

United States Senate, Committee on Armed Services

**Hearing on “Law of Armed Conflict, the Use of Military Force, and
the 2001 Authorization for Use of Military Force”**

May 16, 2013

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Chairman Levin, Ranking Member Inhofe, and members of the Committee, thank you for the opportunity to testify.

The Committee's fifteen questions cover a wide range of topics that do not admit of simple or brief answers. I will try to get at some of the relevant issues in three Parts. I will first explain how the nature of the war against Islamist terrorists has changed in the past dozen years. Then I will then explain why these changes warrant Congress's reconsideration of the contours of and oversight for the war. I will finally discuss particular reforms.

I. How the War Has Changed

On September 14, 2001, Congress passed the Authorization for the Use of Military Force. The AUMF, as it is called, authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

The AUMF focused on entities responsible for 9/11. In the Fall of 2001 those entities, including al Qaeda, were located primarily in Afghanistan. In the last dozen years, al Qaeda has undergone what Professor Robert Chesney describes as an "extraordinary process of simultaneous decimation, diffusion, and fragmentation, one upshot of which has been the proliferation of loosely-related regional groups

that have varying degrees of connection to the remaining core al Qaeda leadership.”¹ The Executive branch expanded the kinetic and intelligence war beyond Afghanistan to other places around the globe against al Qaeda affiliates that were not in existence on 9/11, much less responsible for the 9/11 attacks.

Both legal and organizational innovations accompanied and made possible the expansion of the war. On the legal side, the Executive branch interpreted the AUMF to extend to organizations associated or affiliated with al Qaeda, under the theory that they are co-belligerents. It also interpreted the AUMF – which, unlike some prior congressional approvals of military force, lacks geographical limitation – to authorize force in many nations outside Afghanistan where affiliated or associated al Qaeda forces are found.²

On the organizational side, both the CIA and the Defense Department changed quite a lot. The CIA became committed to targeted killing via unmanned aerial vehicles, or “drones”, and reorganized its intelligence mission to support drone warfare. And the Defense Department’s Joint Special Operations Forces (JSOC) grew rapidly and engaged in an expanded array of stealth operations (including but not limited to drone fire operations) and intelligence missions (including human intelligence missions) needed to support these operations.

These innovations have undergirded a mostly officially secret geographical expansion of the “war on terrorism” since the Fall of 2001. This Committee presumably knows the details of this “shadow war,” including its lethal force elements and any rendition, proxy detention, proxy force, and related elements.

¹ Robert Chesney, *Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism*, 112 Mich. L. Rev. (forthcoming 2013) (available at <http://ssrn.com/abstract=2138623>)

² I believe both interpretive moves are legitimate. See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2107-2127 (2005).

But U.S. citizens know very few details, at least from official U.S. government channels, because the operations are highly classified and often covert. Presidential Reports under the War Powers Resolutions were designed to ensure that Congress and the American people were aware of presidential expansions of war. But these Reports now regularly contain classified annexes, and they do not purport to cover CIA operations in any event. As a result, the American people know about the shadow war primarily through journalistic accounts. These accounts report that the United States has since 9/11 engaged in military or paramilitary operations in at least a dozen countries, and probably a much higher number.³

President Obama proclaimed in his second inaugural address that a “decade of war is now ending.”⁴ It does appear that heavy-footprint war against the Taliban in Afghanistan is winding down. Two former senior legal officials in the Obama administration have given speeches that some interpret to indicate that the shadow war outside Afghanistan is also winding down or will end soon.⁵ I do not know the intelligence basis for these speeches. I nonetheless do not believe the shadow war will end any time soon.

Consider a few recent news reports. The United States has engaged in over a dozen drone strikes this year in Pakistan and Yemen; it is expanding its drone capabilities in North Africa to address the growing Islamist (including al Qaeda affiliate) threats there; JSOC now has boots on the ground in Mali (among many

³ See, e.g., Mark Mazzetti, *The Way of the Knife, The CIA, a Secret Army, and a War at the Ends of the Earth* (2013); Daniel Klaidman, *Kill or Capture: The War on Terror and the Soul of the Obama Presidency* (2012); David Sanger, *Confront and Conceal: Obama's Secret Wars and Surprising Use of American Power* (2012).

⁴ Inaugural Address by President Barack Obama, January 21, 2013.

⁵ Harold Hongju Koh, “How to End the Forever War,” Speech to the Oxford Union, May 7, 2013, <http://www.lawfareblog.com/wp-content/uploads/2013/05/2013-5-7-corrected-koh-oxford-union-speech-as-delivered.pdf>; Jeh Charles Johnson, Jr., “The Conflict Against Al Qaeda and its Affiliates: How Will It End?,” Speech to the Oxford Union, November 30, 2012, <http://www.lawfareblog.com/2012/11/jeh-johnson-speech-atthe-oxford-union/>.

other places); the United States is training Syrian opposition forces; U.S. Special Operations Command is planning to significantly increase its presence in Africa, Asia and Latin America; the Obama administration is debating whether the AUMF extends to Ansar al-Sharia in Libya and the al-Nusra Front in Syria; it is also debating whether the AUMF extends not just to associates of al Qaeda, but also to “associates of associates.”⁶

These and similar reports suggest that the shadow war against Islamist terrorist threats is morphing but not winding down. I will proceed on this assumption – an assumption I believe is implicit in most of the questions this Committee asked the panelists to address.

II. Why Congress Must Engage

Congress’s main engagement with the shadow war is the AUMF, which is nearly a dozen years old. It is long past time for Congress as a body to scrutinize the shadow war fought pursuant to the AUMF and to clarify publicly its legal basis and proper oversight mechanisms.

The AUMF is out of date in two ways. First, through a series of Executive branch interpretations, each legitimate in itself, the AUMF is now deemed to authorize a war that is quite different from the one Congress contemplated a dozen years ago. As Senator Durbin recently said, “I don’t believe many, if any, of us believed when we voted for [the AUMF] that we were voting for the longest war in the history of the United States and putting a stamp of approval on a war policy

⁶ See New America Foundation, *The Year of the Drone*, available at <http://counterterrorism.newamerica.net/drones>; Craig Whitlock, Pentagon Deploys Small Number of Troops in War Torn Mali, *Washington Post*, April 30, 2013; Thom Shanker, Military Sees Broader Role for Special Operations Forces, in *Peace and War*, N.Y. Times, April 2, 2013; Bradley Klapper, U.S. training Syrian Forces in Jordan, *Associated Press*, March 26, 2013; Craig Whitlock, Drone Base in Niger Gives U.S. a Strategic Foothold in West Africa, *Washington Post*, March 21, 2013; Greg Miller and Karen DeYoung, Administration Debates Stretching 9/11 Law to Go After New al-Qaeda Offshoots, *Washington Post*, March 6, 2013.

against terrorism that, 10 years plus later, we're still using.”⁷ To the extent Senator Durbin’s views are widely shared, Congress should determine whether it approves of the shadow war being fought pursuant to the AUMF, including the method by which the AUMF conflict expands.

Second, emerging al Qaeda-inspired Islamist terrorist organizations are increasingly difficult to fit within the AUMF. Michael Leiter, the former Director of the National Counterterrorism Center, recently testified: “With the continued evolution of the terror threat and most notably its increasing distance from the 9/11 attacks and core al Qaeda, I believe it is the time to re-evaluate the AUMF to better fit today’s threat landscape.”⁸ Similarly, an unnamed senior Obama administration official recently told the Washington Post that “[t]he farther we get away from 9/11 and what this legislation was initially focused upon . . . we can see from both a theoretical but also a practical standpoint that groups that have arisen or morphed become more difficult to fit in.” The official added that the waning relevance of the AUMF is “requiring a whole policy and legal look.”⁹ That policy and legal look should not only take place in secret within the Executive branch. It should also take place in Congress and in public.

Another reason why Congress should now engage is that its authorizing and oversight processes are outdated. The CIA component of the shadow war is conducted pursuant to a very thin legal framework for covert action that was not designed to be a central legitimating tool for warfare and that contains open-ended

⁷ Sen. Durbin on the Budget, Social Security, Drones, Washington Wire, Wall Street Journal, March 20, 2013, available at <http://blogs.wsj.com/washwire/2013/03/20/transcript-sen-durbin-on-the-budget-social-security-drones/>.

⁸ The Honorable Michael E. Leiter, Testimony before the United States Senate Committee on Foreign Relations Counterterrorism Policies and Priorities: Addressing the Evolving Threat, March 20, 2013, at http://www.foreign.senate.gov/imo/media/doc/Michael_Leiter_Testimony.pdf.

⁹ Miller and DeYoung, Supra note 5.

reporting requirements and no identified substantive constraints. Congress should determine whether this framework suffices for modern stealth warfare, and if not, how it should be changed. Congress should similarly consider his Committee's even-less-specified oversight mechanisms for Defense Department operations. I am told that the members of this Committee are satisfied with these mechanisms. But the mechanisms are mostly grounded in secret custom, not public law, and the American people cannot assess them and thus cannot know whether to have confidence in them.

This last consideration points to another reason why Congress should engage: the shadow war is unnecessarily – and, increasingly, self-defeatingly – secretive. There are growing indications, and complaints, that our heavy reliance on drones is a strategic failure. This is obviously a vital issue for the nation, but it cannot be debated intelligently in public because our drone operations are classified. More broadly, excessive Executive branch secrecy is weakening trust in the administration's conduct of the shadow war. A good deal of the misplaced concern about drone strikes in the homeland against Americans has resulted from the administration's stilted explanations about the legal limits and secret processes for killing U.S. citizen al Qaeda suspects. These stilted explanations, in turn, are driven by the requirements of classified information and covert action. Excessive secrecy also underlies growing mistrust and doubts – at home, and abroad – about the administration's claims about the rate of civilian casualties, the soundness of its legal analyses, and the quality of its internal deliberations. Congress can and should help the Executive branch bring the shadow war out of the shadows, even if it makes the conduct of the war harder abroad.

The final reason why Congress should engage on this issue is constitutional. The precise constitutional allocation of war powers between the first two branches of government is contested. But one need not resolve that constitutional issue to conclude that Congress has important constitutional powers and duties in this area,

and that pursuant to them Congress (and not some subset of the institution) should engage in fundamental review, guidance, and approval of the basic conduct of a war at least every dozen or so years.

III. Reforms

It is much more important for Congress to engage in a thorough and open review of the United States' shadow war than that it adopt any specific reform. Moreover, it is very difficult to make firm reform recommendations without detailed intelligence information about the nature of the threat that the public lacks. With these large caveats in mind, below I outline what I think are the contours of proper reform.

A. AUMF Threats

The Executive branch appears to have interpreted the AUMF to extend to the Haqqani network in Pakistan, al Qaeda in the Arabian Peninsula in Yemen, and perhaps to al Qaeda in Iraq and al Shabaab in Somalia (or at least to some elements of these latter groups). The administration is reportedly debating whether the AUMF should further extend to the al-Nusra Front in Syria and Ansar al-Sharia in Libya, and to extend its reach to associates of associates of al Qaeda.¹⁰

There are legal advantages to continuing to tie the expansion of the shadow war to the AUMF, because the link to 9/11, however tenuous, puts a potential substantive limit on the expansion of the war. But Congress must play a more extensive role in this process of expansion, which threatens to continue indefinitely on the basis of secret Executive branch interpretations even as those interpretations become more tenuous. At a minimum Congress should state whether it approves

¹⁰ Id.

this piecemeal expansion of the AUMF; whether it agrees that the proper standard for expansion is co-belligerency; and what the standard for co-belligerency should look like precisely. Congress could also adopt a more extensive role in approving any expansion of the war under the AUMF to new groups. It could do this by requiring the administration to inform it of proposed groups to be added under the AUMF, subject to an approval process in Congress. Or it could establish an administrative process for expansion within the Executive branch, built on the model of the State Department's Foreign Terrorist Organization designation process.

B. Extra-AUMF Threats

Newly threatening terrorist groups inspired by al Qaeda but insufficiently tied to it to come under the AUMF present a growing and difficult legal problem. What to do about this threat depends on the severity, scope, and resilience of the threat. To the extent an extra-AUMF group presents a discrete and non-recurring threat of attack to the United States, the President's traditional Article II authorities to use self-defensive force probably suffice. To the extent the extra-AUMF group presents a more persistent and dangerous threat that rises to armed conflict or imminently threatened armed conflict, and to the extent it thus requires long-term U.S. military engagement, constitutional principle and political prudence counsel Congress to assess the threat and approve military force. Congress should also assess and approve the basic authorities entailed by such force, including whether the nature of a specific armed conflict and our strategic and tactical interests warrant authority for law-of-war military detention. There are several architectural options here, including discrete group-by-group congressional authorization (either with or without a process of Executive branch recommendation), or a general congressional articulation of the standard for the use

of force combined with a congressionally sanctioned administrative designation process and significant ex post scrutiny by Congress.¹¹

C. Statutory Accoutrements

With regard to both statutory guidance for AUMF threats and a potentially new statutory authorization for extra-AUMF threats, Congress should clarify a number of contentious matters. One matter, already mentioned, is the availability and scope of detention authority. Congress should also weigh in on whether American citizens are included within the use of force, whether the use of force extends to the homeland, and under what circumstances force is warranted in either context. These important matters, on which Americans are divided, should not be left to the device of secret legal interpretation by administration lawyers. Congress should also calibrate whether the AUMF applies anywhere outside the United States where covered persons are found, any appropriate limiting criteria, and whether standards for targeting and detention are identical. I also recommend a sunset provision for any clarification of the AUMF or authorization of force against extra-AUMF threats. A sunset provision belies the notion of temporally unlimited war, and ensures renewed congressional engagement in light of new information.

D. Accountability and Openness

The shadow war is inherently secret, and secrecy is the enemy of accountability. Secrecy is often necessary to make operations abroad more effective or more acceptable to the foreign government. But it comes at a cost to democratic

¹¹ I and others discuss the complicated pros and cons of these approaches in Robert Chesney, Jack Goldsmith, Matthew C. Waxman, and Benjamin Wittes, A Statutory Framework for Next-Generation Terrorist Threats, Jean Perkins Task Force on National Security and Law, pp. 8-12, at <http://media.hoover.org/sites/default/files/documents/Statutory-Framework-for-Next-Generation-Terrorist-Threats.pdf>.

self-governance at home. It also adversely affects trust in the war and in the presidency to the extent that it prevents open and candid explanation of what is going on in the war.

Congress should push the Executive branch to disclose more fully those matters that can be discussed openly, including the number of strikes and operations, their geographic sweep, estimates of civilian casualties, and the basis for these estimates. It should demand maximum feasible openness about the procedural elements for listing groups as covered entities and for targeting determinations, as well as the legal opinions or at least legal determinations that underlie the war framework. Congress can also do more – as it has done in the last few years in the FISA context – to require detailed classified reporting and auditing from relevant department and agency inspectors general as to both the vitality of internal processes and the integrity of the intelligence underlying the listings and claims about civilian and enemy deaths.

These proposals may portend to some an erosion of traditional presidential authority to conduct war, but I do not see them that way. The conflict we are engaged in is entirely novel in its unusual enemy, its temporal and geographic scope, and its myriad stealth aspects. The legal regime for the conflict – including the accountability and openness mechanisms for that regime – needs to reflect these realities.