may be addressed by greater attenuation of AUMF authority—a phenomenon that has already begun—and by non-military means. But as these threats grow, those methods will become infeasible. Congress and the President, working together, have a duty to ensure that appropriate legal authority exists to address these threats. That will require cooperation between the branches and a relationship of trust, particularly if the nature of this emerging threat requires greater flexibility in targeting than allowed by the AUMF.

Second, the substance of the AUMF's force authorization should be followed. The AUMF's allowance that the President may bring to bear "all necessary and appropriate force" against the entities encompassed by it is consistent with our constitutional architecture, with centuries of precedent, and with the need for flexibility in fighting a diverse and always evolving threat. Congress has never attempted to regulate the specific means by which the President has exercised his power as Commander in Chief. Beyond raising serious constitutional questions, limits on that authority would be folly because they would constrain the President's ability to wage war successfully on non-state actors whom Congress has already identified as the Nation's enemies. The better course is to separate the substance of a force authorization from its breadth.

Third, narrowly tailored, flexible legislation by Congress, prepared in an open and transparent manner, best serves the interests of the American people. As Justice Jackson observed in his famous opinion in Youngstown Sheet & Tube, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his au-

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[14] Robert Chesney, Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism, at 29–30 (footnotes omitted).

[15] http://media.hoover.org/sites/default/files/documents/Statutory-Framework-for-Next-Generation-Terrorist-Threats.pdf

thority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[16] Consistent with that principle, when the President acts with the support of Congress, his actions bear greater legitimacy both domestically and internationally, in the courts and in these chambers. When the President acts on his own, as sometimes he must, his powers are more constrained and therefore may be less effective, while at the same time subject to less oversight and fewer checks by Congress and the courts. But make no mistake: the President has a duty to protect the Nation's security, and any President will, if and as necessary, rely on his Article II powers to carry out that duty in the face of imminent threats, even where Congress has not provided additional authority. Congress therefore weakens not only the President but also itself when and if it declines to face up to the threats against our Nation.

Fourth, Congress must build on the AUMF, not replace it. To replace the AUMF would be risky and unwise at this time, because doing so would cast uncertainty on the legal basis for so many aspects of our campaign against al Qaeda. Any modification to the core AUMF grant of authority is risky for that reason. Over time, the AUMF will obsolete itself, as al Qaeda and the Taliban fade into oblivion, and when that process is finally complete, the AUMF will no longer have any purpose or meaning. We are not yet at that day, however. Therefore Congress may need to build on the AUMF, expanding its authority to reach new threats, rather than altering it at this time.

Finally, Congress must always strive to balance the need for expediency in addressing threats with appropriate congressional control and oversight. No one suggests handing the President a blank check to carry out the power to declare war. The Constitution reserves that power to Congress. It also reserves to Congress the power of the purse and the power to regulate the armed services. These powers are essential to ensuring accountability for results and for the protection of Americans' rights, consistent with our values, as we fight enemies that reject those rights and those values.

CONCLUSION

In summary, the United States remains in a legal state of armed conflict with those responsible for the September 11 attacks. The current AUMF authorizes the use of force against this enemy and also allows this enemy to be detained under the law of war. The mere existence of the AUMF does not, in and of itself, authorize an endless war, as some critics contend. Rather, it merely authorizes the Commander in Chief to use those lawful authorities to confront and ultimately to defeat this enemy. Although those subject to the AUMF's narrow jurisdiction are now on the run and arguably degraded in their capabilities, the fact remains that they still pose a national security threat to the United States. As such, the current AUMF is in the process of becoming obsolete; but unless and until this enemy no longer poses a substantial national security threat to our country, the current AUMF should not be repealed or replaced.

That said, other transnational terrorist groups may pose a substantial national security threat to the United States. The looser the affiliation they have with al Qaeda and those responsible for September 11, the more difficult it is to shoehorn them into the existing AUMF. As such, Congress has the opportunity to assess what threat, if any, they pose to our national security, and if substantial, the obligation to craft appropriate legislation to confront the threat.

I commend the committee for their work in this area.

Thank you for inviting me to testify and for this committee's leadership on these tough issues. The nation's security is a sacred duty, and we can and must balance security with personal liberties and the utmost respect for the rule of law.

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[16] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 636 (1952) (Jackson, J., concurring).

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Chairman LEVIN. We thank you very much, Mr. Stimson. We thank you all.

Mr. Stimson has laid out the limits inside AUMF on its use, and I am wondering whether, Ms. Brooks, you agree with those limits.

Ms. BROOKS. I agree that those are the limits in the AUMF on its face. I think that there are a couple of separate questions. One is there is some ambiguity, I think, in the AUMF as to congressional intent which I do not think can be resolved by reference to the language itself. So I do not think my former colleagues from the Obama administration are saying anything implausible at all when they say that it could be construed to provide precisely the authorities they interpreted it as providing. That is why, in a way, I suggested that this is a policy decision for you as much as anything else. It is a question of: do you want them to have such potentially open-ended authorities? I also should emphasize I have enormous respect for their good faith and the great care that they take in their decisions, but I think that is a separate question.

Chairman LEVIN. I agree, but basically you do not disagree with the statement of Mr. Stimson that there are limits on the face of the AUMF?

Ms. BROOKS. I believe there are limits, and I believe that that was Congress' intent.

Chairman LEVIN. Good, that is good.

The question of co-belligerents: under the law of war, for co-belligerents to be included in who the target or who the named source of attack is, they must, as I understand it, join with the named belligerent and that they must also be participating in an attack on the United States. Would you agree with that, Mr. Roth?

Mr. ROTH. Yes, but I would add one other thing which I think is critical here, which is that the original belligerent has to still exist.

Chairman LEVIN. The original?

Mr. ROTH. The original belligerent has to still exist.

Chairman LEVIN. Right.

Mr. ROTH. I think we are very much facing the prospect of al Qaeda central being decimated. You cannot then have co-belligerents. That is a different authorization.

Chairman LEVIN. But as long as al Qaeda exists, I think you all would probably agree that the co-belligerent doctrine would require that co-belligerent join in an attack on the United States.

Mr. ROTH. Yes.

Chairman LEVIN. That gets to the point of al Nusra. By the way, I think I misspoke in suggesting that al Nusra then might come under that doctrine because unless they joined in an attack on the United States, I do not think that. So I will just confess error on that because I think I was too sloppy in terms of my statement about al Nusra, and we will let Senator Kaine comment if he wishes later on.

The next question I have is the 10- to 20-year reference that we heard from a member of the first panel. I do not think that was a reference to AUMF's life. I think it was a reference to how long that particular witness thought we would be facing the kind of belligerency which he described. So I will just say that in clarification of what I believe was the statement.

Let me ask now about the question of U.S. persons and whether or not the law of armed conflict requires a different decisionmaking process or different standards be applied when targeting a U.S. person. If a U.S. person joins an enemy force, is that person subject to being designated an enemy combatant? Let me start with that, Mr. Corn?

Mr. CORN. I think the answer is clearly yes.

Chairman LEVIN. All right. Does anyone disagree with that? No. Everyone shakes their head no.

I want to get to this due process issue in the couple of minutes I have left. Assume that there is strong evidence that another attack takes place through the air and that one of the three planes attacking us has already hit a target in the United States. It is clear from the evidence that this is an al Qaeda attack on us with three small planes. It is also clear that the second and third planes are piloted by U.S. citizens, and strong evidence, however, is that they are part of an attack by al Qaeda on us. Somehow or other, they get into U.S. airspace.

Let me ask you, Mr. Stimson. I will start with you on this one. Can the Air Force shoot that plane down?

Mr. STIMSON. In the fog of war where information is always imperfect, under your hypothetical it is entirely likely that the President may decide that that is necessary.

Chairman LEVIN. Without due process for those Americans on board?

Mr. STIMSON. Without ex ante judicial process, but process within the executive branch under the exigencies of inherent self-defense.

Chairman LEVIN. But you would say that there does not need to then be a judicial proceeding before that plane could be shot down?

Mr. STIMSON. Number one, there may not be any court you could even go to to get a judicial process, but second, I think time alone would prevent your ability to go to court.

Chairman LEVIN. Does anyone think that those Americans on that plane that are piloting that plane under the hypothetical I gave you are entitled to due process? Does anybody think that? Mr. Corn?

Mr. CORN. I think they are entitled to due process. I think it begs the question what process is due.

Chairman LEVIN. Okay. Due process in the ordinary sense of the term.

Mr. CORN. No, not in the ordinary sense of having to go get a warrant or a judicial authorization. Furthermore, I do not think a police officer would be required to do that under that exigency even in peacetime.

Chairman LEVIN. I agree with you, but I am talking about the military. Does anybody think the military here has to provide any due process under normal definition? Mr. Roth?

Mr. ROTH. I think it is important to say that the rules governing the military and the police in the situation of an imminent threat to American life are not different in that sense. In other words, if an American citizen walked in and held a gun to your head, the police could shoot to kill if that was the last resort to stop—

Chairman LEVIN. I agree, but I am talking about the military.

Mr. ROTH. If it was a soldier, he could do the same thing.

Chairman LEVIN. So the military can shoot that plane down. There is no doubt in anybody's mind about that. Is that correct? Okay.

My time is up. Thank you.

Senator Inhofe.

Senator INHOFE. Thank you, Mr. Chairman. I am going to make mine very brief. As you well know, I have the senior position on the Senate Environment and Public Works Committee, and starting in 3 minutes, there is probably one of the most controversial nominees coming up for our confirmation and I must be there.

In my opening statement, you guys may not have all been here at that time because you are the second panel, I confessed, and confession is good for the soul, that I was not really firm on either side of this. I wanted to hear, I wanted to learn, and I have. I will have to say the testimony has been very enlightening to me more so than I think any other hearing that we have had.

Let me say to you, Mr. Roth, that I am coming from a prejudiced perspective when I say this, but you helped me make up my mind probably more than anyone else did, not that it is all made up yet. But I have probably spent as much time looking at this asset that we have called Guantanamo Bay as anybody else that is up here at this table. While there is not time to go into the details, we also look at what is a good deal and not a good deal for the American people because we are responsible for the expenditure of the money. One of the few good deals we have had since 1904, even if you did not like the way they operate, would be Guantanamo Bay. It is $4,000 a year and about half the time, Castro does not even bill us for it. So it is a pretty good deal that we have there.

I have also looked at the resources that are there, and I very strongly disagree with you in terms of the proper use of that facility, and it is a resource and an asset that should be properly used.

Mr. Stimson, you were Deputy Assistant Secretary for Defense for Detainee Affairs under both Rumsfeld and Gates. Is that correct?

Mr. STIMSON. Yes, sir.

Senator INHOFE. You finalized the overarching DOD instruction related to detainees, drafted the Military Commission Act of 2006, and republished the Army field manual on interrogations.

Mr. STIMSON. It was a team effort, sir, but they were done during my time.

Senator INHOFE. You were involved.

Mr. STIMSON. I was.

Senator INHOFE. I consider you to be an expert or be very knowledgeable certainly.

Do you agree with Mr. Roth that Guantanamo is an "unmitigated disaster"?

Mr. STIMSON. No. I believe that we need to have a place, when we are in a state of armed conflict, to detain the enemy. I have been somewhat agnostic about the ZIP code of where we hold them. I understand that, for example, if we bring them to the United States, there may be additional rights and privileges that would accrue to them. I also believe that when I was in office, President Bush announced that he would very much like to close it, and there are now 166 people there compared to the 779. But we have expended tremendous resources there. So I think even if it was ordered closed tomorrow for purposes——

Senator INHOFE. Mr. Stimson, I would say what we cannot do is debate that right now because there also is another problem of detention or incarceration in the United States. The very nature of a terrorist, his mission is to make other people terrorists. I do not want to get into that, although I would love to have a hearing on this sometime, Mr. Chairman. But nonetheless, you have answered my question.

How about you, Mr. Corn? From a military perspective, are you familiar with the center there?

Mr. CORN. Yes, Senator.

Senator INHOFE. Do you agree that it is an unmitigated disaster?

Mr. CORN. I think that characterization is certainly overbroad. I think that Guantanamo, because of events that occurred there initially, carries with it a connotation of overreaching, or maybe inconsistency, with core principles that guided our treatment of detainees throughout the history of our Armed Forces. I think if the conditions and the standards began as they are today, it would not have that imprimatur.

Senator INHOFE. Okay. Mr. Chairman, I applaud you on this panel. It has been very helpful, and I yield back.

Mr. ROTH. Senator, could I just maybe give a brief word?

Senator INHOFE. Okay. I have a serious problem upstairs on the fourth floor, but go ahead.

Mr. ROTH. The reason I say this——

Senator INHOFE. I was not saying this as critically as perhaps it sounded. There just was not time to elaborate.

Mr. ROTH. I understand.

Senator INHOFE. Go ahead.

Mr. ROTH. My reasoning is this. In the 12 years since September 11, there have been about 500 successful prosecutions in civilian court of terrorists. There have been two trials in Guantanamo, both of which have been reversed, and then five guilty pleas. We are spending $1.5 million a year per detainee. It is a scar on America's reputation. It is not a sustainable situation. That is why I think——

Senator INHOFE. Again, I do think if we have a hearing on this, I will encourage the majority to invite you as a witness.

Mr. ROTH. I appreciate it. Thank you.

Chairman LEVIN. Thank you, Senator Inhofe.

Senator Kaine.

Senator KAINE. Thank you, Mr. Chairman. This has been a great hearing and it has helped me crystallize my thinking a bit.

There is a constitutional ambiguity that goes back to the language in Article I and Article II. The Article I language, and I

think Congress is in Article I, the first article for a reason establishes that Congress has that power to declare war, and the executive power in Article II talks about the President's powers, somewhat undefined but clearly expansive as Commander in Chief.

That somewhat vague line, which I think we have to assume was written vaguely intentionally by those who wrote the language, and additional political realities to me suggest that we have a situation where throughout our history, there has often been executive overreach in matters of war and I think excessive deference by Congress. I think that those two trends are actually perhaps getting more severe for a variety of reasons that I do not need to go into.

In response to a point made by Professor Corn, I strongly believe that decisions about targeting, tactics, et cetera are for the executive. There should be congressional discussion and oversight certainly. But you are right. If we trust our military leaders to do what we empower them to do, then we should not be making those decisions. So in terms of the prosecution of hostilities, I think it is extremely important that power be an executive power and that we give broad latitude to it.

But I believe even more strongly that Congress has to jealously guard its prerogative to commence hostilities and to decide against whom those hostilities will be commenced. So the power to declare war is not just who we are in a state of hostility, but also a pretty clear definition of who are we hostile to. Who is this war to be commenced against? The thing about the hearing that has been important for me is getting at this notion under the AUMF of who exactly was the AUMF authorizing hostilities against.

There was discussion in the first panel about traditional law of war and co-belligerents, and that is a very important and fairly longstanding doctrine. Yet, the questions to the first panel suggested to me that they viewed associated groups under the AUMF as not the same as co-belligerents because they acknowledge certain groups as associated groups under the AUMF against whom, according to their interpretation, we could take action that have not declared any particular hostility to the United States. They may have chosen to ally with al Qaeda in one theater or another, but they have not declared any particular hostility to the United States.

That is what concerns me, Mr. Chairman, about this. Does the AUMF broadly allow associated groups to include groups that have popped up long after September 11 who have not yet declared hostility to the United States, but get swept into the AUMF purely because they have declared an allegiance for some reason to al Qaeda? That causes me grave concern about this jealous prerogative, against whom are we declaring war, that Congress needs to guard.

So the only real question I have is for each of you, and it is great to have so many law professors here at once. Courts have validated that associated groups, who had no connection with September 11, who popped up after September 11, or in the President's words from his State of the Union, have emerged. I asked a question to the panel about whether the legal authority is clear, insofar as it has been litigated, that groups that had no connection with Sep-

tember 11 that have popped up since are, in fact, encompassed within the legal framework of the AUMF?

Ms. BROOKS. Senator Kaine, I do not think it is clear. I would actually refer back to a point that Senator McCain made earlier. Most of the litigation on this is related to the scope of detention authority in which we have both clear legislation and a clear expression of its interpretations of the AUMF by the executive branch in court filings. But I would note that, as Senator McCain suggested earlier, the power to detain is a lesser included power of the power to lawfully target, but the power to lawfully target is, obviously, not necessarily an included power in the power to detain. I think those are distinct issues and should properly be seen as such. But anyway, I think that in terms of your question, is there clarity from litigation, no.

Senator KAINE. Professor Corn or others?

Mr. CORN. I think one thing we have to recognize is that even the judicial review of the detention issues, in those cases, the courts have shown great deference to the judgments of the executive as to who is or who is not properly designated as falling under the scope of the AUMF. So even if there are judicial decisions that endorse the detention of individuals from associated forces, it in many ways is just a ripple effect of the executive's determination.

I tend to disagree with Professor Brooks. I do believe that this litigation has basically permitted detention as an element of the exercise of the principle of military necessity which is invoked through the AUMF which, by implication, would extend to targeting as well. So I think you could read those decisions to support or to validate the executive judgment of which groups fall within this category.

But ultimately I agree with you, Senator, that Congress absolutely does have the prerogative to set limits on the scope of the AUMF, who the enemy is, the duration, and the geographic scope. I do agree with Professor Brooks, that is really the policy question more than the legal question that Congress has to work through.

Mr. ROTH. Senator Kaine, if I could. I disagree with Mr. Corn in the sense that in an armed conflict, the power to detain extends beyond combatants. You can have a security threat who may not be a combatant and still be authorized to detain them. So the fact that the courts have interpreted the AUMF fairly expansively with respect to associated forces to allow detention does not necessarily imply the same expansion with respect to targeting.

As to your basic point, logically, of course, a new force can join a war later. So if al Qaeda central is fighting along and a new force that did not exist 12 years ago joins it, yes, that is a co-belligerent. It could be attacked too. But if the original belligerent disappears, which I think we are nearing the prospect of, the concept of co-belligerency no longer makes sense for the purpose of the AUMF. So this expansive view, that you can keep adding associated forces, stops working not only because they may or may not have joined arms against the United States, but also because the original focus of the AUMF, al Qaeda, I think is in the process of disappearing.

Mr. STIMSON. Senator, I would just add a couple points. One is to your broader first point. I think it is actually very helpful, and has proven to be helpful in the last 10 to 12 years, when Congress

does engage, focus, and work with the executive branch on these tough issues. I would commend to your attention, the committee's attention, the work done by Congress on the FISA Amendments Act, the Patriot Act amendments to that, the Military Commissions Act of 2009 where there was a consensus over time that additional safeguards are needed to be put in place. So when you made the point earlier that you would very much hope that the administration would come to Congress when they were considering kinetic action in Syria, I think that is an excellent point.

Another thing that I would add, is to Senator King's comment about the associated forces piece. There has been very quietly and methodically a great deal of law made by the DC Circuit and the DC District Court in the habeas litigation where not only the Bush administration but then the Obama administration has, as Professor Brooks pointed out, put forth their position that al Qaeda, the Taliban, and associated forces and thereby defines them because they have to put forward some evidence, consists of X, Y, and Z. The courts have actually had to look at that, as courts do, to see whether the evidence is there to justify detention. Some decisions have resulted in them declaring them to be not enemy combatants. Most have upheld that. So I think, even though Congress is typically the body that legislates, the courts have had to fill in this gap and provide more clarification to those narrow definitions.

Senator KAINE. Thank you, Mr. Chairman.

Chairman LEVIN. Thank you very much, Senator Kaine.

Senator McCain.

Senator MCCAIN. Thank you.

If I could just ask the witnesses a series of short questions, and then I would like for you to elaborate on your answers as you so choose. I will go down, beginning with you, Professor Brooks.

Do you believe that al Qaeda, even though having morphed in many respects, is on the increase or decreasing?

Ms. BROOKS. I am only able to evaluate based on what I see in the media, obviously. So subject to that caveat, my sense is that al Qaeda as such is on the wane, that it has less popular support in the Arab and Islamic world, that we have succeeded in significantly, words like "decimating" have been used by the President and the DNI, al Qaeda core. I do believe that it has popped up in franchise form elsewhere, but my sense, at least from a careful read of the March testimony by DNI Clapper, is that the administration, at least publicly, does not appear to see an imminent threat to the United States coming from any of its offshoots.

Senator MCCAIN. Mr. Corn?

Mr. CORN. First off, I would like to qualify my answer by acknowledging I do not have access to sensitive information and again as a former intelligence officer, I think that would be very important.

But my sense is that al Qaeda, as we know it, is following classic insurgent doctrine, which is to recede when pressure is against it, regroup, reorganize with a goal of coming back, and being able to find other vulnerabilities. So I am reluctant to say if it is stronger or weaker. I think it is in a different phase of operations now.

Mr. GOLDSMITH. I basically agree with the first two panelists. I only know what I read in the newspapers. It seems like that the

core is weakening and that it is popping up in other places with an uncertain threat to the United States.

Senator MCCAIN. Mr. Roth?

Mr. ROTH. I agree. I think the principal threat posed by the franchises is actually to local governments, not to the United States. There is obviously some threat to the United States, but al Qaeda core seems to be pretty decimated.

Senator MCCAIN. Mr. Stimson?

Mr. STIMSON. I will incorporate by reference the previous answers. I do not have access to that information from a classified level.

Senator MCCAIN. Do you believe that the AUMF ought to be abandoned, allowed to expire, updated, or replaced?

Ms. BROOKS. If I were in your shoes, Senator, I think I would want to take the current AUMF and put a sunset on it with the understanding that if the administration does feel that there are intense, sustained, ongoing threats, it should come back and with some specificity say to you and your colleagues here what the threat is, what we know about it at this moment, and the scope of authorization that we believe we need to successfully combat it.

Here is a question that I would love to have you pose to the Attorney General: what is it that you believe that you need to do that you do not believe can be done under your inherent Article II powers? There is a policy question, which is a separate one. There is the legal question. But it seems to me that if what the administration is saying, we believe we ought to and can protect the Nation while limiting our use of force to prevent imminent threats of attack to the United States, then I do not see that the AUMF is needed.

Senator MCCAIN. Wow. In other words, we should go out and kill people and it is really okay? That is a very interesting answer.

Mr. Corn, outright replacement, updating, allowing it to expire, or leave it as it is?

As I said in my statement, I believe it is not necessary to update it now. I do not think it would be a terrible thing to update it, but I just do not think it is necessary at this point.

Mr. GOLDSMITH. Senator, I believe that Congress should get its hands around what is going on under the AUMF and figure out how the AUMF is being used to authorize the executive to use force in various countries. I would perhaps, after getting my arms around that, require closer collaboration with Congress on how the AUMF is updated by the executive through interpretation. Only after you figure out what is going on under the AUMF, what the nature of the extra-AUMF threats are, and whether Article II powers are enough to meet those threats can you address legislation for extra-AUMF threats.

Senator MCCAIN. Thank you.

Mr. Roth?

Mr. ROTH. Senator, with the U.S. war against the Taliban winding down by our choice, with al Qaeda Central decimated by the President's view, I think the AUMF is reaching its expiration date very quickly, and I would hasten that.

Your question to Professor Brooks, does that mean we can just run out and kill people? No. There are still strict laws limiting

that, although killing people is sometimes possible. To come back to the chairman's example, if there is an imminent threat to life and there is——

Senator MCCAIN. I am not talking imminent threats, Mr. Roth. We are all in agreement on imminent threats.

Mr. ROTH. But then if there are other groups that do not pose an imminent threat but there is a desire on the President's part to use military force against them, he should seek congressional authorization rather than using the vague terms of the AUMF which are coming to an end.

Senator MCCAIN. Mr. Stimson?

Mr. STIMSON. I think you keep it as is for now, but at the same time, this hearing and others like it need to probe exactly what Professor Goldsmith is saying. Figure out whether the AUMF is being properly applied and follow the narrow strictures as written, whether there are extra-AUMF threats that fall outside but need to be addressed by legislation, and conduct vigorous oversight.

Senator MCCAIN. I thank you. My time has expired, Mr. Chairman. But, my friends, I suggest you take a trip to the region. Al Qaeda is all over Mali. Al Qaeda is in Syria in a bigger and bigger way every day. Al Qaeda is in Libya. Al Qaeda is morphing all over the entire region, maybe not as they were on September 11 and maybe the "core of al Qaeda has been decimated," but from my extensive visits to the region, al Qaeda is on the march. They have just morphed into a different kind of threat.

Could I just ask yes or no? Close Guantanamo?

Ms. BROOKS. Yes, but it does not address the key point which is what do we do, yes for symbolic reasons, but we still have the problem.

Senator MCCAIN. Implicit in my question is that we figure out what to do with the detainees that are there.

Ms. BROOKS. Yes.

Senator MCCAIN. Mr. Corn?

Mr. CORN. If we figure out what to do with the detainees, then yes.

Senator MCCAIN. My time has expired, but would it not be just an act of courage on the part of Congress to find a place to put them and designate it? It is not rocket science.

Mr. CORN. I agree, Senator.

Senator MCCAIN. Mr. Goldsmith?

Mr. GOLDSMITH. Senator, I think that really does turn on the alternative in the United States because some people confuse closing Guantanamo with releasing military detainees. There is also the question whether their conditions of confinement will be better or worse in the United States. I think probably worse based on all the proposals I have seen. But if it truly is a strategic problem and we really can find a replacement that would lessen the problem, which I am doubtful of, then I would say yes.

Senator MCCAIN. It is also an image problem and reputation problem.

Mr. GOLDSMITH. But it might be a reputation problem as well if we just transfer 150 people to maximum security prisons in the United States. It might not just be the location that is the problem. That is what I want to suggest.

Senator MCCAIN. Good point.

Mr. Roth?

Mr. ROTH. I agree with that. I think creating "Guantanamo North" is not the answer. We should prosecute as many as possible in regular court and then release the rest. There may be some risk involved in that, but there are a lot of people around the world who hate the United States who are not detained. There is just a group of legacy detainees in Guantanamo who happen to be detained and everybody is afraid to release them. But I think that their continued detention, as the President has pointed out, is at this stage doing more harm than good. If they are a real threat, prosecute them. Otherwise, I think this continued stain on America's reputation is not doing us any good.

Mr. STIMSON. Yes, Senator, I think it should be closed with two provisos. One, a very sober, legal, political assessment of what additional rights or privileges they would have here in the United States, and we could hold them under the law of armed conflict. Two, with the very bare understanding that closing Guantanamo still will not cause al Qaeda to love us. There was no Guantanamo before September 11. There was no Guantanamo during the USS *Cole* bombing.

Senator MCCAIN. I thank you, Mr. Chairman, and I thank you for your indulgence.

Chairman LEVIN. Thank you very much, Senator McCain.

Senator King.

Senator KING. Professor Goldsmith, you were here, I think. You heard my line of questioning and discussion with the prior panel. Here is my question.

Clearly we are in a different kind of situation. This is not World War II where you have a beginning and end, peace treaties, declaration of war, Axis powers, and all those kinds of things. It is a kind of twilight struggle with groups that are metamorphosing all over the world.

How do we breathe life into the principle of Congress having the power to declare war and the President having the power to prosecute it in this kind of new set of circumstances? That is the issue that I am struggling with here.

Mr. GOLDSMITH. That is a great question, Senator.

There are many ways to do that. I think that it is important that Congress stay closer in touch with how the President is prosecuting the war under congressional authorizations. One of the things that this hearing has revealed is that perhaps the executive branch has an interpretation of the AUMF that is interpretation upon interpretation, each one legitimate, but with the enemy morphing everywhere and with the way we are fighting the war changing quite a lot to a more stealth war, that it has taken us to a place that is quite different from 12 years ago through a legitimate process.

I do not believe that terminating the AUMF is a good idea. I do not think it is feasible frankly. But I do think Congress, as I said to Senator McCain, should try to get its hands around how the AUMF is being interpreted and whether you agree with it. I think there was progress made when Senator Levin said he would like to know a list of groups under the AUMF from DOD and DOD said it would answer that question. That is extraordinary. I do not know

what groups DOD thinks is covered by the AUMF. Anything we can do to figure out what the executive branch is doing under the AUMF and determine whether you think it is appropriate to be engaged in war, in those countries, against those groups.

Then there is the question, maybe not for now, but for later, if the war against extra-AUMF threats is going to go on for decades. There will be a question later about how you deal with threats that are not under the AUMF, groups that do threaten the United States. I think there needs to be a process worked out between Congress and the President for authorizing the President to use force under the authorization of Congress.

I have made a proposal with some co-authors about setting up an administrative process inside the executive branch that would notify Congress about what groups are actually our enemies. Some have characterized that as an expansion of warpowers, but I see that as fleshing out who the President thinks the enemy is and who the President is going to be using force against so that Congress can know and act upon that.

But let me say figuring out how separation of powers works in this new type of war is very tricky. There are many options open to Congress, but I feel very strongly that every 12 years or so, it is time to engage and figure out whether you agree with the scope of the——

Senator KING. Just to pick an arbitrary number.

Mr. GOLDSMITH. Yes, sir.

Senator KING. Mr. Stimson, do you have some thoughts on this problem?

Mr. STIMSON. No. I would associate myself with Professor Goldsmith's comments and only add the point I made to Senator Kaine. It seems that there have been certain inflection points in the last 12 years where the courts have periodically and uncharacteristically, for that matter, engaged in issuing opinions with respect to wartime issues, specifically detention. But then periodically Congress jumps in and weighs in on various counterterrorism and other tools. I think to Jack's point, perhaps a 12-year period might be too long.

Senator KING. Thank you.

Professor Brooks, do you have a thought about how do we make this principle that was written 200 years ago work in the time of a war that really was not contemplated at that time? I happen to think it is an important principle. I want to know how to, as I said, breathe life into it.

Ms. BROOKS. I think it is very tough. I guess I would emphasize that we actually have a choice of legal frameworks for how to deal with the ongoing threat from terrorism, and I think everybody here is in complete agreement that we want to make sure that the United States and the executive branch has the authority to protect us with military force if necessary against imminent attack. No question, everybody is in agreement.

I think there is a strategic and a legal question and they are interrelated. One is, what is the best way to do that in the long run? Does that mean to limit the use of military force to the really imminent, big threats, or is that to go after everybody who is an affiliate of an affiliate of an affiliate because we think that is the

smart way to fight terrorism in the long run? That is the strategic question.

Then the legal question, which I think is frankly driven by how we answer that first question. If we think it is the former, if we think that the legal framework that permits us to use force against imminent threats but sort of restricts it, unless something new emerges, then we should not be in the armed conflict framework. We should be in the self-defense and inherent presidential powers framework, and Congress can do that by taking away the AUMF when the war in Afghanistan ends, for instance, by sunsetting it or——

Senator KING. The problem is, though, with a threat like terrorism where it comes up periodically over a long period of time, self-defense could be used to justify what amounts to a——

Ms. BROOKS. I am not sure I agree with that, and I think this is the question. It seems to me——

Senator KING. I am not sure I do either, but that is what I see.

Ms. BROOKS. I think I see the self-defense framework as more restrictive than the armed conflict framework. The self-defense framework requires essentially the satisfying of a higher threshold of imminence and gravity before force is used than the armed conflict framework which says you do not need to have the threat be imminent in the normal sense. You can target people based on their status, not their activities, and so forth.

So to me authorization to use force in an ongoing armed conflict against an undefined enemy amounts to far fewer constraints and far less ability for Congress to exercise oversight than saying, no, if there is an imminent threat, use force. Here I very much agree with what several of my colleagues on this panel have said. If the nature of al Qaeda core on September 11, 2001, does emerge, then by all means return to Congress and request a narrowly tailored authorization to use force to address that.

My husband is an Active Duty Army officer, and he has to go where he is sent. It sure would give me a lot more comfort to feel like where he is sent, whether I agree with the policy or not, that he is being sent wherever in harm's way only if both Congress and the executive branch agree and have seriously thought about the need for that. Right now, I think we have tilted a little too much towards just the executive branch.

Senator KING. I agree and I think what you just characterized was exactly the way the Framers thought about it.

Thank you all very much.

Mr. Chairman, thank you. I think this has been a very important panel and day's hearing, and thank you for setting it up.

Chairman LEVIN. Thank you very much for your presence. Those of us who were here today I think gained an awful lot from this hearing.

I want to read something that I think very clearly gets into the issue which many of us have raised and the panels have addressed. It will take me about 2 minutes, but I think it really encapsulates something. It is part of Jeh Johnson's speech.

He says the AUMF, the statutory authorization from 2001, is not open-ended. It does not authorize military force against anyone the executive labels a terrorist. Rather, it encompasses only those

groups or people with a link to the terrorist attacks on September 11 or associated forces.

Known as the concept of an associated force, an open-ended one, as some suggest, this concept too has been upheld by the courts in the detention context, and it is based on the well-established concept of co-belligerency in the law of war. The concept has become more relevant over time as al Qaeda has, over the last 10 years, become more decentralized and relies more on associates to carry out its terrorist aims.

An "associated force," as we interpret the phrase, has two characteristics to it: one, an organized armed group that has entered the fight alongside al Qaeda something we talked about before and I was a bit sloppy on when I talked about al Nusra, and two, is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners.

In other words, the group must not only be aligned with al Qaeda, it must have also entered the fight against the United States or its coalition partners. Thus, an associated force is not any terrorist group in the world that merely embraces the al Qaeda ideology. More is required before we draw the legal conclusion that the group fits within the statutory AUMF passed by Congress in 2001.

Now, I view that as an extremely careful, thoughtful description of the AUMF and what it authorizes and what it does not authorize. I will ask our panel and then I will give my colleagues a chance also to weigh in, if they want to, further. This was a long speech of his, and I only picked three paragraphs but I think it really addresses the concerns that are raised here today.

Let me go down the line. Ms. Brooks, do you agree with that?

Ms. BROOKS. I think the devil is in the details. I am not sure what it means to join the fight or fight alongside outside of hot battlefields. I would like to see some clarification from the administration on what it thinks that means.

I would also like to know some of the legal and factual reasoning that gets us from that to, for instance, strikes against Somalia's al Shabaab because I do not see how they could be said to satisfy those criteria.

Chairman LEVIN. Well, no, that is different. I am talking about the criteria. Do you agree with not whether al Shabaab is listed or meets this criteria? Do you agree with this criteria in general?

Ms. BROOKS. I think in this context the criteria are sufficiently vague as to in practice, as we see with the targeting of al Shabaab, become virtually meaningless.

Chairman LEVIN. So this is too vague for you.

Mr. Corn?

Mr. CORN. I agree with it. I would also like to see more information on how these decisions are made. I do not think I should because I do not have access to classified information and I think that one of the great challenges here is you are dealing with an opponent that follows an asymmetric pattern of behavior, and if you disclose this information publicly, you are basically signaling to the enemy exactly what the criteria are that the United States uses to designate a group of co-belligerents which could have a negative consequence.

I think what that speech reflects implicitly is that this is not a characterization that is made lightly, that it is based on an intense focus on all available intelligence, and I think that is the function of the commander in chief and his subordinate officers when you are engaged in a conflict.

Chairman LEVIN. To the extent that it is possible to describe in words what the AUMF does in terms of its authority, in terms of the way it limits it, do you agree with this description?

Mr. CORN. Absolutely.

Chairman LEVIN. Mr. Goldsmith?

Mr. GOLDSMITH. Yes, sir, I think it is a perfect description and brief of how the AUMF should be interpreted. But I have to say my confidence in what it means was shaken a little bit today by the first panel's scope and the breadth in which they thought the President was authorized to use force against groups outside of countries that we, at least in the public, know we are operating in. So with that caveat, yes, I do think it——

Chairman LEVIN. I did not ask the first panel if they agreed with this. I should have.

Mr. GOLDSMITH. I am sure that they do. I think that is the administration's official position, and I am sure those are the principles that they are applying.

Chairman LEVIN. But you agree with those principles.

Mr. GOLDSMITH. Yes, sir.

Chairman LEVIN. You may not agree with the application.

Mr. GOLDSMITH. I thought I knew what the application meant, but I am less confident now after this morning's testimony.

Chairman LEVIN. In terms of application, but in terms of the principles, as laid out here, you like those principles.

Mr. GOLDSMITH. Yes, sir.

Chairman LEVIN. Thank you.

Mr. Roth?

Mr. ROTH. I think we are all saying roughly the same thing. As a statement of principle or as a statement of the law, that is fine. We all have real qualms about how it is being applied.

As for Congress' role, which is what this is really about here, my recommendation would be to move as quickly as possible from a situation where the administration on its own is interpreting this in ways that are giving a lot of us pause, to a situation where they have to ask congressional approval for particular expansions.

That is why I think that retiring the AUMF as quickly as possible, not replacing it with a blank check where some administrative procedure determines this, but rather insisting that the executive ask Congress if particular groups are to be added to a list of groups with which the United States is at war. That would be the way to proceed. That would be the only way that Congress would have a meaningful role. Otherwise, we are all going to be sitting here guessing what facts are justifying seemingly strained interpretations of that principle by the administration.

Chairman LEVIN. In terms of a statement of principles, do you agree with the principles?

Mr. ROTH. The principles are fine, yes.

Chairman LEVIN. Thank you.

Mr. Stimson?

Mr. STIMSON. Senator, I agree with the language you read from Jeh's speech. I actually think he gave that over at The Heritage Foundation about a year and a half ago.

I would say that this administration, especially in the first term, has done a fairly good job with some high-level keynote speeches on various topics like the AUMF. It probably would have served them well had they done more with respect to the drones issue early on and it would not have caught up to them the way it did. I would encourage the administration to continue, to the extent practicable, to give these high-level speeches at key venues.

Chairman LEVIN. Thank you.

Senator Kaine.

Senator KAINE. Mr. Chair, while I might agree with those principles as stated, if I heard you right, I do not think that is a fair characterization of the congressional language in the AUMF. I will tell you why. Again, I just heard it. I did not read it.

Under the principle as stated in those paragraphs, a group that popped up long after September 11 and had no role, therefore, on September 11 that decided to join the fight with al Qaeda and joined it not against the United States, but against a coalition partner——

Chairman LEVIN. It says or its coalition partners.

Senator KAINE.—the AUMF would allow us to commence hostilities against a coalition partner, to commence hostilities against a group that had no connection to September 11 and that had no intention of engaging in hostilities against the United States. Again, while we might have that discussion and as Congress decides what should be done, if that is in fact the administration's interpretation of the AUMF, it would allow the commencement of war, absent additional congressional approval, in a way that I think was clearly not contemplated by Congress when it passed the AUMF.

Chairman LEVIN. Putting aside that coalition partner reference——

Senator KAINE. The rest of it I think is a fair statement of what the AUMF attempted to do.

Chairman LEVIN. That is interesting.

Mr. ROTH. Senator, if I could answer. I missed that and I think you are absolutely right to bring that up. I think we tend to think of coalition partner as a NATO partner or a government for whom there is a treaty obligation to come to their defense. But I do not think it is meant that narrowly here. It may well mean Yemen or Mali, in which case it does under the administration's——

Chairman LEVIN. I do not think that they would fit any coalition——

Mr. ROTH. I do not know. In other words, the governments with whom we are fighting. So it is worth asking that question.

Chairman LEVIN. I think at the time this was given, it is the coalition referred to as probably the Afghanistan coalition.

Mr. STIMSON. Probably so.

Chairman LEVIN. Probably. So in that context, it may or may not have satisfied a very legitimate concern that Senator Kaine has just raised. It may or may not satisfy it if it is referring to that coalition in Afghanistan.

Senator King, do you want to close off?

Senator KING. I am more concerned less about the specifics of the AUMF or its continued vitality than with the underlying principle of how we deal with the separation of powers issue on this important subject. The AUMF was a way of dealing with it. My concern after this morning's hearing was that it was being interpreted in such a way that essentially it had no limits. I take the point that you made, and in fact, that exact language was in the prepared testimony of one of the witnesses this morning. But I am still troubled by the open-ended nature of the authorization and my question to Professor Goldsmith. How do we deal with this issue of Congress having the responsibility to declare war in a time where there is no clear beginning/ending, and especially as you interpret it?

So, anyway, I really appreciate what we have discussed here this morning, and I think it bears more discussion. My concern is not about fighting terrorism. My concern is about open-ended authority to the executive to wage war and send our people into harm's way. That is exactly what the Framers were worried about and that is why they gave that power to Congress.

Chairman LEVIN. I think the fear of open-ended authority is one that hopefully all of us share and I think that is probably the case because it is a very legitimate concern.

We thank you all. You have been a great panel. You have really helped us.

We will stand adjourned.

[Questions for the record with answers supplied follow:]

QUESTIONS SUBMITTED BY SENATOR MARK UDALL

AUTHORIZATION FOR USE OF MILITARY FORCE

1. Senator UDALL. Secretary Sheehan, in your testimony you clarified that with regard to "the authority to put boots-on-the-ground in Yemen or Congo," you were "not necessarily referring to that under the 2001 Authorization for Use of Military Force (AUMF). Certainly the President has military personnel deployed all over the world today, in probably over 70 to 80 countries, and that authority is not always under AUMF. So I just want to clarify for the record that we weren't talking about all that authority subject to AUMF." Can you please provide a very specific answer to this question: what authority or authorities, other than the AUMF, were you referring to in your testimony?

Mr. SHEEHAN. I was referring to several security cooperation authorities under which U.S. military forces are engaged in foreign countries with foreign military and civilian partners. For example, the Combatant Commander's Initiative Fund (under title 10, U.S.C., section 166a) may be used for joint overseas exercises to maintain the proficiency of U.S. military forces and build the capacity of foreign partners. DOD may also provide transportation of humanitarian relief and for other humanitarian purposes worldwide (under title 10, U.S.C., section 2561).

In the realm of Special Operations Forces (SOF), the Joint Combined Exchange Training authority (title 10, U.S.C., section 2011) permits DOD to fund deployments to foreign countries of SOF for training with Armed Forces and other security forces of friendly foreign countries. SOF also deploy to provide counternarcotics training to partner nation forces, improving partner nation skills against illegal narcotics and other related illicit trafficking (under section 1004 of the National Defense Authorization Act (NDAA) for Fiscal Year 1991, as amended).

Subject to appropriate approval processes, these and other efforts taken together enable DOD to engage with the military forces of numerous partner nations.

I note that a deployment could be subject to the requirements of the War Powers Resolution, depending on the nature of the deployment, including whether the forces are equipped for combat and whether they are deployed into hostilities or situations where imminent involvement in hostilities is clearly indicated by the circumstances.

2. Senator UDALL. Secretary Sheehan, under what authority or authorities does the President and could the President, deploy military personnel, to include Special Operations Forces, all over the world today?

Mr. SHEEHAN. In addition to the President's authority as Commander in Chief, to order the deployment of military forces, there are several security cooperation authorities under which U.S. military forces are engaged in foreign countries with foreign military and civilian partners. For example, the Combatant Commander's Initiative Fund (under title 10, U.S.C., section 166a) may be used for joint overseas exercises to maintain the proficiency of U.S. military forces and build the capacity of foreign partners. DOD may also provide transportation of humanitarian relief and for other humanitarian purposes worldwide (under title 10, U.S.C., section 2561).

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QUESTIONS SUBMITTED BY SENATOR ANGUS S. KING, JR.

AUTHORIZATION FOR USE OF MILITARY FORCE

3. Senator KING. Secretary Sheehan, in your testimony you stated that with regard to the "authority to put boots-on-the-ground in Yemen or Congo," you were, "not necessarily referring to that under the 2001 AUMF. Certainly the President has military personnel deployed all over the world today, in probably over 70 to 80 countries, and that authority is not always under AUMF. So I just want to clarify for the record that we weren't talking about all that authority subject to AUMF." What authority, other than the AUMF, were you referring to in your testimony?

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QUESTIONS SUBMITTED BY SENATOR KELLY A. AYOTTE

MILITARY CUSTODY

5. Senator AYOTTE. Mr. Taylor, based on your interpretation of current laws and authorities, if he had chosen to do so, could President Obama have designated Dzhokhar Tsarnaev an enemy combatant and placed him in military custody for several weeks or months for interrogation and intelligence collection and then placed him back in our civil justice system for trial as a U.S. citizen?

Mr. TAYLOR. We are aware of no information that indicates that Dzhokar Tsamaev is an "enemy combatant" subject to military detention under the AUMF. The evidence we possess does not indicate that he was "part of" or "substantially supporting" al Qaeda, the Taliban, or associated forces.

6. Senator AYOTTE. Mr. Taylor, under current law, once placed in military custody, would Tsarnaev have been entitled to file a habeas petition in a civilian court challenging his detention as an enemy combatant?

Mr. TAYLOR. Yes. The Supreme Court in *Hamdi* v. *Rumsfeld* determined, among other things, that the Constitution requires that a U.S. citizen-detainee receive due process sufficient to challenge his classification as an enemy combatant, and held that "[a]bsent suspension of the writ [of habeas corpus] by Congress, a citizen detained as an enemy combatant is entitled to this process." 542 U.S. 507, 537 (2004).

DETENTION AUTHORITY

7. Senator AYOTTE. Mr. Taylor, in your joint statement you say that the, "United States remains in a state of armed conflict with al Qaeda, the Taliban, and associated forces." You also state that, "existing authorities are adequate for this armed conflict." Are existing authorities adequate for the detention operations that are part of this armed conflict?

Mr. TAYLOR. The 2001 AUMF implicitly authorizes the detention of enemy combatants in the armed conflict against al Qaeda, the Taliban, and associated forces. This interpretation has been upheld by the courts in habeas corpus litigation and reaffirmed by Congress in section 1021 of the NDAA for Fiscal Year 2012. This detention authority is adequate for the detention operations that are part of the ongoing armed conflict.

8. Senator AYOTTE. Mr. Taylor, what authorities does the administration rely on to capture and detain foreign members of al Qaeda and associated forces at Guantanamo?

Mr. TAYLOR. The 2001 AUMF implicitly authorizes the capture and detention of enemy combatants in the armed conflict against al Qaeda, the Taliban, and associated forces. This interpretation has been upheld by the courts in habeas corpus litigation and reaffirmed by Congress in section 1021 of the NDAA for Fiscal Year 2012.

9. Senator AYOTTE. Mr. Taylor, will these authorities to conduct detainee operations at Guantanamo derived from the international law of war and U.S. law, change when the combat operations end in Afghanistan or when U.S. troops eventually leave Afghanistan?

Mr. TAYLOR. There will eventually come a point when our enemy in this armed conflict is so defeated that we are no longer in an ongoing armed conflict. At that point we will need to face the difficult questions of what to do with those who still remain in U.S. military detention without a criminal conviction and sentence. But that is a point we have not yet reached, and the end of the U.S. combat role in Afghanistan will not necessarily mark that point.

10. Senator AYOTTE. Mr. Taylor, will the authority to detain and interrogate foreign members of al Qaeda and associated forces at Guantanamo remain unchanged after combat operations end in Afghanistan or U.S. troops leave Afghanistan?

Mr. TAYLOR. There will eventually come a point when our enemy in this armed conflict is so defeated that we are no longer in an ongoing armed conflict. At that point we will need to face the difficult questions of what to do with those who still remain in U.S. military detention without a criminal conviction and sentence. But that is a point we have not yet reached, and the end of the U.S. combat role in Afghanistan will not necessarily mark that point.

LACK OF DETENTION POLICY

11. Senator AYOTTE. General Nagata, based on your role as the Deputy Director for Special Operations and Counterterrorism (J–37) on the Joint Staff, if we captured Ayman al Zawahiri tonight, can you tell me where we would detain him for long-term law of war detention and interrogation?

General NAGATA. If we captured Ayman al Zawahiri, the location and circumstances of his detention would be dependent, in part, on the circumstances of his capture. If it were determined that law of war detention and interrogation were appropriate, as opposed to detention under criminal law (and law enforcement interrogation), the Department of Defense (DOD) has a number of options that would be decided by the President after receiving a recommendation by the senior members of the President's national security team.

VALUE OF MILITARY CUSTODY FOR INTELLIGENCE COLLECTION

12. Senator AYOTTE. General Nagata, has intelligence collected from members of al Qaeda and associated forces held in military custody provided intelligence that we have used to prevent attacks, protect Americans, or help us capture other terrorists?

General NAGATA. [Deleted.]

13. Senator AYOTTE. Secretary Sheehan and General Nagata, did we gather intelligence from detainees at Guantanamo that helped us find Osama bin Laden?

Mr. SHEEHAN. Yes. Intelligence gathered from detainees at Guantanamo improved our understanding of the al Qaeda organization, which was helpful in our efforts to find Osama bin Laden.

General NAGATA. [Deleted.]

14. Senator AYOTTE. Secretary Sheehan and General Nagata, months or years later, did we go back to detainees at Guantanamo and ask subsequent questions that were helpful in finding Osama bin Laden?

Mr. SHEEHAN. Yes. DOD asked subsequent questions of detainees, the answers to which were helpful in our efforts to find Osama bin Laden.

General NAGATA. [Deleted.]

15. Senator AYOTTE. Mr. Taylor, Secretary Sheehan, General Nagata, and General Gross, what is the primary purpose of military custody for members of al Qaeda and associated forces?

Mr. TAYLOR. As the Supreme Court recognized in *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 518–19 (2004), detention to prevent a combatant's return to the battlefield and from taking up arms once again is a long-recognized and fundamental incident of waging war. It is not a punitive measure. It is our preference to capture suspected terrorists whenever feasible so that, among other reasons, we can gather valuable intelligence. Capture and detention of enemy belligerents are traditional military practices and part and parcel of armed conflict.

Mr. SHEEHAN. The purpose of military detention is to keep enemy combatants off the battlefield. Detention facilitates the collection of intelligence that could prevent future terrorist attacks.

General NAGATA. Detention serves a number of purposes, including providing intelligence on enemy operations and in removing enemy forces from the battlefield so that they are prevented from taking up arms again.

General GROSS. As the Supreme Court recognized in *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 518–19 (2004), detention to prevent a combatant's return to the battlefield and from taking up arms once again is a long-recognized and fundamental incident of waging war. It is not a punitive measure. It is our preference to capture suspected terrorists whenever feasible—among other reasons, so that we can gather valuable

intelligence that we might not be able to obtain any other way. In fact, the members of al Qaeda that we or other nations have captured have been one of our greatest sources of information about al Qaeda, its plans, and its intentions. Once in U.S. custody, we often can prosecute them in our Federal courts or reformed military commissions—both of which are used for gathering intelligence and preventing further terrorist attacks. Viewed within the context of conventional armed conflict, as they should be, capture and detention by the military are both lawful and necessary practices.

TARGETED KILLING AND DETENTION POLICY

16. Senator AYOTTE. Mr. Taylor, if the administration believes that it has the authority to kill a U.S. citizen with a drone who is a member of al Qaeda or associated forces, does the administration also believe it has the authority to detain a U.S. citizen who is a member of al Qaeda or associated forces in military custody for purposes of law of war interrogation and intelligence collection?

Mr. TAYLOR. It is our preference to capture suspected terrorists whenever feasible so that, among other reasons, we can gather valuable intelligence. In *Hamdi* v. *Rumsfeld*, the Supreme Court held that the AUMF authorized the detention of individuals who are part of or supporting enemy forces, and the DC Circuit has repeatedly endorsed the administration's interpretation of the scope of its detention authority under the AUMF in the ongoing habeas litigation. All three branches of government agree that the administration may hold in military custody individuals who are "part of" or "substantially support" al Qaeda, the Taliban, or associated forces. The Supreme Court stated in Hamdi that there is "no bar to this Nation's holding one of its own citizens as an enemy combatant." Hamdi, 542 U.S. 507, 519 (U.S. 2004). A U.S. citizen, no matter where held, would have the right to seek a writ of habeas corpus to test the legality of his detention.

Hamdi concerned an individual initially captured by the military in Afghanistan. Law of war detention of U.S. citizen terrorist suspects apprehended in the United States, however, would present serious legal and policy questions. With exceptions for individuals like Ali al-Marri and Jose Padilla, both of whom were apprehended during the previous administration, the usual practice of the U.S. Government (under both the current and prior administrations) has been to arrest and detain under Federal criminal law all U.S. citizen terrorist suspects who are apprehended in the United States.

17. Senator AYOTTE. Mr. Taylor, from where does the authority come to detain U.S. citizens in military custody for purposes of law of war detention?

Mr. TAYLOR. Title 18 U.S.C. § 4001(a) provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." With respect to the conflict against al Qaeda, the Taliban, and associated forces, the Supreme Court has held that the AUMF, enacted on September 18, 2001, grants authority within the meaning of § 4001(a) to detain certain U.S. citizens in military custody for purposes of law of war detention. *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 517 (2004) (plurality opinion); accord *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 587 (2004) (Thomas, J., dissenting). President Obama, in signing the NDAA for Fiscal Year 2012, stated unequivocally that the Obama administration will not authorize the indefinite military detention without trial of U.S. citizens.

18. Senator AYOTTE. Mr. Taylor, since September 11, has the U.S. Government detained members of al Qaeda or associated forces who are U.S. citizens in law of war military custody for purposes of interrogation and intelligence collection?

Mr. TAYLOR. There have been occasions since September 11, 2001, when U.S. citizens have been detained in military custody under the law of war and interrogated for purposes of intelligence collection. Any detention under the law of war must comply with the Constitution, the laws of war, and all other applicable law. President Obama, in signing the NDAA for Fiscal Year 2012, stated unequivocally that the Obama administration will not authorize the indefinite military detention without trial of American citizens.

[Whereupon, at 12:44 p.m., the committee adjourned.]

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