

**USING FORCE: STRATEGIC, POLITICAL,
AND LEGAL CONSIDERATIONS**

HEARING

BEFORE THE

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USING FORCE: STRATEGIC, POLITICAL, AND LEGAL CONSIDERATIONS

WEDNESDAY, DECEMBER 13, 2017

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The committee met, pursuant to notice, at 9:33 a.m. in Room SD-419, Dirksen Senate Office Building, Hon. Bob Corker, chairman of the committee, presiding.

Present: Senators Corker [presiding], Johnson, Flake, Gardner, Young, Barrasso, Isakson, Cardin, Menendez, Shaheen, Coons, Kaine, Merkley, Markey, and Booker.

OPENING STATEMENT OF HON. BOB CORKER, U.S. SENATOR FROM TENNESSEE

The CHAIRMAN. The Foreign Relations Committee will come to order.

I know there is a lot of chatter about most recent events.

We thank each of you for being here. We have very distinguished witnesses today. We thank you for taking the time.

A number of members, both on and off this committee, have raised questions about the executive branch authorities with respect to war-making. And I think you know we are moving on towards an authorization—I hope we begin to socialize with others in this hearing, which is not directly related to that, I think is of good timing—the use of nuclear weapons, and from a diplomatic perspective, entering into and terminating agreements with other countries.

Today we will conclude a series of hearings on these issues by examining the many considerations involved in presidential decisions to use military force without authorization from Congress. Throughout the history of our nation, Presidents have decided to deploy troops into hostilities without prior authorization from Congress in circumstances ranging from small-scale rescue operations to advise and assist missions in the support of partner nations and larger-scale military action.

It is in our strategic interest to have a strong commander-in-chief with the ability to take quick and decisive military action. But that authority must be legally sound and checked by vigorous oversight and engagement from Congress on behalf of the American people.

The decision to use military force is one of the most consequential any President can make and should always be among the most carefully considered. As Presidents deliberate whether and how to use military force, they take into account a number of different fac-

tors, and it is these factors—the strategic, political, and legal concerns involved with such decisions—that we will explore with our panel of witnesses today.

First are the strategic questions. We will look at what test the President should use in determining whether to use military force and what U.S. interest must be at stake. We will also want to examine how Presidents should balance the use of force against other options.

We must also look at the political considerations. Public opinion matters for obvious reasons. But when it comes to the use of American force, the support of the public and the Congress play a key role in our ability to be effective, especially when things go wrong. We hope to gain insight into how much political support should factor into a President's thinking when it comes to using force.

Finally, we should look at the legal side of this issue. The reality is that unless Congress takes the rare step of withholding funding, history shows that the President's ability to initiate military action without Congress has been extremely broad. That said, discussing the legal doctrine regarding these questions is a conversation worth having.

I thank our witnesses for being here today, and I look forward to their testimony and responses to our questions.

And with that, I will turn to my good friend and our ranking member, Senator Cardin.

**STATEMENT OF HON. BENJAMIN CARDIN,
U.S. SENATOR FROM MARYLAND**

Senator CARDIN. Well, Mr. Chairman, first, thank you for convening this hearing. As I said when Secretaries Tillerson and Mattis were before our committee, this is perhaps one of the most important responsibilities we have in the Senate Foreign Relations Committee—to consider circumstances and legal authority for sending our men and women into harm's way. So thank you very much for this hearing.

I welcome our distinguished panel. We have some really great experts here that I hope will engage us in this conversation.

America faces unprecedented crises around the world, from the continuing terrorist threats presented by ISIS and al Qaeda and their affiliates to a worsening nuclear crisis with North Korea, to the growing proxy fights between Saudi Arabia and Iran's destabilizing the entire Middle East.

President Trump's apparent inclination to use military force and to risk war rather than to find diplomatic solutions to these crises is troubling. His attitude toward diplomacy ranges from disinterest to naiveté to actively sabotaging his own Secretary of State.

Finding the proper balance for the authority to use force is not unique to this President. The last two Presidents have stretched their authorities to the breaking point, especially in the use of the 2001 authorization of use of military force, which in my view was intended as a necessary, narrow response to the 9/11 plotters, most of whom are either dead or in custody. And while we can expect that any President will seek to stretch his or her authorities, it is also incumbent on those of us here in Congress to make sure that

we exercise our constitutional authorities too when it comes to the use of force.

Secretary Mattis confirmed at our hearing a few weeks ago that there is no congressional authority for military action against North Korea. But I remain deeply concerned that President Trump will decide to preemptive or preventive military actions against North Korea that is not justified under the circumstances and that Congress has not authorized. He might even potentially seek to initiate a nuclear first strike, and as borne out by our recent hearing on this issue, we would have to rely on the strength of character and bravery of those in military responsibility for carrying out that attack to question its legality.

Mr. Chairman, what is also becoming abundantly clear during the hearing with the Secretaries of Defense and State is that we also need to take stock of what we are already doing. We have U.S. troops deployed almost everywhere in the world, including in circumstances that would easily involve them in the United States in combat as we recently saw in Niger.

In addition to significant deployments in Iraq, Afghanistan, and Syria and major deployments in South Korea, Japan, and Europe, U.S. forces have been engaged in counterterrorism operations in Yemen, Somalia, Ethiopia, Libya, and Chad with extensive advice, train, and capacity building efforts in many more.

A few weeks ago I read in *Politico* a story that the number of U.S. military forces in Somalia has grown this year to over 500 people with the Pentagon quietly posting hundreds of additional special op personnel to advise local forces around the country. This committee has jurisdiction for intervention abroad. Yet, no additional authority was sought, even as the United States doubled its military forces in Somalia, potentially placing them in harm's way.

This is a problem, Mr. Chairman. We have all been seized by the tragic loss of U.S. soldiers in Niger, but let us not forget that we already have seen similar losses in Somalia. In May of this year, a U.S. Navy SEAL was killed while accompanying Somalian soldiers in an advise and assist mission. The incident marked the first loss of U.S. military personnel in Somalia since 18 U.S. soldiers died there in 1993. The Black Hawk Down incident had serious consequences for U.S. engagement and policy in Somalia, just as the recent incidents in Niger and Somalia will impact how we view train, equip, advise, assist, and accompanying missions going forward.

And just last week, the Pentagon acknowledged that there are 2,000 forces in Syria. This is nearly quadruple the level of 503 authorized by the previous administration. This is yet another warning to Congress and the American people that the Trump national security team is greatly expanding the deployment of U.S. military forces on the ground worldwide with minimal congressional consultation, minimal buy-in from the American people, minimal limitations, and minimal transparency.

So as we contemplate the impact of these missions, we must engage in a serious gut check and ask ourselves what are the consequences of our military personnel being involved in places where lethal action seems almost inevitable.

Mr. Chairman, I think we are seeing that over time a kind of gray space is growing, in which a significant and consequential use of force results from activities we all thought did not constitute the use of offensive military forces such as deployment to train and equip other militaries. This is either classic mission creep or significant miscalculation about the very nature of advise and assist, train and equip missions.

This committee needs to take stock of where we are on two fronts. First, what exactly should we be doing now to ensure that the President does not engage in military actions that Congress has not authorized and that cannot be justified under the President's Article II authorities? And second, what exactly is the military doing around the world right now in the gulf between the mere training and conventional wars, a mission that is growing and can be lethal? Both of these issues have consequences for our long-term foreign policy goals and national security.

Yesterday, Mr. Chairman, we received the latest report submitted every 6 months pursuant to the War Powers Resolution. This is a 4-page document updating us on the deployment of U.S. armed forces equipped for combat. There are some new things compared to the June report. And I think we need to put attention to this because the President tells us this is his notification.

A hundred U.S. troops have been deployed to Lebanon to enhance the government's counterterrorism capabilities and support the anti-ISIL operations. Since the last report, the United States forces have conducted a number of airstrikes against ISIS terrorists and their camps in Libya. And U.S. forces equipped for combat have deployed in the Philippines to support counterterrorism operations.

Folks, these are all new activities, and this notification offers us too little information about expanding U.S. military operations around the world.

I think this committee needs to get a more granular understanding of these activities, the authorities under which they are being done, and the troop distribution numbers in this country and other countries around the world.

When we talk about our role, Congress' role, we are inevitably talking about the War Powers Resolution, which has been much debated over the years. We need to consider whether it is sufficient to deal with the new circumstances as well as the current use of military and lethal force or if something more is needed.

I noted with interest the introduction last month of a bipartisan concurrent resolution in the House of Representatives pursuant to section 5(c) of the War Powers Resolution. That resolution would direct the President to remove U.S. armed forces from hostilities in the Republic of Yemen, except those engaged in operations directed at al Qaeda in the Arabian Peninsula or associated forces. This is an interesting example of potential ways Congress can assert itself in these matters.

The 9/11 and Iraq AUMFs, the purposes of this passage have long been overcome, have now become mere authorities of convenience for Presidents to conduct military activities anywhere in the world. They should not be used as legal justification for the administration's international military activities. Nor should Title 10 au-

thorities become authorities of convenience for Presidents to conduct lethal offensive military activities anywhere in the world.

I will end by saying that the United States has relied too long on military force as the first response to problems of terrorism, insurgency, and instability abroad. What makes this issue even more urgent is this administration's growing reliance on military force while, at the same time, pushing dramatic reductions in budgets and resources for diplomacy and development.

It is quite astonishing and deeply troubling, and I think the American people need to hear more about it. Diplomacy, development, and support for human rights are the critical means through which we are safer in the world.

Mr. Chairman, I look forward to hearing from our witnesses, and I really hope we can have a robust discussion as to how Congress can assert its proper role.

The CHAIRMAN. Thank you so much.

Our first witness really needs no introduction. I am personally indebted to him for being here today and for all the kindness he has shown me since I have been here in the Senate and moved along in my understanding of how we deal with these issues. I thank him so much for being here.

So I would like to welcome our former National Security Advisor, Stephen Hadley. We are deeply grateful for his willingness not only to testify today but for his sage advice over the years, as I just mentioned.

Our second witness is the Honorable Christine Wormuth, former Under Secretary of Defense for Policy. Ms. Wormuth is currently the Director of the Adrienne Arsht Center for Resilience at the Atlantic Council and previously served on the National Security Council under President Obama. Thank you so much for being here.

Our third witness is Mr. John Bellinger III, former National Security Legal Counsel at the State Department and then Legal Advisor. Mr. Bellinger is currently a partner at Arnold and Porter in D.C. and has helped us on many occasions.

We thank all three of you for being here. If you would just begin your testimony in the order introduced. I know you understand you can summarize in about 5 minutes. We would appreciate it. Without objection, any written materials you may have will be entered into the record. So with that, Mr. Hadley.

STATEMENT OF HON. STEPHEN J. HADLEY, FORMER ASSISTANT TO THE PRESIDENT FOR NATIONAL SECURITY AFFAIRS, WASHINGTON, D.C.

Mr. HADLEY. Thank you, Mr. Chairman, Ranking Member Cardin, and other distinguished members of the committee. I appreciate this opportunity to appear before you this morning on this important subject.

The decision to use military force is perhaps the most consequential decision this nation can make. It can have enormous consequences for the nation's security, prosperity, and role in the world. It can have enormous consequences for other countries and their peoples. But most of all, it has the most serious consequences for our country's most precious resource, the lives of its citizens.

The decision to use military force is the decision to put those Americans serving in our military in harm's way, at risk of death and serious injury. Such a decision must be made with the greatest seriousness, consideration, and care.

It is a cautionary tale for any President who is considering the use of military force that since World War II, the only war our nation has fought that was as popular with the American people at the end as it was at the beginning was the Gulf War of 1990 to 1991. This was because military force was used in that conflict in service of a critical national purpose, the objective of the military operation was clear, the strategy to achieve that objective was sound, the military resources committed to the effort matched the strategy, a coalition of U.S. allies and affected regional states were involved, and the objective was achieved in relatively short order, and the resulting peace was sustainable. Virtually every other military operation has lacked one or more of these elements of success.

Perhaps the most challenging element from a policy perspective is developing a sound strategy that will achieve the objective. This was brought home to me in a conversation with President George W. Bush in January of 2007, just days before he was to announce the change of strategy and surge of additional forces into Iraq. After being assured once again that his national security team believed that the new strategy would achieve its objective, he made a simple request: if you ever change your mind on this point, you must let me know, for I cannot send men and women in uniform into war if we do not have a strategy that will win.

This is the mindset that the nation must have when it decides to use military force. It must have a strategy to succeed. If it does not, then our military should not be sent to war. And if our military is sent into combat, then it should have the resources, rules of engagement, and support that will allow it to succeed. The military instrument is too precious to be used just to avoid the consequences of a policy failure.

And the same consideration should apply to Americans who risk their lives serving as the nation's diplomats, intelligence officers, development professionals, and peace-builders.

This is especially true because often their work is essential to consolidating the success achieved by our military. Many of the nation's efforts overseas have failed on exactly this point. The military objective has been achieved, but we have failed in helping post-conflict societies consolidate the military victory and achieve a stable and sustainable peace.

Military planning needs to take this into account. John Allen, the retired military general officer who led U.S. forces in both Afghanistan and Iraq, has made this point in reflecting on lessons learned from these two conflicts. Planning for a military operation needs to begin with the desired end state. In military parlance, that means starting with phase 4 and working backwards towards phase 1. Whatever is done militarily must contribute to the desired end state.

And this planning effort must involve from the start civilian elements of the U.S. Government in developing an integrated strategy. A stable and sustainable peace that will not give rise to threats to American lives and interests often will require helping

local actors develop institutions of good governance, economic development, and security. This is the work of civilian actors, every bit as important as our military.

Because of the importance of the decision, because it involves the lives of Americans, the use of military force must have the support of Congress and the American people. Congress is critical because it both reflects and shapes public opinion. But Congress needs to decide what role it wants to have in the decision to use military force and reach a mutual understanding with the President, whoever he or she may be.

It is now established practice that there is some level of the use of military force that the President can take without prior congressional approval. There are numerous precedents under both Democratic and Republican Presidents. At the same time, it has been the practice of both Democrats and Republican Presidents to bring major military operations to the Congress first. Problems arise when the line between those alternatives is not observed.

My own view is that for a major military operation that carries a risk of American military casualties, a high risk of civilian casualties, especially among U.S. friends and allies, has major geopolitical implications for American interests and position in the world, and in which American friends and allies have a major stake, prior congressional approval would be the wiser course. And any such action should be legal under both domestic and international law.

Thank you very much.

[Mr. Hadley's prepared statement follows:]

PREPARED STATEMENT OF HON. STEPHEN J. HADLEY

Chairman Corker, Ranking Member Cardin, and other distinguished members of the committee. Thank you for the opportunity to appear before you this morning on such an important subject.

The decision to use military force is perhaps the most consequential decision that this nation can make. It can have enormous consequences for our nation's security, prosperity, and role in the world. It can have enormous consequences for other countries and their peoples. But most of all, it has the most serious consequences for our country's most precious resource—the lives of its citizens. The decision to use military force is the decision to put those Americans serving in our military in harm's way—at risk of death and serious injury. Such a decision must be made with the greatest seriousness, consideration, and care.

It is a cautionary tale for any President who is considering the use of military force that since World War II the only war our nation has fought that was as popular with the American people at the end as it was at the beginning was the Gulf War of 1990-1991. This was because military force was used in that conflict in service of a critical national purpose, the objective of the military operation was clear, the strategy to achieve that objective was sound, the military resources committed to the effort matched the strategy, a coalition of U.S. allies and affected regional states was involved, the objective was achieved in relatively short order, and the resulting peace was sustainable. Virtually every other major military operation has lacked one or more of these elements of success.

Perhaps the most challenging element from a policy perspective is developing a sound strategy that will achieve the objective. This was brought home to me in a conversation with President George W. Bush in January of 2007, just days before he was to announce the change of strategy and "surge" of additional forces into Iraq. After being assured once again that his national security team believed that the new strategy would achieve its objective, he had a simple request: "if you ever change your mind [on this point], you must let me know—for I cannot send men and women in uniform into war if we don't have a strategy that will win."

This is the mindset that the nation must have when it decides to use military force. It must have a strategy to succeed. If it doesn't, then our military should not

be sent to war. And if our military is sent into combat, then it should have the resources, rules of engagement, and support that will allow it to succeed. The military instrument is too precious to be used just to avoid the consequences of failure. It should only be used to achieve success and a military objective in service of a critical national purpose. Borrowing from the Star Wars movie “The Empire Strikes Back,” when it comes to the use of military power, the Yoda rule applies: “Do or do not. There is no try.” The lives of our Americans in uniform are simply too precious.

And the same consideration should apply to Americans who risk their lives serving as the nation’s diplomats, intelligence officers, development professionals, and peace-builders. They too should be used in service of a critical national purpose, with clear objectives, a sound strategy to achieve those objectives, and with adequate resources matched to the strategy.

This is especially true because often their work is essential to consolidating the success achieved by our military. Many of the nation’s efforts overseas have failed on exactly this point. The military objective has been achieved. But we have failed in helping post-conflict societies consolidate the military victory and achieve a stable and sustainable peace. This is not U.S. nation-building. A nation can only be built by the people who live there. But it is helping those people create the institutions that will prevent their nation from being used to threaten the United States and its friends and allies.

Military planning needs to take this into account. John Allen, the retired Marine general officer who led U.S. forces in both Afghanistan and Iraq, has made this point in reflecting on lessons learned from these two conflicts. Planning for a military operation needs to begin from the desired end-state. In military parlance, that means starting with Phase IV and working backwards to Phase I. Whatever is done militarily must contribute to the desired end state.

This planning effort must involve from the start the civilian elements of the U.S. Government in developing an integrated strategy. A stable and sustainable peace that will not give rise to threats to American lives and interests often will require helping local actors develop institutions of good governance, economic development, and security. This is the work of civilian actors every bit as important as our military.

It is often said that military force should only be used as a last resort—after all other options have been tried, exhausted, and failed. The sentiment behind such statements is understandable, laudable, and worthy of respect. But it suggests a false “either/or” choice between military force and every other instrument of national power and influence. Yet we know from practical experience that sometimes only the coordinated use of all elements of national power—diplomatic, economic, and military—as part of an integrated strategy can achieve an important national objective. As many of our nation’s top diplomats have been quick to say, the threat or judicious use of military power is often an essential element of a successful diplomatic initiative.

Because of the importance of the decision—because it potentially involves the lives of American citizens—the use of military force needs the support of the Congress and the American people. Congress is critical because it both reflects and shapes public opinion. Congress needs to decide what role it wants to have in the decision to use military power and reach a mutual understanding with the President whoever he or she may be.

It is now established practice that there is some level of use of military force that a President can take without prior Congressional approval. There are numerous precedents under both Democratic and Republican presidents. At the same time, it has been the practice of both Democratic and Republican presidents to bring major military operations to the Congress first. Problems arise when the line between these two alternatives is not clear or not observed.

For example, take the decision by President Obama in 2013 to seek Congressional approval before ordering a military strike in Syria over its use of chemical weapons. I supported President Obama’s decision to use force and to bring the matter first to the Congress. But Jim Jeffrey, a distinguished retired U.S. ambassador, has argued that the planned military operation was of a scope and scale that many previous presidents had undertaken without prior Congressional approval. The last previous military operation brought to Congress for its prior approval had been President George W. Bush’s decision to go into Iraq in 2003. Jim believes that many Americans assumed that because the Syrian action was being taken to Congress for prior approval, President Obama must have had in mind a military operation of similar scale and scope. President Obama clearly did not, but the confusion may have produced a significant portion of the opposition to what President Obama proposed to do.

Congressional leadership and President Trump should come to an understanding of what is the line between what proposed military operations should be brought to the Congress for prior approval and what should not. Going into this conversation, Congressional leaders will have in mind preserving Congressional prerogatives and its role in the use of force. But it will also have to consider that in some cases it may prefer not to be implicated in the decision itself so as better to exercise disinterested after-the-fact oversight of the decision based on the results. The President will also be protective of his prerogatives as Commander in Chief and Chief Executive. But he will have to consider his need for Congressional funding for any military operation and the benefit of Congressional support in winning and maintaining the long-term support of the American people for the military effort.

My own view is that for a major military operation that carries a high risk of American military casualties, a high risk of civilian casualties especially among U.S. allies and friends, that has major geopolitical implications for American interests and position in the world, and in which American friends and allies have a major stake, prior Congressional approval would be the wiser course. And any such action should be legal under both domestic and international law.

In making a decision to use military force, the President and the Congress must of course give due regard to public sentiment. But the decision cannot be dictated by the most recent public opinion poll. The American people are not isolationist. But they rightly give priority to the work that needs to be done here at home to ensure security and prosperity. They will support a military operation overseas but only if their political leaders make the case: what critical national purpose is involved, why is military action necessary, what is the objective of the military action, what is the strategy for achieving that objective, what other countries are doing to help, and why it is critical that the operation succeed.

History shows that if the President is willing to lead, win the political and resource support from the Congress, and make the case for the military action, the American people generally will support it.

Maintaining public support will require constant attention. I once asked President George W. Bush why he insisted on giving so many speeches on the war on terror. He made the point that when our military is engaged, the President needs continually to explain what is at stake, what is the strategy, why it will succeed, and why this is critical to the well-being of our nation. In doing so, the President also shows both his commitment to the military effort and his confidence in it. This is something that our military personnel and their families need to hear, and that our friends, allies, and adversaries all need to hear. The longer the military effort will take, the more important is the communications effort.

But in the end the American people will judge the military effort by its success or lack thereof. Support is lost if the public does not see progress, loses confidence in the strategy, and/or doubts the President's ability to execute the strategy successfully. A seemingly endless military operation producing little in the way of success and a constant stream of casualties will, over time, cause the public to question the whole premise of the operation. That is why the oversight role of Congress is so important in holding the President's feet to the fire on the purpose, objective, strategy, and execution of any major military operation. The American people should expect no less.

The CHAIRMAN. Thank you very much.
Christine?

**STATEMENT OF HON. CHRISTINE E. WORMUTH, FORMER
UNDER SECRETARY OF DEFENSE FOR POLICY, WASH-
INGTON, D.C.**

Ms. WORMUTH. Good morning. Thanks, Chairman Corker, Ranking Member Cardin, and members of the committee, for the opportunity to be here this morning to talk with you about such an important issue.

I fully agree with Mr. Hadley that the decision to use force is one of the most consequential our leaders can make, with implications not just for our military forces, but our public, of course, and as well, countries around the world.

Throughout history, there are many examples of countries that decided to use force to address an immediate threat in the hopes

of bringing about a clear resolution, only to find themselves still engaged militarily in the same place years, if not decades later. I suspect when Truman made the decision to come to South Korea's aid in the 1950s, he did not envision the possibility that we would still have troops on the peninsula in 2017.

Similarly, history is full of examples of countries that decided to use force thinking that they would prevail quickly only to find that wars can drag on longer and be far costlier than originally thought. In 1914, Kaiser Wilhelm and his generals thought that they could make quick work of France and Russia and keep Britain out of the war altogether, but they were defeated 4 long and bloody years later in World War I. And we in the United States only have to look at our more recent wars to see how they can defy their original timelines, whether it is in Vietnam, Iraq, or Afghanistan.

Clausewitz reminds us that war is unpredictable. He cautions us that no one should start a war, or rather, no one in his senses ought to do so, without first being clear in his mind what he intends to achieve by that war and how he intends to conduct it.

When deciding to use force, a nation and its leaders must think deeply about what national interests are at stake, whether those interests are sufficiently vital to merit putting lives at risk, and whether there is a strategy to achieve the desired goal. There has to be a clear understanding of what the strategic objectives are, a vision for how all of the instruments of power, not just the military, but also our diplomatic, economic, and other instruments, can come together and be used with confidence that those instruments of power are going to be sufficiently resourced to be able to achieve the goal.

We only have to look at our ongoing operations in the Middle East and Afghanistan to realize that aligning all of these elements of strategy is much easier said than done.

In the complicated security environment we now face, policy-makers may find it tempting to reach for the most well-resourced tool in our foreign policy toolkit, the U.S. military. Our military, as you all know, is extraordinarily capable and compared to State, AID, and other elements of our government, it is also well-funded.

But almost every current security challenge we face requires more than kinetic action. As Mr. Hadley has said in his testimony, force alone cannot carry the day. I personally worry that the U.S. military has been carrying a very heavy burden for many years now and that an imbalance has kind of crept into how we address our foreign policy challenges as a result.

While we need to bring all of the instruments of national power to bear on the security challenges we face, there are certainly going to be times when we are called to use force, and both Republican and Democratic Presidents have sometimes decided to do that without seeking prior approval from Congress.

At the same time, when a President is contemplating a major or prolonged use of force, the President generally has come to Congress in advance. President Bush did so before he sent the military into Afghanistan and Iraq. President Obama sought congressional approval when it came to strikes in Syria in 2013. And in the context of North Korea's continued effort today to develop a capability to strike the United States with a nuclear ICBM, military options

to fully address that threat would likely rise, in my view, to the level that has typically triggered Presidents to seek advanced congressional authorization.

But there is not an established rule or set of criteria for when a potential use of force crosses the threshold requiring the President to come to Congress in advance. The Constitution gives both branches of government important roles in decisions about the use of force, to include giving Congress the power of the purse. But there are many different factors that go into how exactly each branch carries out its roles at any given time.

Despite these challenges, seeking congressional support in advance for major or prolonged uses of force is sound. Clausewitz comes to mind here as well, reminding us of the importance of public support, both when deciding to go to war but also retaining public support in order to finish the job.

The debate about whether the 2001 AUMF should be replaced with a new authorization is not just about whether it can be credibly interpreted to encompass what we are doing today to fight ISIS and other similar groups. But it is also, it seems to me, about whether Congress is adequately involved in the current decisions to use force and is conducting sufficient oversight on behalf of the American people. I think this is a very healthy and important debate, and I support this committee's effort to draft a new AUMF that would clearly address the challenges we are facing.

In today's environment, conflicts seem less black and white than in the past. The fight against ISIS and al Qaeda is a transregional fight, and it is likely to be generational. The bad guys are not wearing uniforms, and information technology and social media has extended the reach of adversaries and allies alike in profound ways. And as a result, I think it is essential that Americans understand and support our activities overseas. Talking to Americans about what is at stake in the world, why the U.S. is doing what it is doing, and why it matters will help the public decide what engagements to support with what resources and for how long. I think most Americans want our country to continue to be a leader in the world, but in ways that are fair and make sense and do not get in the way of our ability to address problems here at home. They are not going to give the President or Congress a blank check, and as a result, I think our leaders need to talk to them on a regular basis. This hearing is a great opportunity to do that, and I commend you for holding it.

[Ms. Wormuth's prepared statement follows:]

PREPARED STATEMENT OF HON. CHRISTINE E. WORMUTH

Good morning. Thank you, Chairman Corker, Ranking Member Cardin and members of the committee, for the opportunity to testify this morning.

It is an honor to appear before you today to discuss such a critical issue. The decision to use military force is one of the most consequential decisions our leaders can make, with implications not just for our military, but also for our diplomats and other civilians who work overseas, our allies and friends around the world, and of course the American public.

Since the September 11, 2001 attacks on the United States, we have used military force in many different places around the world, beginning with Operation Enduring Freedom in Afghanistan and then in Operation Iraqi Freedom, but more recently in Libya, Syria, Yemen, and Somalia just to name a few.

Throughout history, there are many examples of countries that decided to use force to address an immediate threat in the hopes of bringing about a clear resolution, only to find themselves still engaged militarily in the same place years, if not decades later. I suspect when President Truman made the decision to come to South Korea's aid in 1950, he did not envision the possibility that the United States would still have large numbers of troops on the Korean peninsula in 2017.

Similarly, history is also full of examples of nations deciding to use force thinking they would prevail relatively quickly and easily only to find that wars can drag on longer and be far costlier than originally thought. Kaiser Wilhelm and his generals thought they could make quick work of France and Russia, and keep Britain out of the war altogether but were defeated in World War I four long and bloody years later. We in the United States have seen our own more recent wars defy their original timelines, whether in Vietnam, Iraq or Afghanistan.

Clausewitz reminds us that war is unpredictable. Because war rarely goes as planned and can be extremely costly in both blood and treasure, he cautions us that "no one starts a war—or rather, no one in his senses ought to do so—without first being clear in his mind what he intends to achieve by that war and how he intends to conduct it."

When deciding whether to use force, a nation and its leaders must think deeply about what national interests are at stake, whether the interests at stake are sufficiently vital as to merit using force and putting lives at risk, and whether there is a viable strategy to achieve the desired goal. In terms of strategy, there needs to be a clear understanding of the strategy's objectives, a vision for how all instruments of power—military, diplomatic, economic and so on—will be used to achieve the objectives, and confidence that those instruments of power will be sufficiently resourced.

One only has to look at our ongoing operations in the Middle East and Afghanistan to realize that aligning each of these elements of strategy is much easier said than done, particularly in today's world which is much more complicated than the Westphalian world of Carl von Clausewitz. The United States still faces nation state adversaries such as North Korea and Iran, but we also find ourselves in hybrid wars against non-state actors like ISIS and we are dealing with gray zone tactics in Ukraine and places like the South China Sea.

In this complicated security environment, policy makers may find it tempting to reach for the most well-resourced tool in the U.S. foreign policy tool kit—the U.S. military. Our military is extraordinarily capable, and compared to State, USAID and other parts of our government, it is also well funded. But almost every current security challenge we face requires more than just kinetic action. For success to be sustainable, we need diplomats, development and economic experts, and civil society and judicial experts to work with countries on critical issues like reconstruction, fighting corruption, strengthening governance and so on. Force alone can't carry the day. I worry that the U.S. military has been carrying a heavy burden for many years now, and that an imbalance has crept into how we address foreign policy challenges.

While we need to bring all of our instruments of national power to bear on the security challenges we face, there certainly will be times when our strategy calls for us to use force, and there are many examples of both Republican and Democratic presidents deciding to use force without prior approval from Congress. President Reagan did so in Libya in 1986, President Clinton did in Kosovo in 1999, President Obama authorized force in Libya in 2011, and President Trump authorized strikes in Syria earlier this year in response to its latest use of chemical weapons against its own people.

At the same time, in those cases where the President is contemplating a major use of force or one where there could be significant geopolitical consequences for the United States and its allies and friends, presidents have generally come to Congress in advance to seek its support. President Bush came to Congress before sending the military into Afghanistan and Iraq. President Obama sought Congressional support for strikes against Syria in 2013. In the context of heightened tension on the Korean peninsula today and North Korea's continued effort to develop the capability to strike the United States with a nuclear ICBM, military options to fully address that threat would likely rise to the level that has typically triggered Presidents to seek Congressional authorization.

There is no established rule or set of criteria that outline when a potential use of force crosses the threshold requiring the President to seek prior approval from Congress. The Constitution gives both branches of government important roles in decisions about use of force, to include giving Congress the power of the purse, but many different factors influence exactly how each branch carries out those roles at any given moment in time. Decisions about the use of force are also a heavy respon-

sibility and usually are not easy or straightforward. In 2013, some of President Obama's advisors reportedly discouraged him from seeking Congressional approval for strikes in Syria precisely because they worried Congress would say no. Once the Obama Administration sought Congressional support and began making the case for the intervention here on Capitol Hill, members had to grapple with the challenges of sharing responsibility for the decision.

Despite the challenges, seeking Congressional support for major or prolonged uses of force with the potential for significant geopolitical consequences is sound. Clausewitz comes to mind here as well, reminding us of the importance of public support, both when deciding to go to war as well as retaining public support over the longer term to be able to finish the job. Congress and the public are not one and the same, but Congress is an important proxy for the broader American public.

The debate about whether the 2001 AUMF should be replaced with a new authorization is not just about whether the original authorization can be credibly interpreted to encompass what the United States is doing today to fight ISIS and other similar groups outside of Iraq and Afghanistan, but also is about whether Congress is adequately involved in current decisions to use force and is conducting sufficient oversight on behalf of the American people. I believe this is a healthy and very important debate, and I support this committee's effort to craft a new AUMF that would clearly address the current challenges we face.

In today's environment, conflicts seem to be longer and less black and white than in the past. The fight against ISIS, al Qaeda and others like them is trans-regional and likely generational. The bad guys often don't wear uniforms, advanced technology is more available than ever before, battlefields have become increasingly complex and information technology and social media have profoundly extended the reach of allies and adversaries alike. In this complex environment, it is more essential than ever that Americans understand and support our activities overseas. As Prime Minister during World War II, Winston Churchill frequently gave speeches to the British Parliament and the British public to explain what the Allies were doing and why. I believe our leaders, in the White House and here in Congress, need to do that more often today. Talking to Americans about what is at stake in the world, why the United States is doing what we are doing overseas and why it matters to Americans will help the public decide which engagements to support, with what resources and for how long. I think most Americans want our country to continue being a leader in the world, but in ways that are fair, make sense and don't get in the way of us being able to take care of important matters here at home. They aren't going to give any President or Congress a blank check, nor should they, so our leaders need to make the case for what we are doing overseas clearly and regularly.

This hearing, and others this committee has held recently are an important contribution to this needed dialogue between the American public and its leaders. I commend you for your leadership in this area, and for your broader focus on the role of Congress and the Executive branch in critical use of force decisions.

The CHAIRMAN. Thank you so much.
John?

STATEMENT OF HON. JOHN B. BELLINGER III, FORMER NATIONAL SECURITY COUNCIL LEGAL ADVISOR, WASHINGTON, D.C.

Mr. BELLINGER. Thanks very much, Mr. Chairman, Ranking Member Cardin. It is a privilege to be back again before this committee.

I am the lawyer on the panel and will be focusing on the laws and the legal issues governing the use of military force. And I have to say it is a particular pleasure for me to be back with my former colleague and boss, Steve Hadley, as well as Christine Wormuth.

Congress has an important role to play regarding war powers and the use of force, and I commend the chairman and this committee for devoting substantial attention to these issues. It is long overdue. So I commend you for this series of hearings.

When a President and his national security advisors consider the use of military force in or against another country, they must take

into account the domestic and international laws governing the use of force. As the head of government and commander-in-chief of the armed forces of a nation that is committed to the rule of law, the President must follow these rules.

It is also important that the President and the executive branch explain the legal and policy basis for any use of force by the United States. When the United States does not explain the legality of its actions, it appears to act lawlessly and it invites other countries to act without legal basis or justification.

So let me briefly explain the applicable domestic and international rules.

Under Article II of the Constitution, the President has broad authority to order the use of force by the U.S. military without congressional authorization not only to defend the United States against actual or anticipated attacks, but also to advance other important national interests such as regional security or addressing humanitarian crises. Presidents of both parties have deployed U.S. forces and ordered the use of military force without congressional authorization on numerous occasions.

Article I of the Constitution, however, gives to Congress the authority to declare war. This authority has never been interpreted to require congressional authorization for every military action the President may initiate. However, the provision may require the President to seek congressional approval before ordering the military to launch a prolonged or substantial military engagement that would expose the U.S. military, U.S. civilians, or U.S. allies to significant risk of harm.

Although the President does have broad constitutional authority to order the use of force without congressional authorization, Presidents of both parties have generally preferred to seek congressional authorization if it is possible to secure for any prolonged or substantial use of force. As Christine noted, President George Bush secured congressional authorization for the use of force against terrorist groups in 2001 and also against Iraq in 2002.

When authorizing the use of force or deployment of armed forces, Presidents must also take into account the War Powers Resolution. The resolution requires the President to notify Congress within 48 hours after armed forces are introduced into hostilities or where hostilities are imminent or into the territory of a foreign nation while equipped for combat. And it also requires the President to terminate any introduction or use of armed forces into hostilities within 60 days unless Congress issues a specific authorization.

Now, I should note that the War Powers Resolution is outdated and it should be revised. The committee should consider the War Powers Consultation Act of 2014, which was introduced by Senators McCain and Tim Kaine, to implement the recommendations of the National War Powers Commission. So I hope you will have a look at the War Powers Resolution itself.

Now, the President must also consider international law rules, including treaties to which the United States is a party and certain principles of customary international law. The UN Charter prohibits the United States from using force against or in another member state unless authorized by the Security Council or the state consents to the use of force. Article 51 of the charter recog-

nizes that every state has an inherent right to use force in individual or collective self-defense to respond to an armed attack or to prevent an imminent attack.

So let me end by discussing the application of these rules very briefly to two events: the U.S. airstrike on Syrian bases in April and to a possible use of force against North Korea.

In Syria, the President did not have congressional authorization, and he instead relied on his constitutional authority as commander-in-chief. The administration did not cite an international law basis for the strikes. I would urge the administration to explain the factors that it believed justified the attack on Syria under international law.

And finally, with respect to North Korea, the President has constitutional authority to order the use of military force against North Korea without congressional authorization if he concludes that the use of force is necessary to protect important national interests. However, if the use of military force would clearly be substantial or prolonged or would pose a substantial risk to U.S. forces or American civilians, it may require congressional approval. Under international law, if the Security Council does not approve a use of force against North Korea, the President would have to conclude that the use of force was in self-defense of the United States or its allies in response either to an actual armed attack or an attack the President determined to be imminent. And any use of force against North Korea would have to be proportionate to the threat posed by North Korea.

Thank you for inviting me here today. The committee has a critical role to play on these war powers issues.

[Mr. Bellinger's prepared statement follows:]

PREPARED STATEMENT OF HON. JOHN B. BELLINGER III

Mr. Chairman, Ranking Member Cardin, and members of the committee, thank you for inviting me to testify today about the law applicable to the use of military force by the United States. It was a privilege to appear before the committee in June to discuss congressional authorizations for the use of military force against terrorist groups, and I'm delighted to return to discuss the broader set of domestic and international law rules governing use of force. This committee and Congress have a key constitutional role in authorizing and overseeing the deployment and use of U.S. armed forces.

I served as Senior Associate Counsel to the President and Legal Adviser to the National Security Council from 2001-2005 and later as Legal Adviser to the State Department from 2005-2009 during the George W. Bush administration. During these eight years, I spent a substantial amount of time advising the President and senior national security policy officials on the domestic and international law applicable to the use of force against the Taliban and Al Qaida and associated groups in various countries; against the government of Saddam Hussein in Iraq; and to address other threats to our national security. I also had extensive discussions with officials from other countries about these issues.

When a President and his national security advisers consider the use of military force in or against another country, they must take into account domestic and international laws governing the use of force. As a matter of U.S. law, these laws include the U.S. Constitution and laws passed by Congress, including the War Powers Resolution of 1973. As a matter of international law, the rules include the U.N. Charter, treaties governing the use of military force, and certain principles of customary international law.

As the head of government and Commander-in-Chief of the armed forces of a nation committed to the rule of law, the President must follow these domestic and

international legal rules.¹ I hope that President Trump's legal and policy advisers have educated him on the legal rules that govern his actions.

It is also important that the President and Executive branch officials explain the legal and policy basis for any use of force by the United States. When I was Legal Adviser of the State Department, I gave numerous speeches about the domestic and international law authority for U.S. military operations against Al Qaida and the Taliban.² Obama administration officials gave many similar speeches. In December 2016, President Obama issued a report that described the domestic and international bases for the United States' ongoing use of military force overseas and the legal and policy frameworks his administration had developed to govern such uses of force and related national security operations, such as detention, transfer, and interrogation operations.³

Congress also has an important role to play regarding war powers and the use of force. Congress should insist that the President comply with applicable domestic and international legal rules and explain the legal basis for actual or potential uses of force and military operations. Congress should authorize the President to use military force when appropriate. And Congress should exercise appropriate oversight of military operations, consistent with the President's role as Commander-in-Chief.

Separate from his authority to use force, the President also has constitutional authority to deploy the U.S. military in other countries and the Secretary of Defense has statutory authority to train and equip the security services of foreign countries.

Domestic Law Authority

A. Constitutional Authority

Under Article II of the Constitution, the President has broad authority as Commander-in-Chief and Chief Executive to order the use of force by the U.S. military. His Article II powers include authority not only to order the use of military force to defend the United States and U.S. persons against actual or anticipated attacks but also to advance other important national interests.

Presidents of both parties have deployed U.S. forces and ordered the use of military force, without congressional authorization, on numerous other occasions.⁴ For example, President George H.W. Bush ordered U.S. troops to Panama in 1989 to protect U.S. citizens and bring former President Noriega to justice. President Clinton ordered the deployment of U.S. forces to Haiti in 1994 and U.S. participation in NATO bombing campaigns in Bosnia and Kosovo in 1995 and 1999. President Obama ordered the U.S. military to participate in the bombing campaign of Libya in 2011.

The Department of Justice's Office of Legal Counsel has written numerous opinions, under both Republican and Democratic Presidents, determining that the President has the power to commit troops and take military actions to protect a broad array of national interests, even in the absence of a Congressional authorization, including for the purpose of protecting regional stability, engaging in peacekeeping missions, and upholding U.N. Security Council Resolutions. For example, the Office of Legal Counsel concluded that the President had the power, without congressional authorization, to deploy U.S. forces and use military force in Somalia in 1992, in Haiti in 1994, in Bosnia in 1995, in Iraq in 2002, and in Libya in 2011.⁵

Of course, in addition to the powers granted to the President in Article II, Article I of the Constitution gives to Congress the authority to "declare War."⁶ But this authority has never been interpreted—by either Congress or the Executive—to require

¹See John B. Bellinger III, "Law and the Use of Force: Challenges for the Next President," Sixth Annual Lloyd Cutler Rule of Law Lecture, November 20, 2016. <https://www.lawfareblog.com/my-lloyd-cutler-rule-law-lecture-law-and-use-force-challenges-next-president>

²See, e.g., "Legal Issues in the War on Terrorism," Address at the London School of Economics, October 31, 2006 <https://www.state.gov/s/l/2006/98861.htm>

³<https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal-Policy-Report.pdf>

⁴See Barbara Salazar Torreon, Cong. Research Service, *Instances of Use of United States Armed Forces Abroad, 1798-2017* (October 12, 2017).

⁵See, e.g., *Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C. 6 (1992); *Deployment of United States Armed Forces into Haiti*, 18 Op. O.L.C. 173 (1994); *Proposed Deployment of United States Armed Forces into Bosnia*, 19 Op. O.L.C. 327 (1995); *Authority of the President Under Domestic and International Law to Use Military Force Against Iraq* (October 23, 2002); *Authority to Use Military Force in Libya* (April 1, 2011)

⁶Congress has issued eleven declarations of war: Great Britain (1812); Mexico (1846); Spain (1898); Germany (1917); Austria-Hungary (1917); Japan (1941); Germany (1941); Italy (1941); Bulgaria (1942); Hungary (1942); Romania (1942). <https://www.senate.gov/pagelayout/history/h-multi-sections-and-teasers/WarDeclarationsbyCongress.htm>

congressional authorization for every military action, no matter how small, that the President may initiate. Indeed, the War Powers Resolution itself, implicitly recognizes that a President may order the U.S. military into hostilities without congressional authorization, provided that he notifies Congress within 48 hours and ceases the use of force after sixty days unless he receives congressional authorization.

In several opinions, the Office of Legal Counsel has acknowledged that the “declare War” clause may impose a potential restriction on the President’s Article I powers to commit the U.S. military into a situation that rises to the level of a “war.”⁷ This possible limitation appears only to have been recognized by OLC under Democratic administrations; war powers opinions written by OLC during Republican administrations do not appear to have recognized that the “declare war” clause places any restriction on the President’s Article II powers. And even during Democratic administrations, OLC has stated that whether a particular planned engagement constitutes a “war” for constitutional purposes “requires a fact-specific assessment of the ‘anticipated nature, scope, and duration’ of the planned military operations” and that “This standard generally will be satisfied only by prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period.” OLC determined that this standard was not met with respect to President Clinton’s use of the U.S. military in Haiti in 1994 and in Bosnia in 1995 or President Obama’s use of the U.S. military in Libya in 2011.

Although OLC has yet to identify a specific situation where the “declare war” clause would limit the President’s independent authority to order the use of military force and require congressional authorization, this does not mean that such circumstances will never exist. If a President wished to order the U.S. military to launch a prolonged or substantial military engagement that is not in response to an attack or clearly imminent attack and that would expose the U.S. military, U.S. civilians, or U.S. allies to significant risk of harm over a substantial period, there is a strong argument that the President may be required to seek congressional approval. It would certainly be prudent for him to do so.

B. Congressional Authorization

Although the President has broad constitutional authority to order the use of force without congressional authorization, Presidents of both parties have generally preferred to seek congressional authorization, if it is possible to secure, for any prolonged or substantial use of force.

President George W. Bush, for example, sought and secured congressional authorization for the use of force against terrorist groups in 2001 (“2001 AUMF”) and against Iraq in 2002 (“2002 AUMF”). President George H.W. Bush sought and secured a congressional authorization for the use of force against Iraq in 1991.

In my previous testimony before this committee in June 2017, I urged Congress to pass a new AUMF that repeals the 2001 Authorization to Use Military Force against terrorist groups and the 2002 Authorization to Use Military Force in Iraq and replaces them with a comprehensive new AUMF that authorizes the use of force against the Taliban, Al Qaida, and ISIS.⁸ I applaud Chairman Corker’s continued efforts to draft a new authorization, as well as the new draft AUMF introduced by Senators Kaine and Flake.

C. War Powers Resolution

When authorizing the use of force or deployment of U.S. armed forces, Presidents must also take into account the War Powers Resolution of 1973. Section 4 of the War Powers Resolution requires the President to notify Congress within 48 hours after U.S. armed forces are introduced 1.) into “hostilities” or where hostilities are imminent; 2.) into the territory, airspace or waters of a foreign nation, while “equipped for combat”; 3.) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation. Section 5(b) of the Resolution requires the President to terminate any introduction or use of US armed forces into hostilities within 60 days unless Congress issues a specific authorization.⁹ Presidents of both parties have concluded that some parts of the War Powers Resolution are unconstitutional, though all Presidents have tried to act “con-

⁷Deployment of United States Armed Forces into Haiti, 18 Op. O.L. C. 173 (1994); Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327 (1995); Authority to Use Military Force in Libya (April 1, 2011).

⁸https://www.foreign.senate.gov/imo/media/doc/062017_Bellinger_Testimony.pdf

⁹The 60-day termination provision applies only to the introduction of U.S. armed forces into hostilities or imminent hostilities, not to the introduction of U.S. armed forces equipped for combat.

sistent with” the Resolution’s provisions, including by submitting regular reports to Congress.

Presidents have struggled in particular with the Resolution’s 60-day termination requirement. President Obama continued the use of U.S. military force against Libya for more than 60 days in 2011 after concluding (over the purported advice of the Justice Department and Defense Department) that U.S. military operations did not constitute “hostilities” within the meaning of the Resolution. He later continued the use of U.S. military force against ISIS in Iraq and Syria for more than 60 days in 2014 after concluding that the use of force against ISIS was authorized by congress under the 2001 AUMF, even though al Qaida had distanced itself from ISIS.

On several occasions, members of Congress or of the public have sued the President for allegedly violating the War Powers Resolution by using force for longer than sixty days without specific congressional authorization. The courts have generally dismissed these suits, finding that the legislators or members of the public lack standing or that the suits raise non-justiciable political questions.¹⁰

I have previously recommended that this committee revise and update the War Powers Resolution. The committee should review the valuable 2008 report of the National War Powers Commission, a bi-partisan commission chaired by former Secretaries of State James Baker and Warren Christopher, which called the War Powers Resolution “impractical and ineffective.”¹¹ The Commission stated that no President has treated the Resolution as mandatory and that “this does not promote the rule of law.” They recommended the Resolution be repealed and replaced with a mandatory consultation process. In 2014, Senators McCain and Kaine introduced the War Powers Consultation Act of 2014 to implement the Commission’s recommendations; their bill was referred to this committee.¹²

International Law Rules

When considering whether to use U.S. military force, the President and his advisers must also consider international law rules, including the treaties to which the United States is a party. As leaders of a nation committed to the rule of law, Republican and Democratic Presidents have generally tried to comply with these rules. Although international law rules constrain a President’s flexibility to use force, Presidents have found that our close allies and coalition partners—such as Australia, Canada, the United Kingdom and other European countries—are committed to following international law and expect the United States to do so as well. Moreover, if the United States does not comply with its international law obligations regarding the use of force, it is hard for the U.S. Government to criticize other governments, such as Russia or China or Syria, when they do not do so. It is true that certain international rules do not apply well to modern challenges—such as threats from terrorists, rogue governments that develop nuclear weapons, and governments that commit human rights atrocities against their nationals—but Presidents of both parties have still generally tried to abide by international law when authorizing the use of force in or against another country.

The key international law rules governing the use of force are set forth in the U.N. Charter, a treaty which the United States ratified in 1945 after nearly unanimous (89-2) approval by the Senate. Article 2(4) of UN Charter prohibits the use of force against or in another UN member state unless authorized by the Security Council or the state itself consents to the use of force (for example, against a terrorist group operating in its territory). Article 51, however, recognizes that every State has an inherent right to use force in individual or collective self-defense to respond to an armed attack. The United States interprets this “inherent right” to include a right to use force in anticipatory self-defense to prevent an imminent attack. The George W. Bush and Obama administrations have stated that the concept of “imminence” must be interpreted flexibly with respect to contemporary threats such as terrorism and nuclear weapons, and that whether a particular threat poses an “imminent” threat of an armed attack will depend on the facts and circumstances.¹³

¹⁰ See, e.g., *Campbell v Clinton*, 52 F. Supp 2d 34 (DDC 1999)(dismissing suit against President Clinton relating to NATO bombing campaign in Serbia)(citing cases); *Smith v. Obama*, 217 F. Supp 3d 283 (DDC 2016)(dismissing suit against President Obama relating to operations against ISIS in Iraq and Syria) (appeal pending).

¹¹ <http://web1.millercenter.org/reports/warpowers/report.pdf>

¹² <http://thehill.com/blogs/floor-action/senate/195704-senate-bill-amends-war-powers-act>

¹³ See, e.g., The National Security Strategy of the United States, <https://georgewbush-whitehouse.archives.gov/nsc/nss/2002/>; Report on the Legal and Policy Frameworks Guiding the United States Use of Military Force and Related National Security Operations, https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf

State consent, Security Council authorization, and self-defense are the only legal bases recognized in the UN Charter for a state to use force in or against another state. The U.N. Charter does not specifically permit a state to intervene in another state for humanitarian purposes. The United Kingdom and a few other countries have asserted that international law permits the use of force to prevent a humanitarian catastrophe in limited circumstances, but the United States and the majority of other countries do not recognize an international law right of humanitarian intervention.

The foregoing international rules govern when a state may initiate the use of force (so called “*jus ad bellum*,” or law relating to the beginning of war). The United States is also party to dozens of other treaties relating to the conduct of military operations during hostilities (so-called “*jus in bello*,” or law in war). These treaties include, among others, the Hague Conventions of 1907, the Geneva Conventions of 1949, and the U.N. Convention on Certain Conventional Weapons, and its Protocols on Blinding Lasers, Incendiary Devices, and Explosive Remnants of War.

During the conduct of military operations, the United States also complies with principles of customary international law governing military operations, such as the principles of distinction, necessity, and proportionality.

Legal Bases for Use of Force in Syria or North Korea

On April 6, 2017, President Trump ordered air strikes against a Syrian air base after reports that the Syrian government used chemical weapons against Syrian civilians. He subsequently sent a War Powers report to congress stating that he was acting in the “vital national security and foreign policy interests of the United States, pursuant to my constitutional authority to conduct foreign relations and as Commander in Chief and Chief Executive.”¹⁴ There would have been no justification for the air strikes under the 2001 or 2002 AUMFs, and the President did not cite any statutory authority.

The Trump administration has never cited any international law basis for the air strikes in Syria and it would have been difficult to do so because there is no legal basis under the U.N. Charter. Although President Trump and Trump administration officials stated that the air strikes were in response to Syria’s use of chemical weapons, I believe the Trump administration should still have provided—and still should provide—a more detailed statement of the facts and factors that it believed justified the use of force. When President Clinton, without U.N. authorization, authorized air strikes against Serbia in 1999 in order to protect Kosovars from attack by Serb forces, his administration cited a variety of humanitarian factors that the administration believed justified the attacks. When the United States uses military force, especially under controversial circumstances, it should explain the legal basis for its actions. When the United States does not do so, it appears to act lawlessly and invites other countries to act without a legal basis or justification.

With respect to North Korea, President Trump has constitutional authority as Commander-in-Chief and Chief Executive to order the use of military force against North Korea if he concludes that the use of force is necessary to protect important national interests. These interests could include defense of the United States, its nationals, or U.S. allies or the maintenance of regional stability in Asia. Consistent with previous precedents and legal opinions from both Republican and Democratic administrations, he could do so even without congressional authorization. However, if the use of military force would clearly be substantial and prolonged or would pose a substantial risk to U.S. forces or American civilians, it could require Congressional approval consistent with Congress’ authority in Article I to “declare war.” Under international law, if the Security Council had not approved a use of force against North Korea, the President would have to conclude that the use of force was in self-defense of the United States or its allies in response either to an actual armed attack or an attack the President determined to be imminent. As noted above, both the Bush and Obama administrations have taken a more flexible position regarding what constitutes an “imminent” threat when dealing with rogue states and terrorist groups, although some other states disagree with the U.S. approach.¹⁵ It is certainly

¹⁴ <https://www.whitehouse.gov/the-press-office/2017/04/08/letter-president-speaker-house-representatives-and-president-pro-tempore>

¹⁵ Some have argued that the restrictions in the U.N. Charter on the initiation of the use of force would not apply to North Korea because the United States remains in a state of ongoing armed conflict with North Korea since the Korean War. Although North Korea and the United States signed an Armistice Agreement in 1953, North Korea has violated the armistice and has also announced on several occasions that it would not observe the armistice, which might arguably provide a legal basis for the United States to continue to use force against North Korea. See Charlie Dunlap, “Assessing the legal case for the use of force against North Korea; Is ‘armi-

clear that North Korea's development of nuclear weapons and repeated launching of ballistic missiles capable of reaching the United States pose a very serious threat to the United States. Even if the United States were justified in initiating the use of force in self-defense against North Korea, to be consistent with international law, any such use of force would have to be proportionate to the threat posed by North Korea.

Train and Equip Authority

In addition to the laws that govern the President's use of military force and commitment of U.S. armed forces into hostilities, Congress should recognize that different laws govern the deployment of the U.S. military in foreign countries for purposes other than combat.

Under Article II of the Constitution, the President has power as Commander-in-Chief and Chief Executive to deploy the U.S. military abroad for various purposes.

Congress has also given the Secretary of Defense specific statutory authorization to use the U.S. military to "train and equip" foreign security forces. For many decades, Congress had authorized the State Department to provide foreign assistance to other countries by training their military forces. After the 9-11 attacks, starting in 2006, Congress began including additional authorization to the Department of Defense in the annual National Defense Authorization Act to train and equip foreign security forces. This authority was included in annual NDAA's until 2016, when it was permanently added as Section 333 of Title 10 of the U.S. Code.¹⁶ A separate provision, 10 U.S.C. 127(e), authorizes the Secretary of Defense to provide support to foreign groups that provide support ongoing military operations by U.S. special forces.

These "train and equip" authorities do not authorize the use of force by U.S. military personnel engaged in training foreign forces. However, U.S. military personnel in other countries are given authority by the Secretary of Defense to use force to defend themselves; the scope of these authorities are specified in the Rules of Engagement for particular missions.

U.S. Military Operations In Niger

After the tragic incident in Niger last month in which several members of the U.S. military were killed, some members of Congress, including members of this committee, have asked what was the legal basis for the presence of members of the U.S. military in Niger. Some members have asked whether the Defense Department believed that the 2001 AUMF authorized the deployment of the U.S. military to Niger.

In the October hearing before this committee, Secretary of Defense Mattis clarified that U.S. military members were operating on a "train and equip" mission under Title 10 of the U.S. Code. Secretary Mattis was presumably referring to the authority provided to the Secretary of Defense in 10 U.S.C. 333 to train and equip foreign security forces.

Accordingly, the U.S. forces in Niger were not operating pursuant to the 2001 AUMF, because their purpose was not to use military force against persons or groups associated with the groups responsible for the 9-11 attacks, but rather to train and equip Niger's security forces. The legal basis for the force that the U.S. forces did use was not the 2001 AUMF but rather the authority given to them by the Secretary of Defense and their commanders to defend themselves. As Secretary Mattis indicated, it is possible that the mission of U.S. forces in Niger could change and that the U.S. military could begin direct counterterrorism operations against

stice law" a factor?" <https://sites.duke.edu/lawfire/2017/09/17/assessing-the-legal-case-for-the-use-of-force-against-north-korea-is-armistice-law-a-factor/> (assessing arguments made by others). With more than sixty years of intervening peace between the United States and North Korea, it would be a very hard to conclude that a state of armed conflict still exists between the two countries.

¹⁶ 10 U.S.C. 333(a) provides:

(a) Authority.—The Secretary of Defense is authorized to conduct or support a program or programs to provide training and equipment to the national security forces of one or more foreign countries for the purpose of building the capacity of such forces to conduct one or more of the following:

- (1) Counterterrorism operations.
- (2) Counter-weapons of mass destruction operations.
- (3) Counter-illicit drug trafficking operations.
- (4) Counter-transnational organized crime operations.
- (5) Maritime and border security operations.
- (6) Military intelligence operations.

(7) Operations or activities that contribute to an international coalition operation that is determined by the Secretary to be in the national interest of the United States

terrorist groups in Niger. If the President determines that persons or groups in Niger are associated with Al Qaida or ISIS, then the U.S. military would have authority under the 2001 AUMF to use force against them.

Although the U.S. military personnel in Niger have not been operating under the authority of the 2001 AUMF, the Obama and Trump administrations have still notified Congress in ten reports under the War Powers Resolution about the deployment of the U.S. military in Niger, presumably because the forces are “equipped for combat” even if they have not been (until last month) engaged in hostilities. President Obama first notified Congress in February 2013 that he had deployed 100 U.S. military personnel to support U.S. counterterrorism objectives. In eight additional war powers reports, President Obama reported that the number of U.S. military personnel in Niger had increased to 575 by December 2016. In June 2017, President Trump reported that the number of U.S. military personnel in Niger was 645.

The State and Defense Departments also provide reports to Congress on train and equip programs.

Conclusion

In conclusion, I applaud this committee’s renewed interest in Presidential and congressional war powers. Although the President has broad authority under the Constitution to order the use of military force, Congress also has a vital role to play.

The CHAIRMAN. Thank you, all three, for that outstanding testimony.

And with that, I will turn to Senator Cardin.

Senator CARDIN. I agree with the chairman. I thank all three of you for your testimony.

The Framers of our Constitution developed this check and balance system in the United States in order to protect against abuse of power. The President has a term, unlike the parliamentary systems, which the prime minister would not have a term. He is protected. But we have an independent Congress. That is unique, certainly different than parliamentary systems.

Mr. Hadley, I want to thank you in the words of Hamilton for letting us know what happened in the room when President Bush made his decisions on the use of force. It was very helpful to hear that. And I think your analysis on how the President determined the use of force was extremely helpful.

But I think we now need to realize that we have a President who has a reckless self-confidence of his own instincts and makes decisions without relying upon his advisors, as we have seen over and over again, and whether we have adequate protections by the congressional independence in our responsibilities to protect against that use of power inappropriately and allowing our men and women in harm’s way. So I think that is the challenge.

And I think there are three areas that we have talked about, and I want to concentrate on one in my round of questioning. One was the AUMF, which we all agree is outdated. It has been abused not just by this administration but by previous administrations. It is authority of convenience. It is difficult to get an authorization through Congress. So they just use it, and it is inappropriate. And I thank Senator Kaine and Senator Flake for their leadership on this, and I hope we can come to grips on that issue. It is our responsibility.

The second was North Korea. And, Mr. Bellinger, I thought you gave a very good explanation of that. So if the President were to determine he was going to use a first strike, it seems to me it would be contrary to our responsibilities under the United Nations and our obligations there.

But I hear what you are saying, and as I said in my opening statement, we have to rely on the professionalism of those who carry out the presidential orders. But it does seem to me that the use of force here would be an abuse of executive power absent an imminent threat that there was a missile pointed at us ready to be launched. So obviously we put that aside.

But I want to get to the third point, which really has me concerned about mission creep that I talked about in my opening statement. Secretary Mattis said that under the train and equip authority under Title 10, that he believes he has the authority to send American troops out on combat missions with the troops from the host country. That seems to me to be—we are in combat. That seems to me that without specific authorization for combat, we have seen the ability to do this and creep into a much more deep military involvement in a country.

What can we do or what should Congress be doing here in order to oversight our responsibilities on the use of force where we now see we have American troops in so many countries around the world under the mission of train and equip when they are actually participating in combat missions? Any suggestions?

Mr. HADLEY. You know, listening to you, it occurred to me where there might be some misunderstanding on that. You know, it occurred to me, listening to your opening statement, there is one view of train and equip, which is that U.S. forces would go to training camps where there are young recruits of Iraqi or others' soldiers, far away from the battlefield, training them in the various arts and methodologies of war. That is a form of military training, and I am sure train and equip would cover that.

What is really happening, though, is our military thinks that in some sense the best way to train and equip a unit is to go with them in combat and help them succeed in combat. And I think our military—and you can have them before you—would view that as part of the train and equip mission, indeed probably some of the best training and equipping that we can do. And as you rightly say, that begins to blend into our men and women assisting others in combat.

And I think basically the Congress and the administration need to get a better and clearer understanding of what train and equip means and where does that begin to—

Senator CARDIN. I do not disagree with your assessment. How does Congress get a better grip on this? Because as we saw under the AUMF, we give a two-line authorization and it is used for the next decade for different purposes. We have authorization for training and equipping. How does Congress get a better control over the use of that authority?

Mr. HADLEY. I would say two things, and Christine may have a view on that.

One, a better understanding, and that comes through hearings with military officials describing the program to you, and secondly, the authorization is in statute, Title 10, which you all wrote. And it is within your authority to revise that.

Senator CARDIN. So we say train and equip, but you cannot go out on missions, or you say going out on missions is important. I accept that. But we do not want it to be crept into a combat mis-

sion. How do you prevent something like the presidential interpretation of the AUMF that they are using today from any authorization we do? How can Congress effectively carry out its responsibility on the use of force without hamstringing the military from doing their mission?

Ms. WORMUTH. Senator Cardin, if I could maybe try to add something. Certainly when I was Under Secretary at the Defense Department, when we were doing these kinds of train and equip and capacity building missions in various countries in Africa, for example, the rule was they were not allowed to accompany local forces, partner forces if there was any kind of likely possibility that they would come into contact with adversarial forces because they were not supposed to be there in combat. They were supposed to be doing training. So there was an intelligence assessment that would be made and AFRICOM would have a major role in giving that assessment. And if the judgment was that by going out and doing the accompany mission, there was some likelihood that our forces would come into enemy contact, AFRICOM was not authorized to go and proceed and do that kind of mission.

So my sense is that through your oversight function, maybe the thing to do is to try drill down to really understand how the combatant commands are making the judgment about what is the likelihood of making enemy contact so that you can form your own opinions about whether you should have confidence in those intelligence assessments.

And it is difficult. Certainly there were times during my tenure where we assessed that the likelihood of enemy contact was low and we were unpleasantly surprised. But I think there was a threshold and there was a set of understandings, and we even in the Office of the Secretary of Defense had a healthy dialogue with the combatant commands to try to really scrutinize their assessments in that regard.

Senator CARDIN. Thank you.

The CHAIRMAN. Before turning to Senator Flake, I wanted to ask John a question. Part of what prompted this has been just an understanding of what could or could not happen in North Korea. You know, I think everyone understands that we have a serious situation that could be developing there.

As I listened to your explanation of what a commander-in-chief can do to protect our country, it seems to me that it would be an unlikely scenario where a President would come to us and say, hey, look, we are getting ready to, quote, invade North Korea and we want to talk with you about an authorization for the use of force. I do not think I see that happening. I hope nothing ever happens, and I hope diplomatically we are able to resolve this.

But it seemed, as you laid out the criteria, that a President in the type of scenario that likely would develop around a case where we are worried about their getting into a position where they are close to being able to deliver something that we feel is a threat or is destabilizing the region and therefore hurting our allies, it really does seem to me that that type of scenario that is developing based on all the criteria you laid out—which is the criteria—that while they might make a couple of calls to folks to let them know in 2 hours something is getting ready to happen, in all likelihood ac-

tions would be taken mostly unilaterally without Congress. But in that case, obviously it could spread into a much larger conflict with many, many countries involved that in some cases are at least regional super powers if not greater.

Now, did I hear you wrong when you were laying out the criteria and the likely scenario that could develop should the North Korea situation get out of hand?

Mr. BELLINGER. That to me, Mr. Chairman, is a legal matter.

So let me say two things. One, an authorization does not have to be immediately before an attack. It could be a long time before. Recall that the authorization that President Bush sought for Iraq came 6 or 8 months before the actual invasion of Iraq. And Congress passed that authorization not because they expected the President to immediately invade Iraq but because they wanted to go on record and give the President the authority so that it was clear from two branches of government that there was authority to use force against Iraq. I think at the time I was not here on your side. But Congress probably hoped that the President would not use force, but they gave him that authority so that he had it.

One could do that in North Korea with certain limitations. So we are not talking about an authority that is days before an actual attack. The Congress could give the President the authority. Or afterwards, if the President feels a need to act rapidly, that is what the War Powers Resolution says is that within 60 days that the President should seek and Congress could pass an authorization. So it could come after the fact.

So I take your point as a matter of political practicality that if the President within a couple of weeks thinks that he is going to need to use force against North Korea and does not want to signal to them that he is going to do it by going to Congress and seeking an authorization, that would be quite awkward. Hopefully, behind the scenes there would be the policy consultations that would go on.

The CHAIRMAN. Did you want to say something, Steve?

Mr. HADLEY. I agree with what John said. And I would think that—and I tried to suggest in my testimony—that use of military force in the North Korea setting, given the geopolitics and given the stakes, is the kind of thing that I cannot imagine a President would want to do without congressional authorization. You know, it bumps up very much to what John talked about. It is almost a de facto declaration of war, and that is, of course, where congressional prerogatives are strongest.

So the question is how to do that. And again, John is right. In Iraq, we did it well in advance to give strength to diplomacy to try to avoid the use of force. It seems to me that would probably be the scenario you would want to follow here.

The CHAIRMAN. I am going to reserve the rest of my time, the 20 seconds, and turn it over to Senator Flake who I think is going to chair while I introduce somebody in Judiciary. And I will be right back.

Senator FLAKE. I will chair, but since I just got here, if we can turn it over to Senator Kaine and then I will go after that.

The CHAIRMAN. Very good.

Senator Kaine?

Senator KAINE. Menendez was ahead of me. So I do not want to jump ahead.

The CHAIRMAN. A very courteous committee today. Thank you all.

Senator MENENDEZ. Thank you.

And thank you all for your past service as well as your constant willingness to come before the committee and share your insights.

I strongly believe that Congress has to take a much more active role in asserting our constitutionally mandated authority of declaring war and providing the authorizations for our military to engage in sustained combat operations to protect the American people. I think in my 25 years in Congress, there is no more significant vote that can ever be taken than an authorization for the use of force because it is about life and death of the sons and daughters of America that we send in harm's way. So I think it is the singular most important thing we do.

And I certainly believe we live in a significantly different world than when our existing authorities that were passed in 2001 and 2002. And so that is why I believe this effort to try to come to an AUMF is certainly incredibly important and incredibly worthy endeavor. Now, we may have some differences about exactly what does that look like because there are very serious issues when you are going to make such an authorization that you are doing it in a way that if you are going to commit America's sons and daughters, that you are going to commit them with a clear objective, with a clear strategy, with an end goal, and because it is in the national interests and security of the United States. So there are a lot of factors there.

But, Mr. Hadley, I noted in your opening statement where you said many of our Nation's top diplomats have been quick to say that the threat or judicious use of military power is often an essential element of a successful diplomatic initiative. And I would like to pursue that idea as an element of what we are thinking about here.

You mentioned President Obama's decision in 2013 to seek congressional approval to respond to Assad's use of chemical weapons. I was the chairman of the committee at the time. I believe the President was right to seek an approval. And while I am disappointed that our body as a whole did not ultimately act, that authorization, which the President took to the G20 summit at that time in Russia, gave him a credible threat of the potential use of force to convince Putin that he needed to have Assad give up his chemical weapons. And ultimately, a very important goal, getting Assad to give up at least the chemical weapons that we knew of at the time, was achieved without firing a single shot. And that is an example in my mind of the credible use of force that can promote a diplomat effort.

Can you discuss a little bit more how a reliable threat of military action can most effectively be used to bolster a diplomatic effort?

Mr. HADLEY. The example that comes to my mind was when Saddam Hussein kicked out—I think I have the facts on this right—the inspectors under the Clinton administration and President Clinton actually used military force against Iraq and subsequently those inspectors came back in and it gave—revived basically the

diplomatic process to try to solve that problem. I think that is a good example. I think the one you gave is also a good example where you have an integrated strategy that has diplomatic, economic, and some military actions, either threats or actual use of limited military action, to give credibility to the American commitment to find a solution.

Senator MENENDEZ. Let me ask you. I think both of you and Ms. Wormuth in your statements talk about understanding what the end result is that we want and stepping backwards and understanding the military actions that we might authorize. And I think very often we are called upon looking at a set of circumstances in which we are told this is the threat and we might seek an authorization for the use of meeting that threat. But that totality of the picture is not there.

Now, some have suggested that when we think about that totality, it is nation state building, and that became a famous phrase years ago that was a reason not to be engaged. But is it not true that at the end of the day if we are going to send our sons and daughters in harm's way, we want to make sure that whatever the threat is that we ultimately eliminate, that we have eliminated it not for the moment but for the long term? Can you speak to that? As we think about what an authorization should be and what evidence or information should be presented to us to give any particular authorization, can you speak to that end game element?

Mr. HADLEY. Yes. What we have learned is exactly that, that in order to consolidate the military victory, it is not nation building. We are not building the nation of Iraq. The Iraqi people need to do that. What we have learned is that we can and it is in our interest to help them build the institutions of good governance, economic progress, and security so that in the wake of military activity, local authorities are able to meet the needs of their people and provide a sustainable peace and not a situation in which the terrorists will be invited back in. That is the sustainable end state.

And what John Allen was saying is you need to start out with a plan of how you are going to get to that end state, which will involve military, diplomatic, economic, and developmental objectives. You need an integrated plan for that and then walk backwards and plan your military operation. Your military operation has to contribute and move you towards that objective.

We do not do our planning for these operations that way. It is a whole different way of doing it, and I think one of the things Congress can do is when you are asked for the authorization of military force say, fine, what is the phase 4 plan. What is the strategy for achieving the phase 4 plan, and how does this military operation fit into that? And once you are satisfied on that, then of course, the authorization would follow. That will force the executive branch to actually do exactly what John Allen said, start with phase 4 and work backwards.

Senator MENENDEZ. I appreciate it.

Senator Flake [presiding]: Senator Kaine?

Senator KAINE. Thank you, Mr. Chair, and thank you to the members. These issues are so important to me as a member of this committee, the Armed Services Committee, and the father of a United States marine. And I want to thank the chair and thank

my colleagues, Senator Flake especially, for the work that we are trying to do to redraft the 2001 authorization. There is work underway now to do that. I think that is important. Many of you have testified about this before, so I do not want to ask you about this today.

What I want to ask about is the scope of a President's Article II powers because regardless of what Congress might decide to draft, if a President says under Article II, I can do anything, that President can make the congressional war powers essentially illusory. And I am very concerned about this administration in that regard.

After the missile strikes against the Shayrat military base in April, Congressman Adam Schiff and I wrote a letter to the President asking for the legal justification for those strikes. I would like to introduce the letter as an exhibit. We have received no answer. The letter was dated April 24th.

Senator FLAKE. Without objection.

[The information referred to above is located at the end of this hearing transcript.]

Senator Kaine. We had a hearing in October, and we had Secretary Tillerson before us. And I asked him the question of legal justification for the military strike in April in Syria, and he took it for the record and submitted a record answer that I am going to ask my staff to give you copies of. I would like to introduce that for the record as well.

Senator FLAKE. Without objection.

[The information referred to above follows:]

[EXTRACTED FROM—RESPONSES TO ADDITIONAL QUESTIONS FOR THE RECORD SUBMITTED TO SECRETARY TILLERSON BY SENATOR KAINE—HEARING OF OCTOBER 30, 2017.]

Question on Syria strikes

Question 5. In April, Representative Schiff and I sent a letter to the President asking for the Administration's legal justification for the April 6th strike against the Shayrat military airbase in Syria (attached). I asked General Dunford the same question and he stated he would get back to me. To date, I still have not received a response. Can you please provide me with the legal justification under domestic and international law for these airstrikes?

Answer. The April 6 U.S. missile strike on Shayrat airfield in Syria was not based on the authority of the statutory authorizations for use of military force that we have been discussing at this hearing. The President authorized that strike pursuant to his power under Article II of the Constitution as Commander in Chief and Chief Executive to use this sort of military force overseas to defend important U.S. national interests. The U.S. military action was directed against Syrian military targets directly connected to the April 4 chemical weapons attack in Idlib and was justified and legitimate as a measure to deter and prevent Syria's illegal and unacceptable use of chemical weapons.

Senator KAINE. If you would each look at this because this suggests to me that this White House is taking a position about Article II power that would completely wipe out the Congress's power under Article I. We asked about the military justification. "The April 6th U.S. military strike on Shayrat airfield in Syria was not based on the authority of the statutory authorizations for use of military force we have been discussing in the hearing, thus not 2001, 2002. The President authorized that strike pursuant to his power under Article II of the Constitution as commander-in-chief

and chief executive to use this sort of military force, missile strikes, overseas to defend important U.S. national interests.”

Can a President just say, “I am defending important U.S. national interests” and therefore wipe out any obligation to have a congressional declaration with respect to military action?

Mr. BELLINGER. I take that as a legal question. And the answer, which will make you unhappy, is yes. The President has broad power.

Senator Kaine. Is it unlimited?

Mr. BELLINGER. It is not unlimited. It is not unlimited.

Senator Kaine. Because if it is unlimited, would you not agree with me it would wipe out war powers that Congress was granted specifically in Article I.

Mr. BELLINGER. That is true. The answer that the administration gives here I think is basically just the textbook answer that the President has broad authority to order the use of force to advance national interests whether it is a peacekeeping mission, whether it was Libya, whether it is these limited strikes in Syria. And that is both the view of Presidents in Democratic and Republican administrations, and Congress has largely acquiesced in that.

Senator Kaine. Let me challenge you on that in the Constitution.

Mr. BELLINGER. Please.

Senator Kaine. Madison to Jefferson, in writing about what the division of power between Congress and the executive, basically laid it out and said we have to let the President have some power because Congress would be in recess and would be in Vermont. But when Jefferson was President and was grappling with the Barbary Coast Pirates, he said, “I have the ability to defend against attacks on ships, but if I want to go defeat the navy, I need to get congressional approval.”

If you allow a President just to say—and I am worried about this President. I went after the former President on the same thing. But if you allow a President to say, “I am defending important U.S. national interests,” and that is a talismanic phrase that would allow the executive to wage war without Congress under any circumstance, you have essentially eliminated the congressional power under Article I.

And if I could unpack it further, in this particular instance, the White House asserted no imminent threat to the United States, no imminent threat to any U.S. person or personnel. They claimed no legal justification under either the 2001 or 2002 rationale. They asserted no international legal justification. We had not been invited by Syria to invade their sovereignty. It did not meet the international definition, Mr. Bellinger, that you cited earlier.

And so the assertion that we need no international justification, all we have to do is say we are defending a national interest, does that not worry you that that is just so plastic that a President would feel unconstrained and feel the ability to wage war completely without the authority of Congress? How could you square that with having Article I be meaningful?

Mr. Hadley wanted to say something, and then Ms. Wormuth may as well. Then I will come back to Mr. Bellinger.

Mr. BELLINGER. So that is a lot of different questions, but let me try to quickly address them.

On international law, I think there is not a clear basis under the UN Charter, but I would still like to have seen the administration explain why they felt it was justified under international law, if not legal. And I am unhappy that they have just not answered the question because it is important to explain why we are doing things or at least as consistent with international law as possible.

Senator Kaine. You will notice that the question was asked.

Mr. BELLINGER. I did see that, and I wish that they had answered it. As a former legal advisor for the State Department, I like to see us saying that we are acting consistent with international law as best we can.

On domestic law, there is certainly an upper limit, and I said that in my testimony. I think that is certainly what you are saying. This example in Syria, which was limited—it was just a couple of hours—is consistent with what Presidents of Republican and Democratic Parties have done for decades and decades. And if you think back with the—

Senator Kaine. Is consistency the same as legality?

Mr. BELLINGER. Well, Congress has acquiesced in that over time.

Senator Kaine. Is that the same as legality?

Mr. BELLINGER. To a certain extent, yes, Senator, because war powers are shared between the executive and Congress. And practice over time between what the Congress is willing to accept and what the executive branch asserts becomes law. So if you think about the invasions of Panama or Nicaragua or Grenada or President Obama in Libya for long periods of time—

Senator Kaine. For which he was censured by the House of Representatives—

Mr. BELLINGER. I realize that.

Senator Kaine [continuing]. In 2011.

Mr. BELLINGER. But Presidents have to assert important national interests, whether it is rescuing Americans, addressing a humanitarian crisis, addressing regional stability, a variety of different things.

Senator Kaine. Is a humanitarian crisis not fundamentally different than war? When we are putting the military to do typhoon relief in the Pacific, we do not have to have a debate about that under war powers. But firing missiles at a foreign country without an answer about what the legal justification seems to be fundamentally different.

Mr. BELLINGER. Well, it depends—in Syria, one day for an hour was not a lengthy period of time. I think that is well within the President's war powers.

I think what you are concerned about, though, which all of us addressed in our testimony—I as a legal matter and my colleagues as a policy matter—if we are talking about a prolonged or substantial use of force against a country, particularly one that may provoke, unlike Libya which was prolonged and substantial, but particularly one that will provoke likely a counter-attack on the United States, its allies, its civilians, potentially resulting in tens of thousands or hundreds of thousands of deaths, that is probably going to bump up against Congress' power to declare war.

So to end this, there clearly is an upper limit. The President has a lot of authority to act without constitutional authorization. There

is a whole history of that. But what you are saying is, is it unlimited and did this answer say that it was unlimited? I think, no, it is not unlimited. And I do not think that at least this answer said that it was unlimited.

Senator Kaine. I have gone over, and I appreciate my colleagues' patience. And I will follow up in writing for the other two witnesses.

Thanks.

The Chairman [presiding]: Absolutely.

Senator Young?

Senator Young. Well, I thank the chairman for holding this hearing and the ranking member for his leadership in it as well.

Thank you to our panelists.

There is no more consequential issue than the authorization of the use of military force and doing all we can as Members of Congress to get it right as we look to authorize these sorts of actions.

We are a decade and a half into fighting what has been branded the war on terror, and this is a hydra-headed sort of threat. It could be a quite long war. And all of us want to get this right because of the nature of this—because of the gravity of the decisions here. And we not only want to get it right. Some of us may want to get it exactly right in terms of how our authorization of the use of military force is structured.

And so I would like to approach this slightly differently and talk about—we are supposed to deliberate and then act. This is a deliberative body in Congress. But what happens when, I think quite appropriately and necessarily, with the chairman's leadership, we have decided to move forward, have this serious conversation through a series of hearings and so forth, we robustly deliberate in a public fashion on the record, and what if some of us cling to these perfect AUMF models in our head and are unwilling to make principled compromises? What if we fail to act after we deliberate on the question of whether or not to declare a war or authorize the use of military force? Do we send messages to our troops in harm's way, to our adversaries that we do not want to send? But perhaps more importantly or as importantly, do we establish a legal precedent where we have considered acting and not acted, therefore future administrations may say there are broader Article II authorities than have ever been asserted before, citing the Congressional Record, these deliberations, and others?

So I would like each of you maybe to address this legal component, this legal risk that each of us might be establishing by deliberating now that we have crossed what I regard as kind of a threshold but may be failing to act. Mr. Hadley?

Mr. Hadley. I think we would all say the better course is for you to agree on a new, revised AUMF because it will show the American people that the Congress is behind this effort in the name of the American people.

Secondly, I think there is a risk that if you do not reach an agreement, it looks like Congress is abdicating to the President and to the executive branch these authorities, which will strengthen the arguments that Senator Kaine and John Bellinger were talking about.

But you are not out of business. I mean, we have been talking about prior authorization, but there is the after-the-fact. And I would remind the committee that after President Bush announced the surge in Iraq, there were legislative efforts that were adopted by the House of Representatives that defunded it and placed operational limits that would have made the surge impossible. And this was Congress asserting its oversight and asserting its authority over a military operation. So we can have this discussion about prior authorization—is it required from Congress or not? But if the President goes ahead and uses these authorities that have been established and Congress disagrees, you have lots of tools to get at the President post fact.

Ms. WORMUTH. I would just add I completely agree with Mr. Hadley that I think the reason that I have favored developing a new AUMF is that I think it will send a very strong signal to our military but also to the world at large that Congress and, by extension, the American public are behind what we are trying to do. And I think that is very important. I sat on this side of the table as an administration witness a number of times and asserted that whatever we were doing that was being challenged—

Senator YOUNG. I am grateful. My time is winding down here.

Ms. WORMUTH. Apologies.

Senator YOUNG. No, no. That is all right.

I understand I think all of us could articulate here why an AUMF is desirable or might be desirable, why we reaffirm our prerogatives here. But perhaps someone can discuss this, as Mr. Hadley has. Do we establish some sort of precedent and thereby broaden perceived Article II authorities by having this public conversation and by failing to act?

Mr. BELLINGER. The answer is yes, Senator. There are two legal problems here. One is the issue that you and Senator Kaine are getting at. And I can tell you from outside of Washington, there is much talk about Congress' abdicating its war powers and, as a result, accreting to the President more war powers. If Congress does not act, it leaves successive Presidents—it is not Republicans or Democrats. Senator Obama may have actually stretched things farther than President Bush did in terms of the conflict in Libya and the conflict with ISIS, which were not authorized. When Congress does not act, Presidents will.

And then there are narrow legal problems as well that we discussed last time on detention and other issues.

Senator YOUNG. So we are all free agents in the Senate. These are decisions individually each of us has to make. I will just say from this Senator's point of view we need to be prepared to make principled compromises even on an issue as consequential, even on an issue where we seek such perfection as authorizing the use of military force. I have reached out to several offices, Republican and Democrat, trying to synthesize different approaches, and there are others who want this as well on the committee. I think we can get there from this Senator's vantage point.

Thanks, Chairman. I yield back.

The CHAIRMAN. Just before turning to Senator Merkley, look, I think everyone knows I would like for us to have a new AUMF. I

do believe that there is legal grounding for the current President, and the President before him, to do what they are doing.

Just for what it is worth in listening to the debate—it sounds like what we are saying is that we need to write a new authorization, which I agree with—I mean, we are working right now with the committee to make that happen—for Congress to weigh in on what the administration is already doing to make us relevant. It is kind of an odd thing. So, the activity is underway, and for us to be relevant, then we need to pass something. I am sorry. It is just a little bit of a weird thing.

I also say that the difficulty here, as we all know, is what we are really doing is we are authorizing something that is not the standard war. I mean, we are basically saying we are allowing the President of the United States to conduct activities to police around the world in countries all over the world activities relative to ISIS. And we know it is going to go on for another 20 or 30 years. I am slightly exaggerating to make a point, but it is going to go on for a long, long time. We have no idea where it is going. We have no idea which entities are going to mutate out of this. And so it makes it a little more difficult than saying we are declaring war as we did in World War II or some other place.

So again, I am not trying to get us a bye here. I am just saying it is a challenge to try to craft something that takes into account that this is activity that is going to take place in places we have not even thought of today.

Senator CARDIN. Mr. Chairman, could I just comment just very briefly on it because this is helpful for us because we are trying to get to an AUMF.

It seems to me that the overwhelming majority of Members of Congress want to support the use of our military to fight ISIS. We think that is an appropriate use. What we do not want to see happen again is what happened in 2001 when we passed the authorization that is misused by the executive branch.

And I just think this comment here about Article II powers that from my position, I do not understand why we do not pass an authorization that is current to what they need today. If the President runs into a circumstance, he has the Article II powers that have been adequately explained. If it becomes prolonged, he should seek the change from Congress.

So I would just point out I do not think we have to be too concerned about not giving the President enough authority. Whatever we do, he will have enough authority.

The CHAIRMAN. And I think we all know we are circulating some principles now, and I think we have hit what I hope is a sweet spot as it relates to what a new authorization ought to be. But I am just saying the complexity of it is that we are talking about one that is not in a specific country with necessarily a specific group that we know is going to mutate just as the 2001–2002 authorizations have. So again, not giving us a pass. It is just a little different kind of thing. It is really an ongoing policing activity with our military and many other instruments that we have within our government potentially in places that we do not even know of today, which makes it somewhat different.

So, Senator Merkley.

Senator MERKLEY. Thank you, Mr. Chairman, and thank you to all three of you.

And, Mr. Hadley, I was intrigued by your noting that if we think that the chapter 10 powers are being overused, we could constrain them legislatively. But if you read the Title 10 powers, they provide no foundation for accompanying forces, and it is in direct contradiction to the War Powers Act, which says that the introduction of armed forces includes, "the assignment of a member of such armed forces to command, coordinate, participate in the movement or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged or there exists a threat that such forces will be engaged in hostilities."

So you are asking us to come back and write what has already been written, is sitting in the law. And so I find that rather absurd.

The fact is it just gets routinely ignored, and then the question becomes where are the teeth? If the law is already written quite clearly by determination, has been signed in the oval office and lays out this boundary, but it is absolutely ignored, where are the teeth? And you have responded to that just a moment ago by saying, well, Congress can come back and cut off funds. Well, Congress is very reluctant to cut off funds in such a precise and detailed micromanagement fashion.

The courts really provide no teeth for this either in general because the Supreme Court—I am asking this more as a question, but basically defers to the executive on issues of national security.

So am I right to just basically say we laid it out quite clearly? The administration violates it with impunity, and we basically have no teeth except what you are saying to come back and cut off funds?

Mr. HADLEY. I think that is a little harsh. This is an area where Congress and the President are condemned to struggle, and I think the only real approach is for the Congress and the President to sit down and develop some rules of the road. Where is that line that Congress really wants to be in on the ground floor and be asked for authorization and where is that line where the Congress actually is willing to let the President act and then exercise oversight and tell him what is wrong?

And it shows the problems of how these things—if you take Christine's rule, which is a very good one, and cabin Article 10, so train and equip means you cannot go out with someone to a military operation against the bad guys, and the military wants to do it, then they will invoke the 2001 or 2002 authorization to use military force to do it, which authorizes a lot of actions below a level that requires or would suggest the President needs to come back to Congress.

Senator MERKLEY. Okay.

Mr. HADLEY. It is hard to do by drawing lines, and I think it has got to be by an ongoing consultation process, which is why I think the consultation approach is better than the Wars Power Act.

Senator MERKLEY. Let me just point out that this administration is absolutely allergic to consultation or transparency when it comes to these issues.

But as you noted, that brings us to the question of the authorization to use military force. And I am fascinated by listening to ex-

pert after expert cite the associated forces clause of the AUMF, which does not exist, which was completely invented as a justification of moving from what is clearly stated in the AUMF to giving broad ability way beyond what was in the AUMF, which is part of what has given rise to doing a new AUMF. But if we can invent language to insert into an existing AUMF, why can it not be inserted into the next AUMF?

I am really concerned that the boundary of the clarity of law is so routinely violated now when it comes to these issues that we have put ourselves in an extremely difficult spot in terms of clearly articulating our responsibilities under the Constitution, if you will.

And, Mr. Bellinger, you noted substantial and prolonged. I wanted to turn to North Korea. I was part of a congressional delegation that went to South Korea and China and Japan to hold conversations throughout. I am not convinced the President has an understanding of the circumstances or even the ability of the conventional deterrence of North Korea to destroy Seoul, which has a broader population of over 20 million people within the boundaries, just a short distance—reach of artillery. But any attack on North Korea that is likely to produce an artillery response is certainly substantial in my mind.

And in that regard, do you have a sense that the President would need to come to Congress for authorization to engage in such an act?

Mr. BELLINGER. Again, this gets at the issue of before or after. Certainly as a policy matter—and you have heard this from both my colleagues—if the President is considering any use of force against North Korea, unless it is just instantly in response to a shoot-down of an aircraft, there ought to be consultation.

Neither the War Powers Act nor the Declare War Clause say that Congress has to authorize before a use of force. There would be certainly reasons why, but it could be afterwards. And so there should be consultation beforehand.

I think what I am saying is although it is not crystal clear—and as you know, we can never find two lawyers who are going to agree. If the President were going to actually take a use of force against North Korea that is beyond the shoot-down of a single aircraft or something like that but that is going to result in the possible devastation that you and Senator Kaine have suggested, then it seems reasonably clear that under Article I that the Declare War Clause requires Congress to authorize that not necessarily before the fact, although there would be reasons to do it before the fact, but if the President were continuing a war afterwards and Congress did not authorize it, I think there is a good argument that the President was not acting consistent with either his powers or Congress' powers.

Senator MERKLEY. When you think of the substantial and prolonged, are you using it as it has to be substantial and prolonged or either substantial or prolonged?

Mr. BELLINGER. I would say it would be “or.” There are certainly past cases where there has been a prolonged presence that really did not raise serious Declare War issues and they were substantial but were quite short.

Senator MERKLEY. I appreciate that answer. I share that opinion, and I really hope the administration understands that it needs to consult before starting such a hostility.

Thank you all very much.

The CHAIRMAN. Thank you.

Senator Isakson?

Senator ISAKSON. I apologize to the panelists that I am late and I probably missed what I am getting ready to ask and I apologize in advance for asking a dumb question. But I happened to come in the middle of the discussion with Senator Merkley, and I want to get a couple things clear.

In the case of the War Powers Act, the President has to come to Congress within 90 days of utilizing force for the Congress to authorize any continuation of that same force. Is that correct?

Mr. BELLINGER. That is correct. 60 days would be required to terminate and would have to ultimately terminate after 90 days. That is what the War Powers Resolution says.

Senator ISAKSON. But the President does have the authority to initiate such an action without congressional authorization.

Mr. BELLINGER. I would say there is not full agreement on that, but I would certainly say that is what the War Powers Resolution says that you have to notify within 48 hours of doing something, but the President has got 60 days or up to 90 days to continue unless he gets authorization.

Senator ISAKSON. You do not want to tie your military's hands behind their back in a conflict. The last thing in the world you want to do is constrict them from being able to do what is appropriate in that case I think. Thank you for that answer.

And thank you, Mr. Hadley, for all your hard work on behalf of the country and previous administrations and what you are doing now.

What you said I think I wholeheartedly agree when you made your comment about the commitment of resources and forces. It should be done always in consultation with the Congress, but it ought to be consultation not some mandatory hoop to jump over. Is that correct?

Mr. HADLEY. Yes, sir. That would be my view.

Senator ISAKSON. And hopefully, that consultation would always be going on so you got prepared for what might seem to be to the public instantaneous, but it was after a long period of trying to avoid what happened.

Just for reference, in 1983—and I think I am right on this date. I could be off by a year or so—KAL-007, Korean Air Lines, was shot down over the South China Sea or somewhere in that part of the world. The Congressman from my district, who had the 7th district of Georgia represented in Congress, Larry McDonald, was killed in that particular shoot-down. And there is an example of a hostile act that was taken against a United States asset—or actually it was Korean Air Lines, but it was loaded with American citizens—where the President could have based on information he or she had or was delivered to them by intelligence sources—could have initiated a military act. It subsequently would have had to come to Congress to affirm. Is that not correct?

Mr. BELLINGER. That is correct. And there have been other situations where a President has taken an action in his constitutional powers and then sought ratification later.

Senator ISAKSON. The only point was that there is a clear reference to a case that took place in the 1980s where an action of hostility was taken against American citizens in a commercial airliner and the President could have done that and did not and consulted with the Congress.

So I think the parameters that we have laid out now for Congress and for the President of the United States are sufficient to act expeditiously if attacked but always before the ratification of the Congress even if it is retroactive, as in the case of sudden hostilities.

So I think I just want to go on record as saying I agree with Mr. Hadley's comment exactly that our role is one of consultation, leading up to the final vote which would take place under the War Powers Act, but initially there is no need for consultation if it is a hostile attack against us right away. I just wanted to get that on the record.

The CHAIRMAN. Thank you very much. Thanks for being here.

Senator Shaheen?

Senator SHAHEEN. Thank you, Mr. Chairman.

I am sorry I missed much of the discussion, but just to follow up a little bit on your line of questioning, Senator Isakson, has there been a suggestion that we cannot respond to a hostile attack without an authorization for use of military force? Was that what you were suggesting, Senator Isakson?

Senator ISAKSON. No, I was not suggesting that.

Senator SHAHEEN. Okay. I just wanted to make sure I did not misunderstand something.

Mr. Hadley and Ms. Wormuth, both of you pointed out that it is important for us, as we think about how we address potential conflicts, to recognize that we have not only tools of the military but tools from our diplomatic efforts and our aid efforts. I just wonder if either one of you can talk about whether you think we are effectively now making use of all of those tools as we look at the various conflict areas that we are facing. Let us say North Korea first and then also—probably North Korea. If you could just address that specifically.

Ms. WORMUTH. I would be happy, Senator Shaheen.

As I said in my statement, I have concerns that generally the table has tilted for a variety of different reasons too much towards using the military tool to the detriment of our others. There are many reasons for that. Our diplomatic resources are not as well resourced as I think they need to be even under the Obama administration and previous administrations, but certainly I would have that concern now. And I think given the circumstances in North Korea, you very much want to use that diplomatic tool as much as you can. We are using the economic tool in the form of sanctions, and I think that is very appropriate. But I think we need to do more as a country to try to give more resources to the agencies that do development and reconstruction, that do diplomacy because those are just as important, and in some cases, more important.

Part of our challenge I think is generating civilian capacity that can be ordered into dangerous places is difficult to do. And I do not have all the answers for how to fix that.

Senator SHAHEEN. Well, Mr. Hadley, as you talk about stage 4, where do we want to get in conflict areas, and we think about where we currently have military operations right now, Afghanistan, Iraq, Libya, Somalia, I would argue that it is maybe even more important in most of those places for us to have the diplomatic and economic assistance tools than to follow on or at the same time with our military than in some cases to have the military there because if we are going to resolve the military conflict and we do not have anything at the end for stage 4, we are not going to achieve our objectives. Would you agree with that?

Mr. HADLEY. I would, Senator, and I agree with what Christine said. You know, we are still not as good about how to mix the security, the developmental, the governance aspects that are required to bring stability over the long term to places like Syria and Iraq. And the thing I am worried about is that we have heard a lot about military operations to clear those areas of ISIS, a lot less of how we are going to help those people in Syria and Iraq build institutions that will prevent ISIS from coming back. You know, people say, well, that is nation building and we do not do nation building. It is really not. It is taking steps to help people build institutions that will resist terrorists coming back that might threaten the United States.

Senator SHAHEEN. And in your testimony, Mr. Hadley, you mentioned the need to maintain public support for ongoing military operations. I certainly agree with that 100 percent as a student of the Vietnam War growing up and recognizing what happened in this country during that time. But does transparency about our military deployments and the rules that we are operating under improve or impede the cooperation that we have with our allies and partners and our efforts?

Mr. HADLEY. Well, there certainly should be transparency with the Congress, and that could be done in a way where it is all public and transparent to the public. In some instances, because of those considerations, you are going to want to do it in a closed setting so that Congress is aware. But Congress should be aware I think. There is no reason why Congress should not be aware about the size and scale of the deployments.

I think the problem is if you only talk about the deployments, you are not going to generate the kind of public support you are talking about. You have got to talk about why are we there, why does it threaten Americans' interests, what is at stake, what is our strategy, how we are implementing the strategy, why we think we can succeed, and then you put all the facts and figures into context. But, you know, we have a tendency to go right to the facts and figures and none of the context, and therefore, Americans do not really know what we are doing and why we are doing it. And that is the point President Bush kept—as I talked in my testimony, if you are going to engage our military forces, the President needs to be explaining the context, the why, the how, and why it matters over and over again to the American people to maintain that support that is so crucial over the long term because we are going to be at

this for a long time. And the American people have got to understand that and why it is important and that we have a strategy and that it is working. That is just essential because we are going to, unfortunately, be at this for a while.

Senator SHAHEEN. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Coons?

Senator COONS. Thank you, Chairman Corker, Ranking Member Cardin, for holding this important hearing and to this very experienced, seasoned panel for the time you are dedicating with us today.

I could not agree with you more, Mr. Hadley, on the point you were just making. We will be at this a very long time. The American people need to understand what our strategy is. We need to understand what our strategy is. And they need to understand where our troops are fighting and why they are fighting. Both of you have made the point in your testimony that public support is vital for the success of military missions, diplomatic missions, development missions abroad.

And I think the October attack that took the lives of four American soldiers in Niger was a reminder, a bracing reminder, to us. Many Members of Congress are unaware that we have service members deployed in West Africa or supporting counterterrorism missions in the Philippines or deployed in the Horn of Africa. So our current system of notification is demonstrably under-performing. Can I put it that way?

How would you suggest we strengthen this dialogue between the President and Congress in a way that makes more certain that Members of Congress are aware of where and how and when our forces are being deployed and, through us, engages the American people? And I will suggest my answer, and then see what you think of it, which is that although an exercise to craft a bipartisan AUMF may or may not change things in the short term in particular jurisdictions on the ground, that exercise is exactly pointed at forcing the conversation between the executive and the legislation branches, forcing it between the parties here on this committee, and then engaging the public in some dispute about whether we are or are not overreaching in our missions in the world.

Do you think I am right about that, or do you think there are other ways we can improve transparency and engagement by the public? If you would, Ms. Wormuth, Mr. Hadley. And then I have a different question for Mr. Bellinger.

Ms. WORMUTH. I certainly think the effort to try to craft a new AUMF, an updated AUMF, is a very important piece of having that more transparent dialogue and helping Americans understand where we are, why we are there, what we are trying to do, and to give the public an opportunity to be engaged in that debate.

But I do not think it ends there. For example, what happened in Niger was actually not covered under AUMF, as you know. That was just a capacity building exercise that ran into enemy contact when it was not expected. So I think it has to be bigger than that. There has to be, I think, a broader effort to talk to Americans on a regular basis about what we are doing. And I think you cannot

over-communicate. Members of Congress, the President, and the United States cannot over-communicate when it comes to these kinds of important things that we are doing.

Senator COONS. Mr. Hadley?

Mr. HADLEY. I think you are absolutely right. It is one forum for conducting that conversation. Hearings are another. I read the transcript of the hearing this committee had with Secretary Mattis and Secretary Tillerson on use of force and AUMF. I thought it was terrific.

And finally, informal consultations. When I was national security advisor, I was up on the Hill a lot during the 2005 and 2006, the grim days about the war in Iraq talking informally with Members of Congress, some of whom had sons and daughters in that conflict. They were some of the most difficult conversations I had. Terribly important.

So I think there are a lot of different forums where this conversation needs to occur.

Senator COONS. Thank you.

Mr. Bellinger, you have called for Congress to revise and update the War Powers Act. That has already been discussed with a number of members. And there was a reference—I think you made it—to a McCain-Kaine bill I think initially introduced several years ago.

What do you think are the elements that should most be updated, and how would those revisions strengthen our oversight? Help me understand how that would contribute to this dialogue.

Mr. BELLINGER. So thanks very much for that question because really a lot of this is about the War Powers Resolution and whether Congress is requiring compliance with the War Powers Resolution, whether the President is actually following it. So I hope you all really will have a look at it.

So two things. One, the recommendation of the National War Powers Commission, which was a serious commission chaired by Jim Baker and by Warren Christopher, revised the War Powers Resolution in a very narrow way, really just to say instead of these 48-hour reporting requirements and 60-day termination requirements, which Presidents of both parties have largely been ignoring or at least stretching, it should just be all about consultation.

Now, one could argue that maybe that is too narrow, that we are taking what was a fairly restrictive bill and just turning it into a consultation requirement. But this is, I think, what we have been talking about for the last 90 minutes, is there needs to be better consultation. And maybe you can put more meat on those bones in terms of consultation.

I will just mention a couple of the particular problems and then stop. Because of the types of modern conflicts that we have now, it is very difficult for Presidents to report things within 48 hours that may be classified. Congress has now started accepting classified reports. The termination requirement is really the biggest problem in that if Congress will not authorize a new authority, it puts the President in the bind of either stopping something that actually has popular support, like the ISIS war, declaring the War Powers Resolution unconstitutional, which the President does not really want to do, or taking the third option, which is what all of

you have expressed concern about, is to just take the ball and run with it and stretch whatever authorization the President has been given beyond anything that is recognized. The War Powers Resolution was set up in a way that ought to work but has not.

Senator COONS. Thank you.

The CHAIRMAN. Thank you. Are there any additional follow-ups? Senator Shaheen?

Senator SHAHEEN. I am not sure who to direct this to. I do not think it has come up. But, Mr. Hadley, you talked about reading the transcript of the hearing we had on the AUMF. And one of the things that was raised at that hearing was a question about the current status of the conflict in Korea. And so maybe this is for you, Mr. Bellinger.

Does the fact that we do not have a peace treaty with North Korea change the status of what the President could do in terms of going into North Korea without an AUMF or without consulting Congress?

Mr. BELLINGER. I know the argument. I do not think that really flies. The argument is that the war, the armed conflict with North Korea has never actually ended, that there has been an armistice, and that because the North Koreans have broken the armistice and, in fact, have publicly said that they are no longer observing it, that under traditional principles of armed conflict, if there is merely an armistice which is then broken, then we go back into a state of armed conflict. So you could get some academic lawyers to say—sort of a surprise to everybody—we are actually in a state of armed conflict with North Korea right now, which means that we could immediately start using force against them without congressional authorization because we are in an armed conflict. That is the theoretical argument. I just think 60 years later that I would not buy that.

Senator SHAHEEN. And, Mr. Hadley and Ms. Wormuth, do both of you agree with this?

Ms. WORMUTH. Yes. I am not a lawyer, but that is sensible to me.

Mr. HADLEY. I think the argument is too clever by half, as they used to say.

Senator SHAHEEN. Thank you.

The CHAIRMAN. Senator Markey?

Senator MARKEY. Thank you, Mr. Chairman, very much.

Mr. Hadley, how do you think North Korea would respond to a U.S. nuclear first strike?

Mr. HADLEY. Well, I do not quite see a scenario where the U.S. would make a nuclear first strike, but I think the obvious answer is it would be—

Senator MARKEY. It is a discussion that we have heard out of some parts of the White House that we could take preemptive action against the existing nuclear structure in North Korea. What do you think Pyongyang would do? Would it lay down its arms, or do you think it could escalate?

Mr. HADLEY. Well, the risk that everybody has talked about, which makes the military option so difficult, is what was mentioned by members of this committee this morning, the fact that North Korea is able to hold Seoul, a city of almost 20 million peo-

ple, hostage with artillery, rockets, mortars, and missiles and cause enormous loss of life. And that puts enormous constraints on any consideration of use of military force because of the potential for North Korea retaliation.

Senator MARKEY. So given the fact that it would lead to, most likely, a massive increase in hostilities between North Korea and at least South Korea but the United States, do you think that the United States—do you think the White House should be required to get specific statutory authorization from Congress before ordering a military attack?

Mr. HADLEY. We all, I think, have said in our testimony this morning that this is the kind of scale of operation that would—in our judgment is something the President should go to the Congress for.

But I would just say you can see the situation getting to the point where the choices become excruciatingly difficult. If North Korea demonstrated an intercontinental range ballistic missile able to reach the territory of the United States, if it demonstrated that it had miniaturized a nuclear warhead to go on the top of such missile, and if we had intelligence that it was readying on a launch pad such a missile, that is going to put enormous pressure on the President to make some kind of preemptive action, if he has the capacity to do so, in order to protect the citizens of the United States.

This is why what North Korea is doing is so dangerous, is that it can evolve into situations that will pose excruciatingly difficult choices for the President and for the Congress.

Senator MARKEY. Exactly. I am glad you said “and the Congress.” So should the Congress be involved in that decision if the President wants to launch a preventative nuclear attack on North Korea?

Mr. HADLEY. I think one of the things that comes out of the discussions we have in this hearing today is that the North Korea situation is potentially so grave that Congress and the President ought to be having consultations on it now and continually so, as the chairman said, there are no surprises as we go through this very challenging time that we are facing in terms of managing North Korea.

Senator MARKEY. Right.

Let me ask you, Ms. Wormuth. Do you think that the Congress should have a vote before there is a preventative nuclear war which is commenced, understanding that the consequences could be that we do not hit all of the nuclear sites? There are clandestine sites there and the catastrophe is that they launch the first one that they have that we did not get at all of the troops and the Americans that are in North Korea and 200,000 Americans are dead later on that afternoon. Should the United States Congress have voted on that scenario before the President is allowed to launch a preventative nuclear strike?

Ms. WORMUTH. I think, Senator, we had a conversation—I do not think you were in the room—a little bit earlier about the fact that the President Bush secured the authorization to go potentially go into Iraq many months before we actually did the invasion and that one of the benefits of that was that it demonstrated very visi-

bly to the world, enemies and friends alike, that we were prepared to do that and it strengthened our diplomatic hand. So I can see a circumstance where something like that would be beneficial.

And I certainly agree with Mr. Hadley that the military consequences of getting into kind of an engagement with North Korea are going to be substantial and I believe prolonged, and I think it would be very healthy for Congress to have a say in that because the American public is going to have to be prepared to support the consequences of that.

Senator MARKEY. Mr. Bellinger, I know you have already answered the question.

Mr. BELLINGER. No, and there is a legal component to this. A nuclear strike against North Korea I think would bump up against the Declare War Clause. It would obviously end up in a prolonged, substantial conflict. So I think that is something that likely would require congressional authorization.

The way I think that would work would be—one would hope—there would be the consultation process beforehand on something of this sensitivity, presumably be done behind closed doors. And this is where, frankly, it would be like Syria, which sounds like apples and oranges, but President Obama came to Congress, consulted. He got the message that there was not going to be an authorization and that if he went forward, that he was going to be basically on his own on his Article II powers, and he decided not to go forward. The same thing would happen here if President Trump came and consulted and Congress said we are not going to authorize that either before or afterwards, then the President is on notice that he does not have congressional support. And in this case, probably unlike Syria, he probably would be violating the Congress' right to declare war. And he would be on notice beforehand and then would have to go on on his own.

Senator MARKEY. And just to go back in time, it is also very important to know that we had UN inspectors on the ground in Iraq for 4 months and they could not find a nuclear program. There was no mushroom cloud as the next threat to the United States. And Dick Cheney just went on TV and lied that Saddam has reconstituted his nuclear weapons program, and he said that on Meet the Press to Tim Russert the day before the war began. So even with Congress playing a role, it still left a lot of discretion to the administration to mischaracterize what had been found on the ground by the UN inspectors. And we are still paying the price for that, but that was just a deliberate set of lies that were told to the American people.

Thank you, Mr. Chairman.

Senator CARDIN. Mr. Chairman, if I might, I just want to thank our witnesses. We do that almost at every hearing. But I must tell you I think your testimonies have been extremely valuable to our deliberations, and I thank you for that. It has helped us a great deal. The chairman will say the record will be open for a certain number of days. I am going to just ask that you be available to help us as we try to sort through how to deal with this on an ongoing basis.

I would just make one further observation, and that is, this is a tough subject under any scenario for us to deal with. So it is not

an easy subject. But also we are dealing with an administration where the President is doing things with his national security team and their agencies, which are different than previous administrations, that present additional challenges to us in trying to figure out how is the best way to deal with the use of our military.

So the challenges are really very, very difficult for us, but it is something we must deal with. And we thank you very much for adding a great deal to our understanding on our responsibilities.

The CHAIRMAN. I want to thank you all.

Mr. Bellinger, I do not know that I want to leave open the last comment about Syria. We did pass out of this committee an authorization for the use of force. And I do not know if we will ever know fully whether the President, who had a 10-hour operation planned that I think did certainly firmly sit within his presidential powers at the time—had a 10-hour operation planned where no boots were going to be on the ground and whether that was an act to keep from acting by coming to Congress or whether it was an act to respect Congress' role we will never know. And I am not trying to be pejorative here. I do know this committee acted and passed one out.

Certainly in fairness, we were in the height of an election campaign. There was no question that people on my side of the aisle who, generally speaking, would have supported this effort under maybe a President of their own party, no doubt rebelled in ways that I was very, very surprised. So who knows how the mix of that would have ended up.

Again, it could have been done easily without an authorization. No question based on the circumstances at hand.

I was really proud of this committee and the way that it acted during that time. What was really at stake—you know, the Friday evening walk around the White House that took place—who knows?

Mr. Hadley, did you want to say something in response?

Mr. HADLEY. I just wanted to say I have great respect for Senator Markey, and I understand his comment. I just want to say that from the standpoint of the Bush administration, while the inspectors were not able to find WMD, the intelligence community was telling us that they had stockpiles of chemical weapons, biological weapons, and a revived nuclear program. And that was the basis under which we were operating. It was not a case of knowing lies, but it was a case of intelligence that was wrong.

Thank you.

The CHAIRMAN. Thank you. I appreciate you making that point.

And with that, again, I want to agree with Senator Cardin. Outstanding testimony. We thank you all for your service to our country in this regard but in other regards also. And I hope at some point all of you are back in a more formal capacity in that regard.

With that, the questions will remain open until the close of business Friday. We know each of you have other responsibilities. To the extent you could answer those in a fairly prompt manner, we would also appreciate that. Again, thank you.

And with that, the committee is adjourned.

[Whereupon, at 11:21 a.m., the hearing was adjourned.]

Additional Material Submitted for the Record

LETTER SENT TO PRESIDENT DONALD J. TRUMP BY SENATOR TIM KAINE AND CONGRESSMAN ADAM B. SCHIFF REGARDING THE APRIL 6, 2017 STRIKE AGAINST THE SHAYRAT MILITARY AIRBASE IN SYRIA

Congress of the United States Washington, DC 20515

April 24, 2017

The President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C., 20050

Dear Mr. President:

We write regarding the April 6 strike against the Shayrat military airbase in Syria. We share your horror at the chemical weapons attack on civilians carried out by the Syrian regime in Idlib province on April 4. This horrific act, in contravention of international law as well as human decency, is only the latest brutality visited upon the Syrian people by the Assad government, and its Russian and Iranian patrons.

It has now been over two weeks since you ordered the strike on the airfield, and your Administration has yet to put forward any detailed legal analysis or justification for that action under domestic and international law. While the Administration provided a notification to Congress, consistent with the requirements of the War Powers Resolution, that notice simply asserted that the strike was ordered, "Pursuant to my constitutional authority to conduct foreign relations and as Commander in Chief and Chief Executive." The notification further informed Congress and the public that you might order, "Additional action, as necessary and appropriate, to further important national interests."

These assertions of authority do not provide Congress with the information it needs to exercise our constitutional responsibilities. Nor do they provide comfort to a public that fears deeper involvement in a horrific civil war at a time when the U.S. troop presence in the region is already increasing. The legal justification for an attack on the Syrian government is not an afterthought, but rather a first order consideration, and something that is vital for the American people to understand at the outset.

The need for a fulsome explanation of your war making power under these circumstances is all the more necessary as tensions rise in the Korean Peninsula, with the suggestion that a preemptive military strike or a retaliatory strike against North Korea are among the options "on the table." While the President has the authority to use force to defend our service members and allies from an imminent threat, a preemptive strike could easily spiral into a full-fledged war with a nuclear-armed adversary. It is precisely because the decision to go to war is such a momentous one for any nation that the Constitution provides Congress alone with the power to declare war.

President Obama took an expansive view of the President's Article II authority and the scope of the 2001 AUMF. At times, we have been critical of his views, and the Congress for failing to exercise its constitutional duties to authorize and oversee the use of force. Indeed, when the Obama Administration considered launching military strikes against the Assad Regime in 2013, the President asserted independent authority to do so, even though he ultimately made the appropriate decision to seek Congressional approval. However, the Obama Administration,

through the publications of analyses by the Office of Legal Counsel, in public speeches by senior administration officials, and statements by the President himself took care to provide the legal basis for his military actions, as well as the limits of those interpretations.

By articulating a legal basis for military action, as well as laying out a strategic vision for such action, a president provides a justification for the use of the momentous power to commit American lives to a cause, but also an understanding of the limits of those powers.

Accordingly, we ask that you provide a detailed analysis of the legal precedents and authorities supporting the action in Syria, and in particular an explanation of whether this action expands those precedents for action under Article II. We also ask that you instruct senior officials in the White House, Department of Defense, and Department of State to articulate the Administration's legal rationales for military action on an ongoing basis to better inform the public and Congress. Thank you for your quick action on this request.

Sincerely,


Adam B. Schiff
Member of Congress


Tim Kaine
U.S. Senator