

**HEARING TO RECEIVE TESTIMONY ON THE
LAW OF ARMED CONFLICT, THE USE OF
MILITARY FORCE, AND THE 2001 AUTHOR-
IZATION 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, and Ayotte.

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, the 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 witnesses, including Michael Sheehan, Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict; Robert Taylor, the Acting General Counsel of the Department of Defense; 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, quote, 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. Close quote. And again, this authority is referred to as the Authorization for the Use of Military Force, or 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 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 Authorization for the Use of Military Force 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 even have 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 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?

And 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, quote, 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 Authorization of the Use of Military Force, commonly called 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 then general counsel of the Department of Defense, Jay Johnson said—now, this is just a year ago—quote, 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 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.

And I say that—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.” Well, 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.

And we will now call on our first panel. And I believe the administration has a single statement, which is going to be presented by two witnesses. Is that correct? 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 the Department of Defense, Mr. Robert Taylor; Legal Counsel to the Chairman of the Joint Chiefs of Staff, Brigadier General Rich Gross; and a 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 the Department of Defense. 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 because 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 the 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 our 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.

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

Chairman LEVIN. Thank you very much, Secretary Sheehan. Mr. Taylor?

**STATEMENT OF 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 who 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 Department of Defense General Counsel Jay 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 Authorization for the Use of Military Force, 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, quote, 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. We are in an armed conflict, and the Law of Armed Conflict applies to our operations. In this unconventional war, we apply conventional legal principles, well established legal principles reflected in treaties and customary international law.

The United States is not at war with an idea of religion or a tactic. Instead, we are at war against al Qaeda, the Taliban, and associated forces. Former DOD General Counsel Jay 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 con-

stitutional 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 which includes rigorous safeguards to protect innocent civilians.

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

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 for the first round.

Let me start with you, I guess, 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 Jay 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 the Congress is in its oversight regarding the designation of groups. A lot of these groups, as you know, Senator, have very murky membership and they also have very murky alliances and shifting alliances. And they change their name and they lie and obfuscate their activities. So I think it would be difficult for the 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 consider right now are 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 follows:]

[COMMITTEE INSERT]

Chairman LEVIN. And 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, Jay 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. And he said—well, 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 it will end up on the ash heap of history, as with other groups previous, 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 can be jailed, that they 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. Is that the necessity or the ideal? You say "ideal" or "idea"?

Mr. SHEEHAN. Ideally they would be tried if they are captured.

Chairman LEVIN. Well, 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. Well, 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 ques-

tions about what to do with those still remaining in military detention without a criminal conviction and sentence. However, I do 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, what the authority is?

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 follows:]

[COMMITTEE INSERT]

Chairman LEVIN. Thank you.

Senator Inhofe.

Chairman LEVIN. Thank you, Mr. Chairman.

Mr. Secretary, this committee is consistently briefed by the service members 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, have you encountered a situation in the fight against al Qaeda where you believed the special operations community did not have sufficient legal authorization to prosecute the war against al Qaeda or its affiliates?

Mr. SHEEHAN. Senator Inhofe, in a 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 the Department of Defense 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—where you would not have the authority—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 this, 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 authority to go after that organization. But right now, I do not see that case.

Senator INHOFE. Yes. The two generals—you did not give the opening statement, but I would just like—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 mis-

sions, orders, and direction that the combatant commands are given by the Secretary. I have been in this position now for about 18 months, and I have not yet encountered—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. And 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. One of the things I have been looking for and I have not found it yet is I have been distressed for a long period of time. I know it is not a popular position to take—but with 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 Jay Johnson. Let me quote Jay Johnson again as I did in my opening statement and ask the four of you if you agree with Jay 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 you all four, 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 the President ultimately that 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 individuals perhaps?

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

Senator REED. But the decision will ultimately made by—going back, 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 but whether there is any policy consequence of that would be up to the policy-makers.

Senator REED. But the reality would be then the President would be—not just the President but 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 the Congress obviously in a classified setting? Should the Congress have the ability to confirm or reject?

Mr. SHEEHAN. Yes, sir. And 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 would be would it be appropriate for Congress to have a role in not just reviewing but deciding.

Mr. SHEEHAN. Right, sir. I would think that 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, their names and affiliations. And 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. And I presume, at least hypothetically, there could be occasions where both are being used in terms of operations. Does the AUMF sort of give you more flexibility to operate with these different legislative requirements, slightly different for title 10, slightly different in title 50? And 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 affect 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, which is 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, which is, as I understand it, there are indications that this is very highly a 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.

Well, 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.

What this hearing is about is about a resolution that was passed now 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 2011.

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 to you this morning's Washington Post editorial revising the terms of war, the Authorization to Use Force against al Qaeda should be updated, not discarded. And because it has been so long and because of the changing nature, which I think, General Nagata, you would agree the nature of this conflict has changed dramatically, spread throughout northern Africa, throughout the Maghreb, penetrating into other nations all throughout the Middle East. The situation has dramatically changed. So for you to come here and say, well, we do not need to change it or revise or update it I think is—well, disturbing.

And that is why we have people like Senator Dick Durbin last month, 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 said—you know, 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 2001, September 11 attacks, and that organization continues and it has associated forces, forces that have joined with that organization. And 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 and 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 the Department of Defense 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. And 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. That is not what the authorization states, though. 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. And there are published reports, which are not as a result of classified briefings that I have had, that we have killed

people that 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 prevailed

that motivated the United States Congress to pass the authorization for the use of military force that we did in 2001.

So I guess I must say I do not blame you because basically you have got carte blanche as to what you are doing throughout the world, and we believe that it needs to be—it does not need to be repealed, but it is hard for me to understand why you would oppose a revision of the Authorization to Use Military Force in light of the dramatically changed landscape that we have in this war on Muslim extremism and al Qaeda and others. And 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.

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 National Defense Authorization Act 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, quote, enabled us to confront the full range of threats this country faces from those organizations and individuals, and concluded that the new AUMF, quote, 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? And 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. And, 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, quote, 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. End of that quote.

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. And it is specifically part of the 2012 defense 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 I would envision—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 2 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 Authority to Use Military Force?

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 they have in the past. So right now, we are comfortable. And 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. And, Mr. Taylor, if I could come back to you. To your knowledge, has an authorization for the use of military force

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. And 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 Authorization to Use Military Force 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 do we need to change it to give the President—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 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. And 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. And doing nothing is an exceptional—you know, for 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. Well, 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 ISAF 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 organi-

zations 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 the Congress and 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 the 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 talking about 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 the 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 FATA.

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. And it could be anyplace 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, and 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 AQ-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. Well, 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, I do not want to get in, in this setting, the decision-making we have for how we target different groups and organizations around the world.

Senator DONNELLY. Okay.

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

Mr. SHEEHAN. Yes, sir, although it 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 that organized force has to be co-belligerently joined to al Qaeda to threaten us. So when both of those factors are in place, then we can move forward on AUMF.

Senator DONNELLY. If that AQ-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. And, 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 home and abroad, but then do 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 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. Chair.

And 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, focusing 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, and 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 they become an associated force with al Qaeda, then they have joined with the organization that was responsible for those September 11 attacks and we believe they are fully covered by the AUMF. If they have not joined with al Qaeda and become an associated force, 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, quote, 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. Well, 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. And 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. And the determination has been 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 decision-making 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. Chair.

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 the 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. And 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.

And then you said at another point, so 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 the 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. That is a date. It does not go into the future. And 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, Maine, 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 my question is 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 take 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 it with those affiliates that are its operational arm that have previously attacked and killed Americans and a high-level interest 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. And 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.

And 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 the Congress null and void. I do not understand. I mean, I do understand 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, yes, you are correct that this is an overbroad reading that renders the war powers of the 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. Lawyer, 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, become in a sense the arm, the operating arms of al Qaeda, and the operating arms such as—I will use a specific group. 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. And we believe that a group like AQAP is certainly within the scope of the Authorization for the Use of Military Force enacted by the 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. Well, 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. I just think we have granted—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. Well, let me pick up that issue because I think under the Law of War, that Senator King is wrong, but I am going to have to ask you that question. And 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. And 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 Authorization for the Use of Military Force, 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, that 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 about that reading—

Chairman LEVIN. Well, but that reading—

Senator KING.—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, it automatically includes any co-belligerent with al Qaeda under Law of War I believe. Okay?

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.

Now, 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 country you used—or that Senator King used—I believe there were two countries. One was Syria and one was 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. And that then involves sovereignty issues.

Mr. TAYLOR. Yes, sir.

Chairman LEVIN. Do you want to explain that?

Mr. TAYLOR. Well, we are a sovereign state in a system of sovereign states. We benefit greatly by respect for each nation's 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. And my question is should the use of these drones be limited to the Department of Defense or should other Government agencies be allowed to use such force as well, for instance, the CIA. Now, let me, I think, ask 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 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.

Chairman LEVIN. And finally let me say that I believe every President has exercised authority and claimed authority as commander in chief even without the Authorization for the Use of Military Force by the Congress. Is that true?

Mr. SHEEHAN. Yes, sir, absolutely.

Chairman LEVIN. And so I presume that this President, like other Presidents, would even if there were no Authorization for the Use of Military Force, claim certain power under the commander in chief authority of Article 2.

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. 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 make sure that that

authority is not there if that authority in my estimation would be abused.

But, you know, you look at this. It is the most egregious attack on our homeland in history. At that time, I thought we need something broad. We have got 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 apparently had 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 follows:]

[COMMITTEE INSERT]

Chairman LEVIN. Senator Kaine.

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

Based on Mr. Donnelly's question, where this becomes very, 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. You know, I think it is highly, highly important that we stress to the administration that commencing hostilities that put 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 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 that discussion would have to take place between the executive and Congress and could not rely on an expanded interpretation of the AUMF language.

And 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 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 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 even an entity that was not 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. And 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. And 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. I mean, the whole idea of the Constitution is that the Congress makes that initial decision.

And I am well aware. 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 the Congress, and I think it is something 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.

And 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 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 the 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. And 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 internationally—under international law as well. And that also becomes involved in, I believe, Senator Graham's hypothetical.

And 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. If you do not have anything further—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, "boots on the ground," and when I said 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.

And 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. We will, 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 ROSA BROOKS, PROFESSOR OF LAW,
GEORGETOWN UNIVERSITY LAW CENTER**

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

I spent 2½ years working at the Defense Department as Counselor to the Under Secretary for Policy, so I also want to say how much I 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 occurred. And 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. And 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, quote, 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, this Congress was reluctant to give the administration such an open-ended authorization to use force because I think they saw very rightly that 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. And I think Senator King quite rightly commented that it is to Congress it is given not only the power to declare war but a wide range of associated powers. And I think Congress quite rightly felt at that time that such a broad 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. And 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.

So not I believe—and correct me, since you were here, if this is incorrect. But my sense is that even at that very frightening moment when emotions ran very, very high and the threat was far greater, I think, probably than it is today, Congress was very, very careful to try to not send a signal to the executive branch that the Congress was effectively delegating its war powers permanently.

Nevertheless, I think what we have seen—and I think this did come 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. And 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 Jay Johnson saying, that to be an associated force, you have to be an organized force, but then said, no, Congress, we cannot give you a list of such forces because they are too disorganized. Their membership is too shifting. Their alliances are too murky. It has got to be one or the other, it seems to me, and I think that 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 kind of back door way to sort of shoehorn into the AUMF everything potentially 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, we do nothing. You do nothing and you let the administration continue to make something of a mockery of certainly 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. And, Mr. Chairman, my clock is not working. So I hope you will wave to me.

Chairman LEVIN. Ours are not working either. So we will have to have the staff give you a note. Are the clocks no longer functioning or it just was not snapped on? I do not know where to look. We did not start it. Just assume you have used about—pick a number—4 minutes.

Ms. BROOKS. Can we say half? I am a law professor. I can go on forever.

Chairman LEVIN. You have got about 2 minutes left.

Ms. BROOKS. Okay, super.

I think an expanded AUMF is neither wise nor necessary, and 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 just 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 it can kill them.

I also think at the moment we are risking 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 and 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 just unnecessary to expand the AUMF. And here I think maybe this will get to the root of the earlier discussion between 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 both, 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.

And 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. The President under the Law of Armed Conflict—once that 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 fewer legal constraints. Excuse me. I am sorry. There are more legal constraints insofar as precisely 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—and I will wrap up here—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. And you do not need to fear that that in fact leaves the United States vulnerable at all. And 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 default is, he has to come back to you and ask for more if he needs it or where the default is that the President gets to go on at his own discretion without ever having to return, as I think the first panel suggested they thought was legally the case.

Thank you.

[The prepared statement of Ms. Brooks follows:]

Chairman LEVIN. Thank you very much.

Mr. Corn?

**STATEMENT OF 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 United States 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, 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 organiza-

tion and engage in hostilities alongside al Qaeda directed against the United States or its interests.

The focused 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 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. 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 asymmetrical 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, which is 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. And 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:]

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

Mr. Goldsmith.

**STATEMENT OF 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 and talking and arguing about the Authorization to Use Military Force 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 Central Intelligence Agency, changed to meet this threat and that the war is now taking place in many countries around the world including, as it was acknowledged today, that the Authorization to Use Military Force—the Secretary tried to wind it back a little bit at the end, but he said that at one point that it 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. Each one of those steps—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. And the question is is Congress on board for that. A lot of the Senators seemed to be surprised at the scope of the AUMF, as it has been interpreted by the Defense Department. And indeed, one of the great things about this hearing—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, lots of other things.

But I think it is very important that Congress engage this issue. If nothing else, I think asking these questions and all the questions you ask 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 Authorization to Use Military Force 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 the Defense Department 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 2 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 the Defense Department 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 2 powers to address extra-AUMF threats. I believe and this panel, to my surprise, appears to robustly believe that the President—excuse me—the committee I mean—has robust Article 2 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 2 will suffice for that. I think the Congress needs to engage and authorize that.

I will stop there. Thank you very much.

[The prepared statement of Mr. Goldsmith follows:]

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

Mr. Roth?

**STATEMENT OF KENNETH ROTH, EXECUTIVE DIRECTOR,
HUMAN RIGHTS WATCH**

Mr. ROTH. Thank you very much, Chairman Levin, Senator Inhofe, 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. We have people on the ground. And so 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.

And so the basic rights to life and liberty are at stake in this war/peace distinction. And 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 war powers.

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. And 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 have much less attention to the rights of their citizens or others.

And 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 to resort to the exceptional war powers.

And 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 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 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 war powers 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 war powers. 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 2 powers. I would add to that simply the police powers the President has to pursue 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 exceptionally.

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, write a blank check allowing the administration to write in the names over time of the last security threat. I actually think that that would put Congress in a weaker authority with respect to its war powers 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 while 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 limiting its ability to mount these lethal attacks. And 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. And 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 that was only for core leaders, but there is considerable evidence that 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 or Somalia or northwestern Pakistan. Drivers, cooks, doctors, financiers in these areas could all very well be associated with the local al Qaeda or al Shabaab. There could very well be appropriate terrorist concerns, but they would not be combatants under the laws of armed conflicts. And 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. And 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 much more certain as a 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, that we are going to face the moment sooner rather than later where a war theory is no longer going to allow the tension 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:]

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

Mr. Stimson.

STATEMENT OF 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.

And I found particularly helpful the 15 questions that the committee put to all the witnesses. And 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 JAG, 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.

And 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 2 powers or both, must be done only when absolutely necessary and only as a last resort.

As you know, 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. And the 2001 AUMF directed the President in the preamble to, quote, protect the United States citizens both at home and abroad, unquote, 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.

And 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.

But I want to address something that Senator King brought up and I think is sort of 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, quote, in order to prevent any future acts of international terrorism against the United States, unquote. 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. And 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, the Congress may—and I stress the word “may”—need to consider additional legislation to confront that threat.

And 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, quote, all necessary and appropriate force, unquote. And I want to pick up on Professor Corn's comments to that regard.

And 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. And 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:]

Chairman LEVIN. Well, 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 at all implausible 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. And 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. Well, 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, for them to be included, 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. And 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 that co-belligerent join in an attack on the United States.

Mr. ROTH. Yes.

Chairman LEVIN. Now, 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—I think I misspoke on that one. 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 decision-making 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 minute I got 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 the 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. Well, 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 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—

Mr. CORN. No, not in the ordinary sense of having to go get a warrant or a judicial authorization. And 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 the military here have to provide any—under normal definition of due process, does anybody think they do? 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. 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. Well, thank you, Mr. Chairman. I am going to make mine very brief. As you well know, I have the senior position on Environment and Public Works, 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. And I will have to say the testimony has been very enlightening to me more so than I think any other committee 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. And 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, as you know. 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 got there.

I have also looked at the resources that are there, and I feel very strongly in disagreement with you in terms of the proper use of that facility and while 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. And you finalized the overarching Department of Defense 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 a, quote, 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. And 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 ac-

crue to them. And 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. Well, 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, what his mission is is to make other people terrorists. And so 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. Well, Mr. Chairman, I applaud you on this panel. It has been very, very helpful. And I yield back.

Mr. ROTH. Senator, could I just maybe give just a brief word?

Senator INHOFE. Well, 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. You know, we are spending \$1.5 million a year per detainee. It is a scar on America's reputation. It is not a sustainable situation. And that is why I think—

Senator INHOFE. Again, I do think if we have a hearing on this, I will invite you—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. Chair. 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 2. The Article I language—and I think the 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 2 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. And I think that those two trends are actually perhaps getting more severe for a variety of reasons that I do not need to get 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 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 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? And that has been the thing about the hearing that has been important for me, is getting at this notion under the AUMF of who exactly was that AUMF to authorize hostilities against.

Now, 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, traditional Law of War. And 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.

So that is what concerns me, Mr. Chair, about this. Does the AUMF broadly—if it allows associated groups to include groups that have popped up long after September 11 who have not yet declared hostility to the United States, but they get swept into the AUMF purely because they have declared an allegiance for some reason to al Qaeda, then that causes me grave concern about this jealous prerogative that Congress needs to guard against whom are we declaring war.

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. I asked a question to the panel about whether—you know, courts have validated this issue 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, these new groups that have emerged—is the legal authority clear, insofar as it has been litigated, that groups that had no connection with September 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, the geographic scope. And I do agree with Professor Brooks that 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.

And as to your basic point, logically, you know, 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. And 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, and that is, I think it is actually very helpful and has proven to be helpful in the last 10 to 12 years

when Congress does engage and focus and work with the executive branch on these tough issues. And I would commend to your attention, the committee's attention, the work done by the 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, and that 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. And the courts have actually had to look at that, as courts do, to see whether they fit in—the evidence is there to justify detention. Some decisions have resulted in them declaring them not to be enemy combatants. Most have upheld that. And so I think, you know, even though the 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. Chair.

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. And I would 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, though, 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 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. And 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 to the franchises is actually to local governments not to the United States. There is obviously some threat to the United States. 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 Authorization of the Use of Military Force 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 is what the threat is, here is what we know about it at this moment, and here is 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. It would be what is it that you believe that you need to do that you do not believe can be done under your inherent powers, Article 2 powers, because insofar as—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 is 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, or allowing it to expire.

Mr. CORN. Of those three options, my choice would be to update it, Senator.

Senator MCCAIN. Mr. Goldsmith?

Mr. GOLDSMITH. I believe you should—

Chairman LEVIN. Are you adding the cause, leave it as it is? Was that one of your options?

Senator MCCAIN. Yes. In other words, it has—yes.

Mr. CORN. Well, then I retract the answer. 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 the 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 and what the nature of the extra-AUMF threats are and whether Article 2 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, you know, 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. I mean, 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 that there is a desire on the President's part to use military force against, 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, quote, 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 the Congress to find a place to put them and designate it? I mean, it is not that it is 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 Gitmo 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. And 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 mean, 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 assessment, legal assessment and 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. And two, with the very bare understanding that closing Gitmo still will not cause al Qaeda to love us. There was no Gitmo before September 11. There was no Gitmo during the 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.

There are many ways that I think Congress needs to—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, 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.

And then there is the question—it may not be for now, but for later it will be 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. There 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 the 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 war powers, but I see that as not that but 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 this out how separation of powers works in this new type of war is—it 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 and that is 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. And 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, 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 that the question is just—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 sort of 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 affiliates of an affiliate because we think that 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 sunseting it or—

Senator KING. Well, 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. If you believe—and here I very much agree with what several of my colleagues on this panel have said. If a specific organization—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 got to go where he is sent. And 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. And right now, I think we have tilted a little too much towards just the executive branch.

Senator KING. And 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. Well, 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 Jay 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.

Next paragraph. 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.

And the final paragraph. 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—and that is something we talked about before, and I was a bit sloppy on when I talked about al Nusra. So one, it has two characteristics. The first one, an organized armed group that has entered the fight against al Qaeda, 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 authorization for the use of military force 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. And 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 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. Well, I did not ask the first panel if they agreed with this. I should have.

Mr. GOLDSMITH. They do because—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 which is 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, I mean, 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 got to ask congressional approval for particular expansions.

And that is why—I mean, 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 Jay's—the language you read from Jay's speech. I actually think he gave that over at The Heritage Foundation a couple years ago, about a year and a half ago.

And 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 and 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. And so 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. And 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. And again, while we might have that discussion and as Congress decide that 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 whatever where 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, you know, Yemen or Mali, in which case it does under the administration's—

Chairman LEVIN. I do not think they would fit any coalition—

Mr. ROTH. Well, 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.

So, Senator King, do you want to close off?

Senator KING. Well, I am more concerned less about the specifics of the AUMF or its continued vitality with the underlying principle of how do we deal with the separation of powers issue on this important subject, and 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 has the responsibility to declare war in a time of essentially limitless—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 a lot further 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. And 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 hope all of us share and 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.

And we will stand adjourned.

[Whereupon, at 12:44 p.m., the committee adjourned.]