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REVIEWING CONGRESSIONAL AUTHORIZATIONS FOR THE USE OF MILITARY FORCE

TUESDAY, JUNE 20, 2017

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

The committee met, pursuant to notice, at 10:00 a.m. in Room SD–419, Dirksen Senate Office Building, Hon. Bob Corker, chairman of the committee, presiding.

Present: Senators Corker [presiding], Risch, Rubio, Johnson, Flake, Gardner, Young, Isakson, Paul, Cardin, Menendez, Coons, Udall, Murphy, Kaine, Markey, Merkley, and Booker.

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

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

We thank our witnesses for being here and all of our Senators who I know care deeply about this issue. I would like to thank you for being here to testify. Your insights and experience will be helpful as we begin to reengage on this difficult topic.

It has been well over a decade since 9/11, and there is an interest on the part of many members to revisit and refresh the authority we use to fight terrorism. In 2014, we saw the rise of ISIS, which seized territory in Iraq and Syria and has drawn thousands of foreign fighters and conducted, enabled, or inspired repeated attacks against the United States or our allies.

As a result of these types of threats and others, multiple Presidents have used the 2001 authorization for the use of military force by necessity to conduct hundreds of drone strikes around the world and to put American troops on the ground in multiple countries.

However, there are a multitude of terrorist groups operating today that pose a direct threat to the United States and have lesser connection to the 9/11 attacks. Many have questioned whether the 2001 AUMF covers these groups.

I have always believed that it is important for Congress to exercise its constitutional role to authorize the use of force and that our country is better off when Congress clearly authorizes the wars we fight. As a matter of fact, we are approaching the day when an American soldier will deploy to combat under legal authority that was passed before they were born.

In 2014, I wrote that absent congressional action, the President will continue to operate under an outdated authorization, leaving the door open for future Presidents to claim undue and unbounded powers that will, over time, erode the balance of power fundamental to our constitutional system. Three years later, that statement remains true. It is also one that I think most Members of Congress will agree with. But there are very real reasons why Congress has been unable to pass a new authority and they are worth outlining.

First and most importantly, the 2001 AUMF continues to provide our military with the authority they need to protect American citizens from very real threats. In the past year, American forces have been on the ground fighting terrorism in at least five countries. I believe that the President has the authority under the 2001 AUMF to take action against ISIS, as the Obama administration repeatedly testified before this committee. The 2001 AUMF, while stretched, provides a necessary legal authority for us to continue this fight. We should not risk its expiration without replacement.

Second, some Members of Congress will use this debate for the singular purpose of imposing limitations on our President. It is just a fact. Others may refuse to limit a President at war in any way. That is a fact. And that is a wide gap to bridge.

Finally, many argue that while passing an AUMF may not be a legal necessity, it is a moral one. They believe that Congress must fulfill its constitutional duty of authorizing war and show the men and women fighting around the world that their elected representatives support the war. I too share many of those sentiments but believe we must also guard against an outcome that could have exactly the opposite effect. While Congress, in fact, strongly supports the fight against ISIS and has repeatedly funded the effort, the failure to bridge differences and to pass a new AUMF could create a false impression of disunity during a time of war.

So with the backdrop of these challenges, I intend to conduct this debate in a way that I believe serves best our national interests. I hope that the administration will brief this committee to present their counterterrorism strategy and engage us constructively to ensure that any new authorization is appropriately tailored to serve the national interests and to win this fight.

I also want to thank Senators Kaine and Flake for their tireless efforts. I want to thank Senator Young for presenting his own AUMF. And I want to thank Senator Menendez for chairing a hearing where we attempted a markup to do the same thing. I appreciate all the work that has been done to develop bipartisan solutions.

Again, I want to thank you for your presence today. It is most useful and helpful to us, and I look forward to your testimony and responses to our questions.

And with that, I would like to turn to our distinguished ranking member.

And I want to thank all committee members. I think what we did last week on the Senate floor through intense negotiations struck exactly the right balance and continued to cause this committee and the United States Senate to reclaim our rightful role in setting

foreign policies that are so important to our Nation. I want to thank everybody for that, and with that, turn to Senator Cardin.

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

Senator CARDIN. Well, thank you, Mr. Chairman.

I totally concur in your comments about the actions last week. I think it was the United States Senate, guided by this committee, that did exactly what we needed to do in regards to the appropriate role of Congress. So I thank you very much. And I also thank you for holding this hearing.

Much of what you said in your opening statement I fully support and agree with. There are some differences that I will point out in my opening statement, but I do agree that this is one of the most important responsibilities that we have and one in which hearings are very important for us to get this right. We cannot run away from this responsibility, and I thank you for holding this hearing.

I also join you in thanking Senator Kaine and Senator Flake for their leadership for many years of pointing out that Congress has a responsibility to express itself on the use of military force and that the interpretations of both Democratic and Republican administrations on our 2001 authorization certainly go well beyond what Congress intended. And I thank them both for their leadership.

Senator Young, thank you for your leadership.

This committee took up this issue under Senator Menendez's leadership, and we did not come to an agreement. Certainly the administration was not supportive of what we were trying to do, but we attempted to come together on that issue.

In the wake of the horrific attacks against our country on September 11th, 2001, Congress passed an AUMF targeting the perpetrators of those attacks and the Taliban who harbored them in Afghanistan. In 2002, Congress passed a second AUMF for the war in Iraq. When written, these AUMFs provided the President with sufficient latitude to target terrorist affiliates in order to better combat the threat of terrorism. Unfortunately, this latitude has been stretched far beyond what Congress intended. We are now 16 years beyond the 2001 AUMF, and yet it continues to be used as justification for a wide range of military operations. This includes military operations against terrorists in the Middle East, Africa, and elsewhere whose connections to Al Qaeda and the 9/11 attacks are tenuous at best.

Mr. Chairman, let me just read what the 2001 authorization said: "The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons who he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September the 11th, 2001, or harbored such organizations or persons in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons."

It was clear to me, when I voted for it, that I was giving the President the necessary authority to take action against those who attacked our country on September the 11th. It is now being used well, well beyond what Congress intended. There is no question to me. We saw in the most recent use of this in regards to activities

in Syria certainly had nothing to do with the attack on our country on September the 11th. And that is true, as I said initially, about the interpretations under both the Obama administration and now under the Trump administration.

The Iraq AUMF is still used, in part, as justification for U.S. military operations in Iraq, 14 years past the U.S. invasion and long after the end of the Saddam Hussein regime. These AUMFs are now becoming mere authorities of convenience for Presidents to conduct military activities anywhere in the world.

This is no longer acceptable. To permit this situation to continue is a dereliction of Congress' duty, under the Constitution, to direct and regulate the President's use of his commander-in-chief authority in activities of war. It is an invasion of our responsibility to the American people to ensure that the United States does not stumble into war or involve itself in ill-conceived wars that are not ours to fight or do not comport with interests, needs, values, and principles of our great Nation. It is a failure of our commitment to our brave service men and women when we do not clearly define the battle and the objectives for which they must fight and risk their lives.

This is especially the case now as the President has yet to tell us or the American people what his strategy is for defeating ISIL in Iraq and Syria but also in other relevant theaters like Afghanistan where violent extremist groups threaten U.S. interests. What we see instead is the President delegating his most vital responsibilities to others to decide what military operations are conducted and how many U.S. troops are to be committed to combat in foreign countries.

It is critical to the future security of the United States and our friends and allies that Congress provide the President with proper authorities to target and combat ISIL and its affiliates. The 2002 Iraq AUMF should be repealed, and the 2001, the 9/11, AUMF must be repealed and replaced with one that specifically targets ISIL and other terrorist groups. The authorities provided in the new AUMF must be tailored to allow the President to effectively go after direct threats to the United States but also to avoid granting the President unilateral authority to engage in operations practically anywhere in the world.

Mr. Chairman, let me just point out that you and I have both asked the administration to present us with their strategy. They have yet to do that. There are numerous examples of where we have asked them to present to us what they need. It is difficult for us to carry out our responsibility unless we know what the commander-in-chief needs as far as the use of military force in combating the ISIL forces. So it is going to be a challenge for us. As I said, I think we need to repeal the 2001 and replace it, but we need to know what the administration's strategy is and they have not done that. But we do know they are using the 2001 and 2002 authorizations well beyond what we ever intended.

Of particular concern to me is the need for meaningful restrictions on deploying U.S. ground forces to combat ISIL. I do not believe significantly escalating our direct involvement in current combat operations is beneficial to actually solving the crisis instigated by ISIL. There is no easier or more assured way for the U.S. to un-

intentionally commit itself to a long-term military quagmire than this.

As we know too well, once committed and then under attack, it becomes politically nearly impossible to withdraw those troops. Moreover, I am not at all convinced that the evolving threat from ISIL to us and to our friends and partners necessitates committing more of our brave men and women to ground combat operations. The need for significant combat military operations should diminish as ISIL's control over the territory is diminished and the organization shifts its focus to terrorist attacks around the globe because at this point, the battle becomes one of assisting and building local partner militaries and improving counterterrorism civilian security forces, law enforcement units, and intelligence, investigative, and judicial agencies, as well as combating ISIL's cyber activities.

As we have heard in recent hearings, ISIL's global reach—the organization is moving from a physical caliphate to a virtual caliphate, and that is not something one fights with combat troops.

For all of these reasons, I believe this hearing is critically important but it is equally important that we hear from the administration.

The CHAIRMAN. A most fulsome statement.

We have a vote at 11 o'clock. We actually have two votes, and I think what we should do is just power through those and keep going. So if people could just pay attention to when their time is up, then we will move back and forth and continue on.

Our first witness is the Honorable John Bellinger III, former State Department legal advisor from 2005 to 2009. Before that, he was legal advisor to the National Security Council from 2001 to 2005. He has been before us in the past. We thank you so much for being here.

Our second witnesses is the Honorable Dr. Kathleen Hicks, Director of International Security Program at CSIS. Dr. Hicks previously served at the Department of Defense during the Obama administration. We thank you also very much for being here.

And as you know, you can summarize your comments, if you will, in about 5 minutes, and we look forward to our questions. But again, I appreciate your expertise, and if you would just begin in the order I introduced you.

STATEMENT OF HON. JOHN B. BELLINGER III, PARTNER, ARNOLD & PORTER KAYE SCHOLER LLP, WASHINGTON, DC

Mr. BELLINGER. Thank you, Mr. Chairman, Ranking Member Cardin. I agree with your comments at the outset, and it is a privilege for me to be back before this distinguished committee.

Mr. Chairman, I want to especially commend you for your efforts to reach a consensus on a new authorization against ISIS, and I applaud the very valuable contributions from Senator Kaine and Senator Flake. And I know, Senator Kaine, you have been at this for quite some period of time. It was a privilege to meet with you. And Senator Young as well for your recent contribution. Thank you.

As you heard, I served as the legal advisor for the National Security Council in the first term of the Bush administration and the State Department legal advisor in the second term. I was in the

White House situation room on 9/11, and I was involved in the drafting of both the 2001 and 2002 AUMFs. And for my sins, I then spent the next 8 years engaged in almost daily discussions on the legal issues relating to the use of military force, including detention arising under both AUMFs.

Sixteen years after the enactment of the 2001 AUMF and three years after the beginning of the U.S. conflict with ISIS, Congress should repeal the outdated 2001 AUMF and replace it with a comprehensive new AUMF that authorizes the use of force with appropriate limitations against named terrorist groups, including Al Qaeda, the Taliban, ISIS, and associated groups. Congress should also repeal the 2002 AUMF, which is no longer necessary.

An updated AUMF is legally necessary to ensure that our military has clear authorization from Congress to use force against terrorist groups engaged in hostilities against the United States and to ensure that U.S. detention operations withstand legal challenges in U.S. courts.

An updated AUMF should remove the limitation in the 2001 AUMF to organizations that committed the 9/11 attacks. It is increasingly difficult—and I have been there—to demonstrate that new terrorist groups that have emerged in the last few years are associated with Al Qaeda. It is not clear that the 2001 AUMF authorizes the use of force against ISIS because ISIS did not exist, at least in its current form, in 2001 and was not the group that committed the 9/11 attacks. A new AUMF that specifically authorizes the use of force against ISIS would also provide a clearer legal basis for detention of members of ISIS.

An updated AUMF should authorize the President to use all necessary force against named terrorist groups and associated organizations that have attacked or have an intention to attack the United States or U.S. persons. The AUMF should include a list of specific groups, which would presently include at least the Taliban, Al Qaeda, and ISIS, and may include other named groups, but allow the President to use force against additional organizations if he notifies Congress that he has determined that the additional organizations are associated with the named organizations and are engaged in hostilities or plan to engage in hostilities against the United States.

In my view, a new AUMF should not be limited geographically to certain countries. Even if a new AUMF does not limit the use of force to certain countries, the United States is still required by international law to limit its use of force in or against other countries.

As a purely legal matter, I would oppose a sunset provision. A sunset creates legal uncertainty for the President and the military. However, I can certainly understand that some kind of a sunset or review provision may be politically necessary to achieve consensus on a new AUMF.

I would oppose provisions in a new AUMF that would seek to restrict or micromanage the use of force by the President and the military such as an absolute prohibition on ground combat operations. If a limitation is necessary, I would support a clearer prohibition, such as "This authorization does not include authorization

for the ground invasion or occupation of any sovereign country or part thereof without further congressional authorization."

A new AUMF might include provisions providing certain procedural protections for the use of lethal force against Americans who join terrorist groups.

It might also authorize but also provide procedural safeguards for detention of terror suspects captured by the military outside the United States and certain congressional reporting requirements.

Finally, Congress should also make it a priority to revise and update the War Powers Resolution, which the National War Powers Commission, which was a bipartisan commission chaired by former Secretaries of State Baker and Warren Christopher, called impractical and ineffective. And I applaud the War Powers Consultation Act of 2014, which was drafted by Senators McCain and Kaine, to implement the recommendations of the commission.

Members of Congress have understandable concerns about approving a broad, new authorization and extending what many view as a forever war. However, I am convinced that Congress can come together to agree on a new AUMF that provides our military forces the clear legislative authorization and congressional support they need to defend the United States against Al Qaeda, ISIS, and other terrorist groups rather than continuing to rely on a 16-year-old authorization.

Thank you for inviting me here today, and I look forward to your questions.

[Mr. Bellinger's prepared statement follows:]

PREPARED STATEMENT OF JOHN B. BELLINGER III

Mr. Chairman, Ranking Member Cardin, and members of the Committee, thank you for inviting me to testify today about congressional authorizations regarding the use of military force against terrorist groups. It's a privilege for me to appear again before this distinguished committee.

Mr. Chairman, I especially want to commend you for your perseverance to reach a consensus on a new Authorization to Use Military Force against ISIS. And I applaud the very valuable contributions by Senators Flake and Kaine in S.J. 43 and by Senator Young in S.J. 31.

To start with my bottom line, I believe it is very important as a legal matter that Congress pass a new AUMF against terrorist groups 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, ISIS, and associated groups.

I have spent much of my time in government working on legal issues relating to fighting terrorism and specifically arising under the 2001 and 2002 AUMFs. I served as the Legal Adviser to the National Security Council from 2001 to 2005 and later as the Legal Adviser to the Department of State from 2005 to 2009, a position to which I was confirmed by the Senate. I was in the White House Situation Room during the 9-11 attacks and was later involved in drafting both the 2001 and 2002 AUMFs. Between 2001 and 2009, I engaged on an almost daily basis in discussions about legal issues relating to the use of military force, including detention, arising under both AUMFs.[1]

As the committee knows, the 2001 AUMF, which was passed by Congress on September 14, 2001 only days after the 9-11 attacks and signed by President Bush on September 18, 2001, authorizes the President to "to use all necessary and appro-

[1] I previously served as Counsel for National Security Matters in the Criminal Division of the Department of Justice (1997-2001); Of Counsel, Select Committee on Intelligence, U.S. Senate (1996); General Counsel, Commission on the Roles and Capabilities of the U.S. Intelligence Community (1995-1996); and Special Assistant to Director of Central Intelligence William Webster (1988-1991).

priate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

The 2002 AUMF focused on Iraq and the failure of Saddam Hussein to comply with Iraq's obligations under a series of U.N. Security Council Resolutions. The 2002 AUMF, which was signed by President Bush on October 16, 2002, authorized the President to "to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to (1) defend the national security of the United States against the continuing threat posed by Iraq; and(2) enforce all relevant United Nations Security Council resolutions regarding Iraq.

On the one hand, the 2001 AUMF is very broad. It authorizes "ALL necessary force" (emphasis added) without restriction as to type of force or geography. It also has no termination date. But it has one important limitation: it authorizes force ONLY against nations, organizations, and persons who planned, authorized, committed, or aided the 9-11 attacks (or harbored such organizations or persons). In other words, the 2001 AUMF requires a nexus to the 9-11 terrorist attacks.

For the last sixteen years, the 2001 AUMF has provided statutory authority for a very broad range of U.S. counterterrorism operations against persons and terrorist groups in at least seven countries, including the invasion of and continued military operations in Afghanistan; more than 500 drone strikes in Afghanistan, Pakistan, Yemen, Somalia, Syria, Iraq, and Libya; and detention of thousands of individuals in Afghanistan, Guantanamo Bay, and elsewhere.

The 2001 AUMF continues to serve a very important legal purpose. But as time passes, it is becoming increasingly outdated. It does not provide clear legal authority to use force against terrorist groups that have been formed or expanded after the 9-11 attacks, such as ISIS. When considering whether a potential counterterrorism action is authorized by the 2001 AUMF, Executive branch lawyers have spent countless hours debating whether the targeted individual or group is associated or affiliated or co-belligerents with the organizations that committed the 9-11 attacks, which principally means Al Qaida.

For more than a decade, including while I was still in government and since leaving government, I have advocated revising the 2001 AUMF in order to update it to address terrorist threats that have emerged after 9-11 and to clarify its parameters. Nearly seven years ago, in 2010, I wrote an op-ed in the Washington Post entitled "A Counterterrorism Law in Need of Updating," in which I argued that the 2001 AUMF should be updated because it provides "insufficient authority for our military and intelligence personnel to conduct counterterrorism operations today and inadequate protections for those targeted or detained, including U.S. citizens. . . . As U.S. forces continue to target terrorist leaders outside Afghanistan, it is increasingly unclear whether these terrorists, even if they are planning attacks against U.S. targets, are the same individuals, or even part of the same organization, behind the Sept. 11 attacks."[2]

Of course, the President has ample authority as Chief Executive and Commander-in-Chief under Article II of the Constitution to order the use of military force to defend the United States, U.S. nationals, and U.S. interests against terrorist threats. Although I will not try to explain the legal basis for every counterterrorist action by the last three Presidents, it is likely that all or most of their actions could have been legally justified under Article II alone, without reliance on congressional authorization. But every constitutional lawyer will agree that the President has stronger legal authority—as well as greater political legitimacy—when he orders the use of military force with the explicit authorization of Congress, rather than based solely on his inherent constitutional authorities.

The need to update the 2001 AUMF has become even clearer after the rise of ISIS in 2014. It is not clear that the 2001 AUMF authorizes the use of force against ISIS because ISIS did not exist (in its current form) in 2001 and was not the group that committed the 9-11 attacks. And it is questionable whether ISIS is associated with or a co-belligerent of Al Qaida, given that Al Qaida has repudiated ISIS.

When President Obama first ordered air strikes against ISIS in Iraq in August 2014, in his report to Congress pursuant to the War Powers Resolution, he initially cited only his Article II authority as the legal basis for the use of force.[3] In September 2014, however, faced with the War Powers Resolution's 60-day termination provision, the White House announced that the use of U.S. Armed Forces against

[2] John B. Bellinger III, "A Counterterrorism Law in Need of Updating," Washington Post, November 26, 2010.

[3] Letter from the President—War Powers Resolution Regarding Iraq, August 8, 2014.

ISIS actually was specifically authorized by Congress in the 2001 AUMF against Al Qaida and the 2002 AUMF against Iraq because ISIS, while not associated with Al Qaida, was a descendant of Al Qaida.[4] This interpretation relieved Congress from having to vote on a new AUMF against ISIS before the 2014 mid-term elections, but the Administration's reliance on the 2001 and 2002 AUMFs as specific congressional authorization was widely viewed as a very strained legal interpretation.[5] [6]

In February 2015, while continuing to insist that existing congressional authorizations provided all the authority he needed to use military force against ISIS, President Obama submitted a draft congressional authorization to Congress that would specifically authorize the use of force against ISIS. The President's proposal did not limit the use of force to specific countries, but it did include two significant restrictions. First, it did not authorize "enduring offensive ground combat operations" (a term that was not defined). Second, it terminated three years after the date of enactment. President Obama's proposal was also limited to authorizing use of force against ISIS. It did not repeal or revise the 2001 or 2002 AUMFs. In his submittal letter to Congress, President Obama stated "Although my proposed AUMF does not address the 2001 AUMF, I remain committed to working with the Congress and the American people to refine, and ultimately repeal, the 2001 AUMF. Enacting an AUMF that is specific to the threat posed by ISIL could serve as a model for how we can work together to tailor the authorities granted by the 2001 AUMF."

President Obama's proposal was not passed by either the Senate or the House. Members of Congress raised different concerns about the proposal, but in general terms, some members thought that it was too broad because it authorized open-ended use of the US military without geographic limits. Other members objected that the sunset provision and prohibition on "enduring offensive ground combat operations" imposed restrictions on the President that did not previously exist in the 2001 AUMF.

Need for an Updated Comprehensive Counterterrorism AUMF

Sixteen years after the enactment of the 2001 AUMF and three years after the beginning of the U.S. conflict with ISIS, Congress should repeal the outdated 2001 AUMF and replace it with a comprehensive new Authorization to Use Military Force that authorizes the use of force against named terrorist groups including Al Qaida, the Taliban, ISIS, and associated groups, with appropriate limitations. Congress should also repeal the 2002 AUMF, which is no longer necessary. An updated AUMF is legally necessary to ensure that our military has clear statutory authorization to use force against new terrorist groups that threaten violence against the United States and to ensure that U.S. military operations, including detention, withstand legal challenges in U.S. courts.

An updated AUMF should remove the limitation in the 2001 AUMF to organizations that committed the 9-11 attacks. As I have discussed above, it is increasingly difficult to demonstrate that new terrorist groups that have emerged in the last few years, such as ISIS, are associated with Al Qaida. A new AUMF should authorize the use of force against new groups that pose significant threats of violence to the United States whether they are associated with Al Qaida or not.

A new AUMF is especially important if the United States detains members of new terrorist groups such as ISIS.[7] If members of such groups are able to challenge their detention in US courts, they will undoubtedly argue that ISIS is not covered by the 2001 AUMF. A new AUMF that specifically authorizes the use of force against ISIS would provide a clear legal basis for detention of members of ISIS.

Members of Congress have understandable and valid concerns about approving a broad new authorization and extending what many view as a "Forever War." However, I am convinced that Congress can come together to agree on a new AUMF that provides our military the clear legislative authorization, with appropriate limitations, they need to defend the United States against Al Qaida, ISIS, and associated terrorist groups.

An updated AUMF should authorize the President to use all necessary force against named terrorist groups and associated organizations that have attacked or have an intention to attack the United States or U.S. persons. The AUMF should

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[4] White House Press Briefing, September 11, 2014, In December 2014, the White House issued a more detailed explanation of its legal rationale entitled "Report on the Legal and Policy Frameworks Guiding the United States Use of Military Force and Related National Security Operations."

[5] Bruce Ackerman, "Obama's Betrayal of the Constitution," New York Times, September 12, 2014,

[6] Ben Wittes, "Not Asking the Girl to Dance," Lawfare, September 10, 2014.

[7] See Jack Goldsmith, "The Practical Legal Need for an ISIL AUMF," Lawfare, February 8, 2017.

include a list of specific groups (which would presently include at least the Taliban, Al Qaida, and ISIS, and may include other named groups) but allow the President to use force against additional organizations if he notifies Congress (in either public or classified form) that he has determined that the additional organizations are associated with one of the named organizations and are engaged in hostilities or plan to engage in hostilities against the United States.

Potential Limitations

Geography. A new AUMF should not be limited geographically to certain countries. Although I fully appreciate that many members of Congress may be reluctant to vote to authorize the use of force in a potentially unlimited number of countries, terrorist groups move easily from country to country and will simply move to countries where Congress has not authorized the use of force. Even if a new AUMF does not limit the use of force to certain countries, the United States is still required by international law to limit its use of force in or against other countries, as I discuss in further detail below.

Sunset. President Obama's draft ISIS-specific AUMF proposed a three-year sunset, and several congressional drafts of AUMFs have also included sunsets of varying duration. As a former executive branch lawyer, I would oppose a sunset provision from a legal perspective. A sunset creates legal uncertainty for the President and the military. Moreover, a sunset provision may telegraph a lack of political resolve to the terrorist groups who threaten us. It would have been unthinkable for Congress to have limited its declarations of war against Germany and Japan to a term of years. Having said this, I appreciate that many members may be highly uncomfortable voting to approve an open-ended authorization, especially in light of the wide range of counterterrorism activities that have been conducted pursuant to the 2001 AUMF over the last sixteen years. I can understand that some kind of a sunset or review provision may be politically necessary to achieve consensus on a new AUMF.

Scope of Military Force. As an executive branch lawyer, I would oppose provisions in a new AUMF that would seek to restrict or micromanage the use of force by the President and the military, such as an absolute prohibition on ground combat operations. The President and the military need flexibility to conduct necessary military operations to defend the United States. That said, I can understand that Congress would not want to authorize in a counterterrorism AUMF the invasion and occupation of additional countries, such as happened in Afghanistan and Iraq. The prohibition in President Obama's proposed 2015 AUMF on "enduring offensive ground combat operations" seemed very vague to me. If a limitation is necessary, I would support a clearer prohibition, such as "This authorization does not include authorization for the ground invasion and occupation of any sovereign country or part thereof without further congressional authorization." A restriction on occupation could also be a useful signal that the United States does not seek to seize sovereign territory or resources of any Islamic country.

Use of Force Against Americans. Although not strictly necessary, a new AUMF might include certain restrictions on the use of lethal force or detention of U.S. citizens who join terrorist groups such as Al Qaida and ISIS. It is clearly legally permissible for the U.S. military to target without judicial approval U.S. citizens who have joined a foreign terrorist organization outside the United States, but Congress might reasonably require certain due process standards within the Executive branch, such as that the specific targeting of a U.S. citizen require the approval of the Attorney General based on a determination that the individual poses a serious threat to the United States.

Detention. Although the 2001 AUMF does not specifically mention authority to detain, it is now well accepted by U.S. courts that the words "all necessary and appropriate force" include the authority not only to kill but to detain. Although not strictly necessary as a legal matter, I believe it would still be legally helpful, both for the military and for potential detainees, for a new AUMF to specifically authorize detention of terror suspects captured by the military outside the United States and should specify some basic parameters, such as who can be detained and for how long and certain basic procedural safeguards against mistaken or unnecessary detention.[8]

[8] I also made this argument when I recommended updating the 2001 AUMF in 2010. John B. Bellinger III, "A Counterterrorism Law in Need of Updating," Washington Post, November 26, 2010.

Transparency and Reporting. It would also be reasonable and valuable for Congress to include reporting requirements in a new AUMF that would require the President to report, in public and classified forms, the counterterror activities conducted pursuant to the new AUMF, including information regarding additional groups against which the President plans to use force and countries where he plans to use force under the AUMF, specific terror suspects targeted, captured or killed, and numbers of civilians killed.

International Law

It is important for Congress to understand that the AUMF only authorizes the use of force under U.S. domestic law. The United States must separately comply with international law rules governing the use of force. The U.N. Charter, a treaty to which the U.S. is a party, prohibits the use of force in or against another U.N. member state unless the state has consented, the U.N. Security Council has authorized the use of force, or the use of force is in self-defense in response to an armed attack or imminent armed attack. It is important that the United States observe international law rules governing the use of force not only because the U.S. has agreed to be bound by the U.N. Charter but because we want other countries like Russia and China to follow the same rules.

As I explained in the Sixth Annual Lloyd Cutler Rule of Law Lecture last November:

> If the United States violates or skirts international law regarding use of force, it encourages other countries—like Russia or China—to do the same and makes it difficult for the United States to criticize them when they do so. If the United States ignores international law, it also makes our friends and allies who respect international law—such as the UK, Canada, Australia, and the EU countries—less likely to work with us. Unlike Russia and China, the United States has many friends and allies who share our values, including respect for the rule of law. But we lose our friends when we do not act consistent with law and our shared values.[9]

Updating the War Powers Resolution

In addition to revising and updating the AUMF against terrorist groups, Congress should also make it a priority to revise and update the War Powers Resolution, which has been increasingly ignored or stretched by recent Presidents. President Obama, for example, claimed that U.S. military actions in Libya did not constitute "hostilities" for purposes of the War Powers Resolution.[10]

Congress should review the very valuable report of the National War Powers Commission, a bi-partisan commission chaired by former Secretaries of State James Baker and Warren Christopher, which issued a report in 2008 that called the War Powers Resolution "impractical and ineffective." 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.

In addition to updating the 2001 AUMF, I hope that this Committee will recognize the need to update the War Powers Resolution. Any general reform of the War Powers Resolution must address contemporary conflicts and take into account increasing congressional reluctance to vote to authorize the use of force.

Conclusion

I appreciate the opportunity to appear before the Committee today. I hope that the Committee and the Senate will be able to reach consensus on a revised and updated Authorization to Use Military Force against terrorist groups engaged in hostilities against the United States.

The CHAIRMAN. Thank you very much.

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[9] John B. Bellinger III, "Law and the Use of Force: Challenges for the Next President," Sixth Annual Lloyd Cutler Rule of Law Lecture.

[10] "White House Defends Continuing U.S. Role in Libya Operation," The New York Times, June 15, 2011.

STATEMENT OF HON. KATHLEEN H. HICKS, PH.D., SENIOR VICE PRESIDENT; HENRY A. KISSINGER CHAIR; AND DIRECTOR INTERNATIONAL SECURITY PROGRAM, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, WASHINGTON, DC

Dr. HICKS. Chairman Corker, Ranking Member Cardin, distinguished members of the committee, I appreciate the opportunity to testify before you today. The subject of this hearing, authorization for the use of military force, is a critical one that fails to receive the attention that it deserves. Open deliberations over the decision to use military force have been foundational to our democracy since its establishment.

I will focus my testimony today on the imperative for a new authorization for counterterrorism operations, the essential constitutional role Congress must play in exercising its war powers through passage of a new AUMF, and the factors Congress should consider in developing an effective provision. I approach this issue not as a lawyer, but as a former defense policymaker, implementer, and evaluator, including participtation on decisions involving the use of U.S. military forces in counterterrorism under the existing AUMFs.

The United States faces an array of threats from violent extremist groups that necessitate counterterrorism operations in disparate parts of the world. Current U.S. counterterrorism activities generally operate under provisions of the 2001 AUMF, which was intended to sanction force against the individuals, groups, and states involved in the planning and execution of the September 11 attacks. To create a legal justification for U.S. military action taken against terrorist groups that have emerged since 9/11, notably including the Islamic State and Al Shabaab, the executive branch has relied on an ever-expanding interpretation of the category of Al Qaeda associated forces provided for under the 2001 AUMF. Relying on a 16-year-old authorization focused on countering core Al Qaeda for current or potential operations against the Islamic State and other emergent terrorist threats jeopardizes our Nation's principal belief in the rule of law and thereby risks the legitimacy of the institutions designed to create, carry out, and enforce such laws.

Alongside the courts, the United States Congress can serve as a critical safeguard against any perceived attempts to fundamentally alter the quality of civilian control of the military in this country. The path to reviving the vigorous exercise of civilian control through congressional war powers should start by repealing and replacing the 2001 AUMF.

Civilian control of the military is not just an end unto itself. Military force must be tied to policy objectives if it is to succeed. The 16-year reliance on the 2001 AUMF, the longest-standing congressional authorization for the use of force in American history, suggests a failure on the part of the Nation's political leaders to bear their strategic responsibility. A robust congressional role in use of force decisions can spur consideration of policy alternatives, raise important strategic considerations, and build the public support necessary for sustainable national security strategy. It strengthens our democracy and our legitimacy.

Most Members of Congress were elected after the 2001 AUMF and have not been party to a serious discussion on AUMF. Consequently, the American public has not had an opportunity to witness and participate in an open debate over the Nation's approach to authorizing force in support of its counterterrorism objectives in some time. The administration's submission of a strategy to defeat ISIS, as required by the fiscal year 2017 omnibus appropriations bill, will be critical for setting the stage for that public debate. What is our goal? How should we go about accomplishing it? What is the role of U.S. military force alongside that of other national and international actors and tools? Without an honest and frank national discourse on our strategy, we run the risk of the executive branch's activities separating not only from the legal basis upon which its use of force rests, but also a disconnect between the will of the people and the military actions pursued by its duly elected government.

To be effective, AUMF should strike an appropriate balance between the national command authority's ability to rapidly respond to emergent national security threats and Congress' ability to exercise appropriate oversight. Specifically, Congress should ensure any AUMF it considers address key issues in the following areas: targeted entities; geographical limitations; special U.S. military force limitations, such as regarding combat roles; reporting requirements; associated detention issues; and sunset provisions.

Stakeholders across the political spectrum rightly support a new AUMF to create legal clarity and political legitimacy for the use of American military force. The range of current proposals originating from the Senate and House offer viable pathways for repealing and replacing the 2001 AUMF and repealing the 2002 AUMF. The time is now ripe for reconsideration of the 2001 AUMF and discussion of congressional war powers.

Thank you in particular for your efforts to draw attention to this matter and for calling this hearing today.

I have walked through in my written statement my views on the various issues I referenced. I will simply say Mr. Bellinger and I agree on many issues. There are some areas of some disagreement, but I think most importantly we agree that there is an imperative to get to a solution on a new AUMF and move forward.

Thank you very much. I am open to your questions.

[Dr. Hicks's prepared statement follows:]

PREPARED STATEMENT OF KATHLEEN H. HICKS

Chairman Corker, Ranking Member Cardin, and distinguished members of the committee, I appreciate the opportunity to testify before you today. The subject of this hearing—authorization for the use of military force (AUMF)—is a critical one that fails to receive the attention it deserves. Open deliberations over the decision to use military force have been foundational to our democracy since its establishment. I will focus this written statement on the imperative for a new authorization for counterterrorism operations, the essential constitutional role Congress must play in exercising its war powers through passage of a new AUMF, and the factors Congress should consider in developing an effective provision. I approach this issue not as a lawyer but as a former defense policy maker, evaluator, and implementer, including on decisions involving the use of U.S. military forces in counterterrorism.

The Need for a New AUMF

The United States faces an array of threats from violent extremist groups that necessitate counterterrorism operations in disparate parts of the world. Current

U.S. counterterrorism activities in Afghanistan, Iraq, Syria, Libya, Yemen and elsewhere generally operate under provisions of the 2001 AUMF, which was intended to sanction force against the individuals, groups, and states involved in the planning and execution of the September 11 attacks. To create a legal justification for U.S. military action taken against terrorist groups that have emerged since 9/11, notably including the Islamic State and Al Shabab, the executive branch has relied on an ever-expanding interpretation of the category of al-Qaeda "associated forces" provided for under the 2001 AUMF. Relying on a 16-year old authorization focused on countering "core" al-Qaeda for current or potential operations against the Islamic State and other emergent terrorist threats strains credulity. It jeopardizes our nation's principled belief in the rule of law and thereby risks the legitimacy of the institutions designed to create, carry out, and enforce such laws.

Beyond the immediate issue of replacing the 2001 AUMF and repealing the 2002 AUMF, the need for revitalizing the whole of Congress' war powers has never been more essential. As I testified before the Senate Armed Services Committee earlier this year, "The United States Congress, the nation's statutes and courts, the professionalism of our armed forces, and the will of the people are critical safeguards against any perceived attempts to fundamentally alter the quality of civilian control of the military in this country." The path to reviving the vigorous exercise of civilian control through congressional war powers should start by repealing and replacing the 2001 AUMF.

Civilian control of the military, deeply rooted in our nation's history and constitution, is not just an end to itself. Military force must be tied to policy objectives and embedded in a broader foreign policy strategy if it is to succeed. In accordance with Clausewitz's dictum that war is the continuation of politics by other means, Congress and the President are responsible for providing the strategic political leadership needed to shape the employment of arms. Yet the sixteen-year reliance on the 2001 AUMF—the longest-standing congressional authorization for the use of force in American history-suggests a failure on the part of the nation's political leaders to execute this responsibility. A robust congressional role in use of force decisions can spur consideration of policy alternatives, raise important strategic considerations, and build the public support necessary for sustainable national security strategy. It strengthens our democracy and our legitimacy.

Most members of Congress were elected after the 2001 AUMF and have not been party to a serious discussion on AUMF. Consequently, the American public has not had an opportunity to witness and participate in an open debate over the nation's approach to authorizing force in support of its counterterrorism objectives in some time. The administration's submission of a strategy to defeat ISIS, in accordance with Congress's mandate in the FY2017 Omnibus., is a critical associated element to set the stage for that public debate. Without an honest and frank national discourse, we run the risk of the executive branch's activities separating not only from the legal basis upon which its use of force rests, but also a disconnect between the will of the people and the military actions pursued by its duly-elected government.

Essential AUMF Elements

To be effective, AUMF should strike an appropriate balance between the national command authority's ability to rapidly respond to emergent national security threats and Congress's ability to exercise appropriate oversight. Specifically, Congress should ensure any AUMF it considers address key issues in the following areas:

- Targeted entities;
- Geographical limitations;
- Special US military force limitations, such as combat roles;
- Reporting requirements;
- Associated detention issues; and
- Sunset provisions.

There are several current proposals for AUMF addressing some or all of these issues. In particular, the Kaine-Flake provision serves as the most comprehensive starting point for developing an approach that balances oversight with the need for operational flexibility. The related proposals by Senator Young and Representative Schiff complement the Kaine-Flake proposal in key areas. Where a current proposal appears relatively advantageous, I attempt to highlight it below.

Targeted Entities

It is important that any proposed authorization clearly identify the targeted entities. I believe that those entities should include al-Qaeda, the Taliban, and the Is-

lamic State of Iraq and Syria (ISIS). However, an authorization should not be limited to these entities. As in 2001, it must address the thorny issue of "associated forces." In addition to creating a group of "initial associated persons or forces," the proposed Kaine-Flake legislation provides a pathway for the President to identify additional entities while allowing the Congress to play a meaningful and appropriate oversight role. I believe this approach meets the principle of balancing prudent oversight and effective execution.

Use of force against nation-state belligerents, such as the U.S. naval and air strikes conducted against the Syrian regime, should be debated authorized separately rather than contained under this AUMF.

Geographical Limitations

In addition to determining who the President is authorized to use force against, it would be wise for Congress to require the President to justify where he or she seeks to execute a use of force under the AUMF. The Kaine-Flake legislation authorizes force in Afghanistan, Iraq, Syria, Somalia, Libya, and Yemen and creates a straightforward procedure that allows the executive to expand operations into additional territories while providing the Congress with effective oversight. I believe this basic approach-geographic specification and a procedure to extend it- is appropriate and operationally feasible.

U.S. Force Limitations

It would be unwise to constrain future military commanders unnecessarily in the options they could put forward to civilian leaders to achieve operational goals. At the same time, it is appropriate and indeed wise for Congress to create a framework that conveys the will of the American public regarding the parameters of such force employment.

Employing US forces in ground combat operations has been a persistent source of debate and concern for the American public. It is thus appropriate for a new AUMF to create a most stringent notification requirement for the President's use of ground forces in combating terrorist groups. Representative Schiff's proposed legislation allows the executive the ability to exercise an informed judgment on ground combat force deployments while also ensuring that Congress be notified of such an action as soon as possible, a faster reporting requirement than exists for other actions authorized by an AUMF. Significantly, the proposed legislation's definition of "ground forces in a combat role" provides needed flexibility by excluding a range of activities that have been generally accepted as below the threshold of greatest concern. I recommend the Senate consider adopting a provision into its AUMF along the lines that Representative Schiff has delineated.

It is reasonable for Congress to seek notification as soon as possible when any US combat mission—from the air, ground, or sea—is undertaken outside of acknowledged theaters of ongoing U.S. military conflict. I thus believe Congress should consider an "as soon as possible" notification requirement when the executive branch has used air or sea forces in a combat role outside of designated operational theaters but otherwise within the AUMF's scope. Such a requirement would be less geographically restrictive than the ASAP notification for ground force use in a combat role, allowing greater flexibility in designated operational theaters for air- and sea-based combat operations. Like the ground combat force notification, air and naval combat forces would need to be defined in a reasonable way to exclude special operations forces, intelligence, surveillance, and reconnaissance missions, and other roles that fall below a reasonable interpretation of the threshold for combat forces. Strikes from the air or sea conducted by U.S. conventional forces against targets in Yemen might constitute one example of an action otherwise authorized but about which Congress would want immediate notification.

Reporting and Disapproval Requirements

Beyond the ASAP notification for combat uses (globally for ground forces and geographically restricted for air and sea forces), any proposed AUMF should have a regular reporting requirement to ensure that there is not an unchecked expansion by the executive of military operations and to keep the public informed regarding the direction of operations. The requirements across the proposals currently before the House and Senate vary, but the specific provisions matter less than ensuring there is a meaningful reporting process in a new AUMF.

Authority for Detention

Congress should consider the detention implications of AUMF as it deliberates over possible provisions. It should be clearly understood how a President might interpret his authority for detention and judicial proceedings as it is associated with the AUMF.

Sunset

Finally, a new AUMF should include a sunset provision. Congress must not resign itself to an inability to legislate on use of force matters. The authority granted by the Flake-Kaine proposal expires after five years while the authority proposed by Representative Schiff expires after three years. The three- to five-year timeframe for sunset and passage of new authorization is appropriate for ensuring Congress is an active partner in use of force decisions, ensuring the authorization is aligned to changing geopolitical and other realities, and creating stability for military planners.

Conclusion

The time is ripe for reconsideration of the 2001 AUMF and congressional war powers. Congress's role in exercising civilian control of the military is fundamental to our government. Stakeholders across a broad political spectrum rightly support a new AUMF to create legal clarity and political legitimacy for the use of American military force. The range of current proposals originating from the Senate and House offer viable pathways for repealing and replacing the 2001 AUMF and repealing the 2002 AUMF. Our constitutional republic relies on a vibrant discourse between the executive and the legislative branches on issues of use of force.The public should expect it. Thank you for your efforts to draw attention to this matter, by calling hearings and engaging the executive branch, experts, and the public on the AUMF, war powers, and U.S. counterterrorism strategy.

The CHAIRMAN. Thank you both.

I am going to reserve my time for interjections.

It is my understanding the minority party is not agreeing for us to go past noon. I understand. The health care issue—there is some bunking up that is occurring. So we are going to remain 5 minutes strict. Please do not ask questions that end at 5 minutes and move on.

And I really hate it. This is a serious discussion and a serious hearing, and we may need to reconvene. But we thank you both for being here.

With that, Senator Cardin.

Senator CARDIN. Mr. Chairman, again I agree with you. I think this subject needs the open hearings in our committee. So I join you in finding ways that we can make sure we have ample time for this debate.

So I just want to follow up on both of you. I think both of you have had a lot of agreement.

After the attack on 9/11, all of us wanted to take action against those who caused that tragedy. And we had the vote in Congress. And we wanted to give the President maximum discretion on how to go against the perpetrators of that attack. So we passed an authorization for use of military force. It was not terribly controversial, but it did contain a restriction. It was against those who attacked us on 9/11. And now we see that authorization being used against groups that were not in existence on 9/11.

Do either one of you think that Congress has authorized the use of our military force against the Assad regime in Syria? I hope that is a yes or no answer. [Laughter.]

Mr. BELLINGER. I certainly do not think that is what Congress intended 16 years ago.

Senator CARDIN. Right.

Dr. HICKS. Agree, certainly not under the two AUMFs in discussion.

Senator CARDIN. And, of course, on June 18th, U.S. forces shot down an armed regime fighter jet in northern Syria.

And then we could get into whether we have authorized the use of military force against the terrorist groups, ISIL or ISIS, which I do not believe we have authorized. And yet, I am in support of America pursuing these terrorists. But I do not believe Congress has authorized force.

So I guess my first concern is when you give the President maximum authority, looking at how three previous administrations—one current and two previous administrations—have used our authorization, do we not have to be particularly concerned on how we define this so it is not misused by future administrations?

Mr. BELLINGER. Senator, I agree with all of what you have just said, and I think the challenge is going to be to try to get that tailored authorization that authorizes the use of force against the groups that we are actually fighting,so that we have congressional support, but that does have the appropriate limitations. And rather than continue to let successive Presidents stretch this authorization that was used for a particular purpose, this is actually a time when some appropriate limitations that all could agree on could be added. It has been stretched beyond the recognition of what was passed in 2001. I agree.

Senator CARDIN. Dr. Hicks, I am going to let you answer the next question because this is the dilemma we face. You have an administration who says, look, I am just using President Obama's interpretation. I can do pretty much anything I want to do. So why should I bother even dealing with Congress because I have all the authorization I need?

I agree with you that Congress has a responsibility to be clear on its authorization and to repeal the 2001 and replace it. How do we do that when we do not know what the President wants to use as far as military force? He has not come to us.

Dr. HICKS. As I said in my testimony, I do think having that dialogue, and certainly in the form of a strategy from the administration, is central to understanding the right set of tools for——

Senator CARDIN. But they are not having it with us.

Dr. HICKS. I am sorry?

Senator CARDIN. The administration is not having that dialogue with us.

Dr. HICKS. Correct. No. I am in complete agreement with you. You all have passed a requirement for them to submit that. It has not come in.

That said, I think you can still move forward on an AUMF. It may not be the AUMF they ultimately desire, but the burden is on them then to come forward with their strategy.

Senator CARDIN. So you believe the fact that we have an authorization out there that is being misused is more important for us to clarify than knowing exactly what the administration wants because normally Congress does not pass an AUMF unless the commander-in-chief wants an AUMF.

Dr. HICKS. Well, you do have the administration certainly from the Defense Department indicating they want a new AUMF, just as the Obama administration in theory wanted a new AUMF as well.

I think the issue here is there is that a major policy and strategic issue, as I said, about where we go on the counter-ISIS campaign,

let alone where we go on counterterrorism more generally. And that issue is not going to go away in and of itself by passage of a new AUMF. But by the same token, you need a new AUMF or they are just going to continue to act under the authority of the 2001.

Senator CARDIN. And I think both of you agree we should repeal both 2001 and 2002—replaced. I understand with a replacement. But both should be repealed. And you understand the need for a sunset or review process, which I appreciate both of your testimonies.

Thank you, Mr. Chairman.

The CHAIRMAN. You are a great example to all.

Senator Flake?

Senator FLAKE. Thank you, Mr. Chairman. I want to thank the chairman and the ranking member for having this hearing and for, not just in this area, but in all areas, looking to reassert this committee and our proper constitutional role with regard to foreign policy. And nowhere is that more needed in my view than in this area. The Constitution gives the Congress the authority to declare war. If we are not going to declare formal war, if we are going to move forward on the basis of an AUMF, then certainly Congress needs to be more involved.

And I think that we have struck—myself and Senator Kaine—a pretty decent balance here in terms of the interests of the committee and its members. And I hope that we can move forward on that basis.

I just wanted to address a few of the topics, but to say, as well, that to work on the basis of a 16-year-old AUMF is simply not tenable. Our allies need to know where we are. Our adversaries need to know where we are, that we speak with one voice. Our troops in the field need to know that we speak with one voice. Not having a current AUMF, allows Congress—lets us off the hook and allows us to criticize the administration of either party when we should be involved and have skin in the game, as it were.

I would really like, Mr. Bellinger, your thoughts. I appreciate your thoughts on a sunset. In an ideal world, I think you should not have a sunset. You know that we did not have a sunset with regard to World War II. I would note that that was against a sovereign government where unconditional surrender was the only acceptable outcome. Here, when you are dealing with non-state actors, it is not quite as clear cut.

And I would note that in the House, when we voted on the AUMF in 2001, it was a much different body with different Members. 300 Members who are in the House today did not vote on the 2001 AUMF, more than 300 Members of the House of Representatives. Here in the Senate, do you want to know how many Senators voted on the 2001 AUMF? 23. So three-quarters of this body has not voted on an AUMF. And when you have a situation like that, we are not speaking with one voice. We are let off the hook. We can criticize the administration. They can criticize us. We need to be together on matters of foreign policy of this importance. And so that is why I am so pleased that we are moving ahead on this.

Can you give some thoughts on that with regard to a sunset? Is it a little different situation when you are dealing with nation states opposed to non-state actors?

Mr. BELLINGER. Thank you, Senator. I completely agree with all of your remarks both on the overall philosophy and particularly the need to back our armed forces. As all of you know, I think all 535 Members say we completely back our military. We want to give them the resources they need.

But one of the resources is legal resources, legal backing. I, as a lawyer, want our troops to have the legal authorization that they need, and the current law is unclear now as to whether the fight that is being fought is actually legally backed by Congress. And if it actually comes to detention and we start detaining members of ISIS, members of ISIS, if they have an opportunity to get into court, are certainly going to say that it is not authorized by Congress. Perhaps the President will fall back on his Article II powers, but there are real practical concerns about this stretch to have the AUMF covering ISIS.

On the sunset, yes. As a legal matter, no administration lawyer is going to go in and propose that the authority expires in 3 years or 5 years. It just creates legal uncertainty for commanders. As I said in my written testimony, we would never have done that in World War II to say, "well, we are declaring war but only for a year and then we will revisit it in a period of time." And this is a serious threat. So to have Congress tell the military that we are only in it for a year or a couple of years is legally problematic. But that is from a legal perspective.

From a political perspective, I certainly understand that Members of Congress and the American people have said that last AUMF lasted for 16 years and got stretched beyond all sorts of things. So this time, I would like have a sunset. I think that is a politically reasonable thing for you to agree on. I just say, as a lawyer, one would not want to go in asking for a sunset.

Senator FLAKE. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Another a great example.

Senator Coons?

Senator COONS. Thank you, Chairman Corker. Thank you, Ranking Member Cardin. Thank you to the witnesses, and thank you to Senators Flake and Kaine for their hard work in framing what we are debating and discussing today and for the committee as a whole for their engagement on this. I think this is an opportunity for us to demonstrate how the Senate can work well together in an important and difficult constitutional moment.

When the President sends American troops into harm's way, those men and women, their families, and the American people deserve clear authorization from Congress, a robust debate in Congress, a strategy that outlines the path to success. And at the moment, I am concerned we have none of those three.

President Trump has not yet presented to us a strategy for success in Afghanistan and Syria. We have taken important steps on a bipartisan basis in this committee, and I am encouraged to see we are having this hearing today and that there is, more than not, agreement between our witnesses. But I will note the absence of an administration witness.

The decision to send Americans off to fight in battle deserves our thoughtful consideration and a bipartisan effort to produce a clear

path forward. This is not a partisan issue. We have more than 8,000 American troops deployed in Afghanistan, and there are reports several thousand more may soon be deployed. We have hundreds of American troops in Syria who have recently been taking fire from both ISIS and Assad forces in one of the most dangerous and complicated battle spaces on earth. I want them to succeed. We all want them to succeed. But what does success look like? How do we define success? That requires a strategy. What are the national interests we are defending and advancing on these battlefields? We have to have a conversation between the branches, executive and legislative, about what our goals are in Afghanistan and Syria and what it will take to achieve them.

Particularly, when it comes to our military, I am not here to criticize the President or disagree with my colleagues across the aisle. I am here to work with them so that we can do our best to provide our troops with a strategy, the resources, and the support they need.

So if I might, I am encouraged that our witnesses both largely agree. Would you take the time I have left to talk to what are the strengths of the AUMF proposed by Senators Flake and Kaine, and what do you see as the areas that might require amendment or improvement? I am broadly supportive and encouraged by what has been framed and what has been presented.

Dr. HICKS. We do have a couple areas of disagreement, but again, as you point out, Senator Coons, we agree on many of these areas.

I think the one thing I would take a moment to comment on is that I think Kaine-Flake is a great beginning of that conversation in the area I talked about. Two areas that are not covered under it that need discussion, not necessarily ultimately inclusion, but discussion, are the detention implications.

And then the second is is there a special attention to be paid to forces used in a combat role. I would say Representative Schiff's bill in the House which speaks to the issue of ground combat forces and essentially as a soon as possible notification—it is not an exclusion or a limitation but a notification procedure that is faster for use of forces, in his case for ground forces in a combat role—I think is an appropriate balance of giving absolute operational flexibility to the commanders in the executive branch while at the same time allowing the fastest possible dialogue to begin with Congress.

I will stop there.

Mr. BELLINGER. And I will just, Senator, focus on two things. Again, I thank Senators Kaine and Flake for really working incredibly hard on this. I know you have listened to—it must be hundreds of people—to get what the concerns are and try to get it right.

I guess I would say one thing is a nice to have and one I think I would try to fix. The try to fix is the limitation on associated forces having to be part of Al Qaeda. I would at least like to talk to you all some more about that. I know you must have gotten that after a lot of thought. We all know that one of the top two or three hardest things is defining the associated forces so that Congress is not authorizing use of force against associates of affiliates of people who say nice things about Al Qaeda. We want it to be either Al

Qaeda groups that are fighting along with them and keep it narrow.

To define associated as part of Al Qaeda seems to me to be a little bit too tight in that there may be groups that are using the terminology that both administrations have used of co-belligerency. You have a different group that is fighting alongside and allied with Al Qaeda, but they really are a different group and they are not part of Al Qaeda or ISIS. So that is one thing that I would be—that is a little bit too tight. I know you want to keep this tight. And I do think that association cannot be just a group that shares the ideology but is writing white papers somewhere. It has got to be a group that is, in fact, fighting along with Al Qaeda in some way. So I think that idea of co-belligerency is important.

Senator COONS. Thank you both for your testimony. I appreciate the opportunity to get your input.

The CHAIRMAN. Thank you.

Senator Young?

Senator YOUNG. Well, first, I want to thank our chairman for his leadership in convening this panel about this important issue. I also want to thank my fellow members, Kaine and Flake, for their longstanding leadership on this matter.

Mr. Bellinger, Dr. Hicks, you have each spoken to the importance of and the appropriateness of an AUMF not just debating it but ultimately Congress passing an AUMF focused on ISIS. Allow me to flip this issue on its head for a moment and ask a question of you in this way.

If in 1 year, 2 years, God forbid 5 years, U.S. forces remain engaged in hostilities against ISIS and Congress still has not passed an AUMF, why do you believe the average American, the rank and file Hoosier, should be concerned?

Mr. BELLINGER. I will say one thing legally and one thing more generally.

Legally—and I know this is of particular interest to you. It also answers your question and Senator Coons'—is that it is not clear about detention authority. If we do start detaining members of ISIS under this old 2001 AUMF, there really is potential legal infirmity. And so Congress has not acted to provide clear authority to detain members of ISIS.

More generally, I would say to the American people that they should be concerned that our Congress, while saying that they are backing the military, is not giving the military the legal support that they need. Congress does not have your backs legally.

Dr. HICKS. I would just add to that that we are a Nation of laws, and if we lose that, I do not know what we stand for. I do not know why Americans should believe in the institutions that they have elected and that they support through the courts. And I think that is fundamentally a problem for American democracy.

Senator YOUNG. So there is some overlap between my concerns and yours. I, of course, am concerned about our constitutional prerogatives, our obligations, our duties as elected representatives of our respective constituencies. And this is not a war making power that can be delegated to the executive branch. We cannot outsource our responsibilities as difficult as it might be to come to terms on

some of these issues. And I do, indeed believe, that we can find some principled compromises and pass an AUMF.

As a former Marine Corps officer, I perhaps am more sensitive—maybe not—but I am certainly very sensitive to the fact that we do not want to leave our troops who are in the field in the lurch. They do need to know that the American people through their elected representatives have their backs. And I think even having a debate on this issue shines a bright light on the sacrifices they are making and on the propriety or impropriety of our involvement in different areas. So that is another point.

And lastly, I believe that this new AUMF would address the concerns, Mr. Bellinger, you have mentioned several times throughout this hearing about detention authority. I was a Marine Corps intelligence officer. I understand the importance of eliciting intelligence, human intelligence, from detainees and from other sources. It helped save lives on the battlefield and here in the homeland. But it is not clear that under current authorities that can be done.

So I intend to build on my efforts, having done the best I could to draft an AUMF, and I am prepared to make principled compromises with other members of this committee, other Members of Congress as we move forward so that we can formulate an AUMF that can pass this committee and pass out of the United States Senate.

With respect to the authorization to detain—I know it has been mentioned time and again, but I want it to be reinforced. So, Mr. Bellinger, do you believe specifically authorizing the detention of terror suspects captured by the military outside of the U.S. would be legally helpful? You have already said yes. Why is this so important?

Mr. BELLINGER. The courts have held that the words "all appropriate and necessary force" do include the authority to detain. So the courts have said that, but it would be more helpful if Congress were to specifically say that and particularly with respect to ISIS.

Senator YOUNG. So if we do not, there will be an invocation of habeas. There will be a habeas petition filed. Is that correct? Can we not predictably say that that will happen from a number of these detainees based on recent history?

Mr. BELLINGER. Potentially, yes. Right now, they have the right to habeas if they are in Guantanamo. If they are held somewhere else in Iraq or elsewhere, it is not clear they would have the right to habeas.

Senator YOUNG. So in my Senate joint resolution 31, the AUMF I put together, it does make crystal clear that this is within the authorities we have. We can get the combatants off the battlefield. We can be eliciting intelligence from them. And I would hope this would be part of a future AUMF.

Thank you.

The CHAIRMAN. Thank you so much.

Senator Menendez?

Senator MENENDEZ. Thank you, Mr. Chairman, for holding the hearing. I hope we can use it as a catalyst for this body to take up its constitutional responsibility of declaring war and guiding the civilians who must ultimately make the most consequential decision of sending America's sons and daughters into battle.

In 2014, I authored a specific authorization for the use of military force to combat the Islamic State. As chairman at the time, we worked extensively with the executive branch as it developed and critically sought congressional support of the authorities it believed it needed to confront growing threats against the United States and our strategic interests. We worked closely with Republicans on the committee as well to ensure that we exercised the most solemn responsibility we have, which is sending young men and women onto the battlefield to protect and defend the United States. And we did so with a deep understanding and clear guidance of what we wanted to do. We may not have all come to an agreement as to all the elements of it, but there was a sincere effort.

I was disappointed that the Senate as a whole and the House failed to take up the legislation and failing to deliver is nothing short of an abrogation of constitutional duty.

With this President quietly delegating authorities to the Secretary of Defense and commanders in the field, I think it is critical that this committee and the Congress as a whole embrace our oversight duties. We have had nine Americans killed in combat missions this year. Campaigns have ramped up. I read about a surge in Afghanistan. And I continually do not have a sense of what the totality of the strategy is.

So as Congress considers a new AUMF, Ms. Hicks, how should we consider what some have termed the President's delegation of civilian control to the military itself? Should and how can Congress effectively weigh in when the civilians who are supposed to be making critical decisions, including where to send troops and how many of them, have delegated that authority to the entities of which they are supposed to be in control of?

Dr. HICKS. I think this is a very important issue to be raising. So I appreciate you asking the question.

There is always a debate to be had over the degree to which the President should be delegating authority down into, in this case, the Defense Department. I think you are well aware that there was a view from the military, broadly speaking, that the last administration held that too tightly. I think the view of most of us who look at the defense community in a pretty bipartisan way think we are going very much the opposite direction. So it is swinging as a pendulum.

So the good news, I guess, is that there is another civilian in the chain of command, and he is the Secretary of Defense. And together with the President, he constitutes the national command authority and he should be held responsible for decisions on use of force and so should the President, obviously. So there is a civilian in the chain that remains, but it is one.

And I think what Congress can do, obviously, is AUMF, war powers enforcement, the power of the purse, and I would just add, for this committee in particular, building up or maintaining or sustaining or protecting the other tools of national power that kind of fall out through that kind of decision when it moves from the President down directly in the Defense Department, even the most enlightened Secretary of Defense is going to be looking at this issue set through a military lens. That is his job. What you lose in that

is any consideration or large consideration of diplomacy, economic tools, development, et cetera that might be appropriate to the issue at hand. So anything you can do as authorizers in that space I think would be welcome.

Senator MENENDEZ. I appreciate that. I think it makes all the more compelling case for an AUMF to actually be passed.

Let me ask you both this. Since 9/11 we have grappled with effectively confronting threats that are non-state actors, which almost by definition makes the geographic applicability of any authorization a complicated subject and one that you both touched on in your testimonies. Given the nature of the threats, how do we balance between giving our leaders the ability to target threats who move between borders and not allowing this mission to creep to operating in every country in the world? For example, Islamic State. Some claim to be part of the Islamic State but operating out of an ally country like the United Kingdom. How do we deal with that issue?

Mr. BELLINGER. I will take a first step. I completely understand the concern, particularly after the 2001 AUMF, that one does not want to be authorizing the use of force all around the world. My European colleagues, when I used to talk to them, were always worried that when we said there was a global war, that we were going to go use force in London or Germany or elsewhere, and I had to assure them that, no, that we were not. And that reason is that international law limits our use of force.

So I do not think a domestic authorization should limit the use of force against groups to certain countries. The authorization is against the groups. I think you could have a sense of the Senate that says we think we should be limited to these seven countries, but I would not specifically say force can only be used in these countries because, as you say, Senator, the groups move. But again, international law limits where the United States can use force to those countries that have either consented to the use of force or are unwilling or unable to prevent a threat from their country. But I would not say force can only be used in these seven countries.

Senator MENENDEZ. Thank you.

The CHAIRMAN. I know you missed my riveting opening comments, but I did thank you for your leadership in 2014 on this topic.

Senator Isakson?

Senator MENENDEZ. Mr. Chairman, I got a full briefing on your opening comments. [Laughter.]

The CHAIRMAN. Thank you.

Senator ISAKSON. You know, Dr. Hicks, when you made your testimony and you used the words "repeal and replace," you used it at a time that used to be two verbs that connotated action. Now it is two verbs hooked together that connotate difficulty in the Congress of the United States in terms of coming to a resolution, which begs my question.

On the non-state actors referred to by Senator Menendez and others, Senator Young, in drafting this AUMF, should we be specific in not naming names in terms of group names or people that we are attacking but rather connotating the actions of groups so we do not find ourselves handicapped by the limitations that the two

are one that AUMF limits us to today because it refers to 9/11 partners?

Dr. HICKS. I will take a first cut at that. I do think you have to specify groups. I think the problem, as has been evident even in this discussion today and certainly in the last 16 years, is this thorny issue of associated forces, and then the process for expanding, if you will, the interpretation of associated forces and then the ability to review and renew, which I consider a sunset clause being an essential element of for Congress to adapt just as the threat may adapt.

So I think what Kaine-Flake has done successfully is put a pathway in there where it names the forces, which I think is an appropriate limitation, but provides a process by which the executive branch can come forward with groups that they would like to have added, if you will, to the list. And obviously, they have to be able to defend the associated forces under the other criteria that would be in the provision specifically relating, for example, to threats directly to the United States and its forces and other personnel.

Mr. BELLINGER. Senator, I agree with that. I think it is important to have a list of named groups that you are authorizing the use of force for, but since these groups can morph and there can be new groups, it is important for the President to be able to add groups. But we are not authorizing them against groups that are completely unassociated that might come up. That would require a new authorization, but you should authorize use of force against groups that are associated and really co-belligerents engaged in the hostilities with the main groups, Al Qaeda, the Taliban, ISIS, that you are authorizing the use of force against.

Senator ISAKSON. So basically give yourself some flexibility to be more adroit and quicker in terms of a declaration against another group than tying yourself like we have for the last 17 years to the 2001 attacks—or 16 years. Is that right?

Mr. BELLINGER. Precisely.

Senator ISAKSON. Well, I would just point out that I think Congress should be involved. I think a new AUMF does make a lot of difference. But I hope when we get into a robust debate, it will be a robust debate with an endpoint and a decision because inaction by a Congress that is trying to write an AUMF is worse than no action at all.

Thank you very much for your attendance today.

The CHAIRMAN. Senator Udall?

Senator UDALL. Thank you very much, Chairman Corker.

And let me just say that last week with what we did, the Russia-Iran sanctions, what we did on the floor, what we did on the committee and all the negotiations, I think that was a good example of what we need to do here in terms of reasserting the authority of this committee and reasserting the Congress into these very important issues, especially the war making authority, which for too long—and I think both of you have said that—we have not stepped up. We have not pushed to do our constitutional duty.

So I want to thank you both for your testimony so far.

Like some of my colleagues, I was in Congress in 2001, and I voted for the 9/11 AUMF to authorize military action against Osama bin Laden and Al Qaeda and their allies, including the

Taliban. I would have never imagined that vote supporting U.S. troops in Syria in 2017 in engagements with the Assad regime, and I do not think anyone else did either. And as we are speaking, I think we have another drone being shot down, but we had this contact with the Syrian jet.

How do you all view, Mr. Bellinger, the legality of doing that under these current circumstances when we are in Syria without an authorization?

Mr. BELLINGER. So thank you, Senator.

On Syria, I have to say just on the law, I was puzzled about the statements coming out of the Pentagon that the shoot-down was authorized by the 2001 AUMF, and I hope that they will clarify that. I think the President may well have Article II authority constitutionally. I do not know all the facts, but he may have decided it was in our national interest to shoot down the plane. But it is hard for me to see the Congress, by authorizing the use of force against organizations and nations and groups that committed the 9/11 attacks, authorized the use of force against Syria.

Senator UDALL. So you would say questionable legality at this point if not outright——

Mr. BELLINGER. Well, the President may well have constitutional authority. He has broad constitutional authority to use force that is in our interest, and it may well have been in our interest. But it is harder for me to see that Syria was one of the nations that committed the 9/11 attacks or is associated with them or is a co-belligerent with them.

Senator UDALL. Please.

Dr. HICKS. I would just like to add. The other piece of this, clear in Mr. Bellinger's answer, is the lack of transparency. Even going back to the strike against Assad, against the airbase related to chemical weapons use, I do not think we have ever seen—at least I am not aware of the legal justification for that. It may well be defensible, but we have not seen any legal basis. I think Congress should be insisting on seeing these war power filings in whatever means possible to get the legal basis that is being used. There may be a very defensible way they are framing it, but we would not know because we are not being told.

Senator UDALL. Ms. Hicks, on the issue of the sunset, I did not hear you say what your position was on that because I wanted to ask a question on that.

Dr. HICKS. Yes. I believe in a sunset. I think it is an appropriate way in which to ensure that you are adapting with the threat and keeping Congress and thus the public engaged in the discourse over use of force.

Senator UDALL. So that is one of the issues you two disagree on in some respect I would think is on the sunset.

Let me just add a question to this. When we have considered these authorizations of force, I have added sunset provisions, and the reason for doing that is looking at the history of where we are today. I mean, what in fact has happened is Congress has not stayed engaged. And so one of the ways for Congress to be engaged is you say, you know, you are going to come back and look at this in 3 years, or you are going to come back and look in 2 years. So how can you force that engagement within an agreement without

having some kind of sunset? That is really my question. And you two may have a little bit of disagreement on that. And I only have 30 seconds.

Mr. BELLINGER. I will just say I come at this, Senator, as an executive branch lawyer where I am sure you can understand the President and the military is not going to ask for a sunset on its authority and say please sunset my authorities. But from a political perspective, particularly over the last 16 years, I completely understand that one might want to have a sunset. If I were in your position, would I vote for a sunset if that were the way to get consensus? I might well do that. If I were writing the legislation as a lawyer who wants to not have uncertainty for my troops, I would not put in a sunset. But I think you can see the difference there.

Senator UDALL. Thank you, both, very much.

Senator RISCH [presiding]. Thank you, Senator.

Senator Paul? Before you do that, let me take the chair's prerogative here. One of the things is there is always a sunset annually because, obviously, Congress can defund or put language in the authorization, but that has not been particularly effective in recent years. But it is always there.

Senator Paul?

Senator PAUL. Madison wrote that the executive branch is the branch most prone to war. Therefore, the Constitution with steady care granted that power, vested that power in the legislature. In no way did they argue that Article II was unlimited authority to commence, initiate, or engage in war at all. In fact, most of the Founding Fathers would disagree with you on saying that Article II gives the President the authority to commence in war. To defend the country under imminent attack, to execute the war once the war is initiated—the initiation of war is congressional duty, not the President's at all.

Even the War Powers Act a couple centuries later—nobody reports this. It has a reporting requirement in there, but it also says in another section that this is a reporting requirement for things that are either imminent attack or authorized war. There is nothing in the War Powers Act about unauthorized war because we are not supposed to be doing it.

So I agree completely with the authors of this that we should be doing something. I applaud their motives. I do not question their motives, but I do doubt that this will change any of our military interventions as to what we are doing.

I want to know if we are going to limit the President's power. Are we going to take back our power?

I think a 5-year sunset—and I do not mean to be mean—but is essentially nothing. I mean, we have had millions of people die in 5-year wars before. So I think it is virtually meaningless.

As far as the geographic limit on there, also virtually meaningless. If you look at associated forces, part of or substantially supports Al Qaeda, the Taliban, or the Islamic State, well, just the Islamic State is in 32 countries right now. I mean, you add in Taliban and you add in Al Qaeda, we are probably at least 50 or 60 countries. I am not voting to go to war in 50 or 60 countries. If we are going to limit something, let us have a debate. If we are going to just simply pass something to say we passed something—

but it is not limiting—I mean, one of our testimonies today says basically you got all the Article II, and it would be nice to have an AUMF. No, it would not be nice. That is the Constitution. There is supposed to be no war without an AUMF. We have been illegally at war for a long time now. This is an illegal war at this point.

So when we look at this and we ask ourselves what are we doing here, are we going to limit the power, are we going to limit the duration of war, are we going to identify our enemy—but, you know, the 9/11 proclamation—over and over again, people say associated forces as if that is in the document. That is not even in the document. The document, as Senator Cardin said, was very, very specific to 9/11. And we have had people just saying you can do anything you want now for 15 years.

Then there is the practical question. The practical question is doing anything you want, killing every perceived enemy and every perceived leader, a chieftain of five people in some misbegotten village—is it helping? Are we going to defeat an ideology by killing people?

I was all for going after the people after 9/11. I would have voted for that. But I do not think war in Yemen is necessarily helping us. I do not think the manned raid in Yemen made us safer. And I do not blame our soldiers for this. Look, I have members of my family that are on active duty. They do what they are told. They are brave young men and women. But, you know, when they kill four or five Al Qaeda people in a village but we also kill their wives and children—and I am not saying we intentionally do it—they are probably firing at us. They are in the middle of the fire fight. But is it better? Do we have fewer terrorists now or more? We killed five, but what do you think happens in that village and surrounding that village for decades? For 100 years, they will be talking about the time the Americans came and killed the people and killed our women and children. For 100 years, they are going to be talking about the Saudis dropping bombs on a funeral procession. That does not go away. These people remember the battle of Karbala in 680 A.D. They have long memories.

One of my favorite quotes is "you have all the watches, but we have all the time." They are just going to be there, and they will wait us out.

But we are not going to defeat terrorism by having war in 60 some odd countries and dropping drones on everybody that we think in a village is of a radical ideology. We have to defend ourselves, but we should be much more specific than this. And I just say now I will not vote for something that does not limit the President's power but simply gives a rubber stamp to what we are doing.

And I would argue that our Founding Fathers did not agree with unlimited Article II authority. In fact, they thought Article II was virtually unlimited authority to execute an already initiated war. If you look at every Founding Father, whether it is Washington, Adams, Jefferson, Madison, every one of them believed that the power to initiate war was Congress'. You could repel imminent attack even against the Barbary pirates. It was an imminent attack, but Jefferson worried that he needed to come back and he actually

did come back very quickly, within a few months, and they did vote on authorizing that activity.

But that is not what we are talking about. We are not talking about repelling attackers in the open seas, which I am for. We are not talking about a limited thing. We are talking about worldwide war. And I think this authorization will not limit that in any way. I have no question.

Thank you.

Senator RISCH. Senator Paul, would you yield to a question?

Senator PAUL. Absolutely.

Senator RISCH. This is not a belligerent question. Indeed, I think that your comments are exactly the kind of robust debate that Congress needs to do and the American people need to do and that the Founding Fathers intended when they put those provisions in there.

And I would ask if you would respond. And again, this is not a belligerent question, but there are people who argue, in response to your allegations that, well, what we are doing is illegal—they would argue that, well, look, Congress has to authorize military force. There is no exact way they have to do it. And one of the ways they can do it is by appropriating funds for it, thereby giving it the okay. So there are people who make that argument. How would you respond to that? And again, this is not a belligerent question.

Senator PAUL. I appreciate the question. I think it goes to the heart of the matter.

There are two ways you can initiate war. You initiate it through an authorization and then through funding. You can discontinue funding. That is one way of ending it. But you are trying then to end something if it was never initiated. So, for example, currently we have a war never initiated by Congress, and you would be trying to end it by funding. I would argue that practically it is very difficult to stop funding because the argument will be, you know, like I say, I got have members of my family over there. Do I want to stop funding them in the middle of their battle? So it is much more difficult that way.

But I think the debate was intended to be at the beginning, before we begin funding a war. And even during Vietnam, the most acrimonious situation our country has probably been in terms of war other than the Civil War, I think in the very end we still did not even defund it. We might have defunded it after people had left Vietnam, but we never voted to defund even a very unpopular war. So for practical purposes I would say—and for constitutional purposes—our job is before we get to the funding part.

Senator RISCH. Thank you, Senator Paul.

Senator Kaine, you have been a real leader on this issue. The floor is yours.

Senator KAINE. Thanks to all my colleagues. And I really appreciate the chair and ranking doing this hearing. I so appreciate working together with Senator Flake, Senator Young, your efforts.

And to our witnesses, this is an obsession. I represent the State that is most connected to the U.S. military. I have a child who is a marine infantry officer. It is an obsession of mine.

And I think this is really about lessons learned, and I am going to talk a little bit about what this bill does. And I have one question for you.

Lessons learned after 16 years—if we cannot learn some things after 16 years of war, shame on us. We ought to be able to learn some things.

And I have learned some things too. This is the third AUMF I have introduced: one on my own in September of 2014 right after President Obama decided to go on offense against ISIS; one with Senator Flake in the summer of 2015; and then this is number three.

One of the things I have learned is it is hard to craft an authorization against non-state actors. It is one thing to have an authorization or declaration of war against a nation. Non-state actors, which we are going to be living with for a very long time, pose some additional challenges. But it is very important that we do it.

While you have some points of disagreement, I applaud the fact that you agree on more than you disagree, but you especially agree that it is time for Congress to act.

Now, what does the Flake-Kaine bill do? And there is one area where Senator Paul was inaccurate. We try to fix three problems with the existing essentially limitless status quo.

First, we try to fix the who are we fighting by naming groups, specific groups, not perpetrators of an attack, specific groups. We try to fix the who are we fighting against problem by fixing the associated force definition. The associated force definition, as Senator Paul mentioned, was not contained in the original authorization. We do put an associated force definition in ours, and it has got two components, not just one. To be an associated force, you have to be connected with Al Qaeda, ISIS, or Taliban, but you also have to be engaged in hostilities against the United States. So it does not authorize anybody connected to the Taliban we are going to go after them anywhere. But if they are engaged in hostilities against the United States, that is a second factor to the associated force definition. We tried to tighten up the definition of who we are fighting against.

And we additionally have a listing process where the President actually lists those groups that have to meet both criteria. And if Congress believes that he has listed a group that actually does not meet the criteria, we have a resolution of disapproval process to strip a group away. That is the first issue we tried to fix. Who are we fighting against?

The second issue we try to fix is where are we fighting. The 2001 authorization had no geographic limit. This one allows action to take place in the current handful of nations where we are engaging in activities against the Taliban, ISIS, or Al Qaeda. And then it allows a similar listing process. If the President believes we need to take action against those groups or that tight definition of associated forces elsewhere, he can come forward with an initial and geographic limitation and must do so to take action there. But, again, Congress has the ability through a resolution of disapproval to deny that if we think that is an unnecessary stretch.

And the third problem we try to fix is how long will we fight. Sixteen years in, we have learned something and we have learned

about sort of zombie authorizations that can go on into perpetuity. And so I wish we had a phrase other than "sunset clause," but what we have done is we have put in a mandatory review at 5 years, which is actually 21 years if you count the first 16 years of this. So at 21 years, we would have a review to determine whether we needed to go forward. And Senator Flake and I have put a process in that gives it expedited consideration, but under normal voting procedures. So it would take the 60-vote threshold, et cetera, in the Senate to continue.

These are three problems that exist. These are three things that I think we should have learned, and areas that we address. Senator Young raises a good issue, and both of you do too about detention. We did not address that, and that is why a robust discussion and debate, with amendments considered, are going to be necessary in the committee.

To conclude, it is time to do this. It is a new administration. That is always a good time to do this. We have both the Secretary of Defense and the head of the Joint Chiefs of Staff, who as recently as 10 days ago testified before the Armed Services Committee and said we should do this. These are President Trump's appointees, General Dunford was reappointed by President Trump. Our military leadership is telling Congress we should do it. It is time to do it.

You each said things that you think are important. You did not say this, and I want to ask you if you think this is important. How important is it that we do this in a bipartisan way as opposed to a partisan vote?

Mr. BELLINGER. Senator, one, thank you. Senator Paul is not here anymore, but, actually, your bill would place the limitations. You can argue about exactly how the limitations ought to be done, but instead of having a very broad authorization, this allows certain limits to be placed on it to actually address his concerns. And I think you have raised important points.

Actually on detention, although I know different groups raise concerns about legislating that, I actually see that as an opportunity to both authorize detention, but put in safeguards so that you make sure you are actually ensuring that the right people are detained and for no longer than is necessary. So it is a place to put in safeguards.

On your question, I think it is very important to do this in a bipartisan way. I come away from this hearing, hearing agreement largely on the need for a new authorization. I am convinced that Members can work out these details. They are not that far apart. There are important points, but we ought to be able to get that language. And I am convinced that this can get done and should be done in a bipartisan way.

And thank you for your leadership with Senator Flake in doing it that way, at least from the perspective of one lawyer.

Dr. HICKS. I would just add that I completely agree with everything Mr. Bellinger said. You know, this is not a partisan issue. There is, as I said in my opening comments, broad bipartisan support beyond Congress as well, from the human rights community to the military community. And this is about the role of Congress. This is about the fundamentals of our democracy. It does not get

more fundamental than this question of the role of Congress in the use of force.

Senator KAINE. Thank you, Mr. Chair.

The CHAIRMAN [presiding]. I find myself by myself and unprepared. [Laughter.]

The CHAIRMAN. Let me ask you this. John, we were talking about the fact that you had written the AUMF back in 2001. Obviously, it has been very durable. But if you were going to start from scratch—I know that Flake and Kaine have done great work, and we appreciate that, and we have had numbers of iterations, and I know you have been asked this in different ways. But if you were starting from scratch, what would be some of the attributes that do not exist in this one that you would add or do exist that you would change?

Mr. BELLINGER. Well, you give me too much credit, Senator. I will not say I drafted the 2001 AUMF. I was the legal advisor to the National Security Council when it was drafted. So the pointed end to the spear was at the White House——

The CHAIRMAN. I remember there were some grammatical errors, and you do not want to claim those.

Mr. BELLINGER. Yes, exactly. So in those 60 words.

But I was there when it was drafted, was consulted on it. And of course, it was drafted very quickly in just a couple of days after 9/11, when the Pentagon was actually still smoldering.

But I do think now, if one were starting from scratch, one, we have new groups that did not exist at the time. And so it is important——

The CHAIRMAN. I am talking about currently.

Mr. BELLINGER. Currently.

The CHAIRMAN. Yes, the current AUMF, the one that has been proposed.

Mr. BELLINGER. Oh, the Kaine-Flake?

The CHAIRMAN. Yes.

Mr. BELLINGER. I would say two things. One, the associated force definition is too narrow for me. I would at least like to hear from Senators Flake and Kaine why they said that for a group to be associated, it literally has to be part of Al Qaeda or ISIS. There certainly seem to be some groups that are co-belligerents fighting along with Al Qaeda or ISIS but are not part of Al Qaeda. So I am sure they had a reason for drafting it that way, but that did strike me as too tight. I certainly understand the concerns that you do not want to go too broadly to say anything that is associated meaning that they met in the street sometime or said something nice. That is too broad. But the way it is currently drafted, part of Al Qaeda or part of ISIS, seems to be too narrow.

I would add some detention provisions ideally, but the affirmative power to detain I would certainly balance with certain safeguards. It is a two-edged sword. If Congress is authorizing the detention of people under the laws of war, there ought to be protections to make sure that the people who are detained are the right people and are detained for no longer than is necessary.

I defer to you all on the disapproval provisions. I know Senators Flake and Kaine worked very hard on those. It is a lot of lines and a lot of pages. It is quite complicated.

The CHAIRMAN. Let me zero in on that just one moment. We have addressed a number of issues, for instance, in the Russia sanctions bill last week and on the Iran sanctions bill that actually work in exactly the opposite way. In their particular situation, they sunset and put an expedited procedure in place to extend it.

The opposite way of doing that is for Congress to, at any time, have the ability to end it through a vote. And in many ways it would be safer. It would keep us from being in a situation where you end up with no authorization to deal with what is happening around the world.

Can you give any input as to which you think is a better place for us to be—and actually both of you—where instead of having a hard deadline and an expedited procedure and people know that that is coming and people around the world wonder whether we are going to continue, instead of having that, have just the reverse of that where Congress can at any time end it and Congress could at any time state that we do not want to be involved in a certain country with a certain group?

Mr. BELLINGER. Senator, I think that is an excellent question. It gets really to my point about the sunset. My legal preference would be to not have a sunset because then it ends, and if you are the military, to know that your authority ends, is at least problematic. So I would rather have a review provision after a certain period of time rather than to know that it is going to end. But politically I really just have to defer to you all. If it is better to have it end and then reauthorize, I can understand that. But preferably as a legal matter and you are in the military, you do not want to know at least now that your legal authority is going to go up in smoke and just hope that Members of Congress will reauthorize it after a couple of years. But I do understand the politics of this.

The CHAIRMAN. In 20 second, Dr. Hicks.

Dr. HICKS. The Department of Defense would love it if it had a 5-year budget authorization too. I think it is very reasonable to put a sunset on the authorization here. And I do think, as Senator Kaine was saying, it creates an incentive structure that drives Congress to take on its role in the conversation. I do not think it is unduly burdensome to the military commander. 5 years is essentially a lifetime in how they think about their authorities.

The CHAIRMAN. Thank you.

Senator Markey?

Senator MARKEY. Thank you, Mr. Chairman.

Dr. Hicks, in your testimony you say it is appropriate for a new AUMF to create a most stringent notification requirement for the President's use of ground forces in combating terrorist groups and recommend language included in H.J. Res. 100 that gives the President expansive authority to send our service men and women into combat as long as he notifies Congress as soon as possible.

What is your perspective on whether we should include in a new AUMF a requirement that the President notify Congress within 48 hours after he substantially enlarges the level of U.S. armed forces in a foreign country where combat appears likely?

Dr. HICKS. I think the fundamental challenge for a new AUMF in all aspects is this balancing of ensuring the flexibility the commander needs on the ground. The national command authority

needs to authorize force in defense of U.S. interests, and the appropriate role of congressional oversight.

I think that the bill put forward by Representative Schiff with regard to notification on ground forces used in a combat role is an example of an appropriate balance. It is a notification. It allows Congress to have the earliest possible opportunity to start to engage in a conversation over authorities upon which that is based, over a discussion of resources being expended, the principles, et cetera. But it also does not really create a burden for the commander. So I think that is a reasonable way forward.

Senator MARKEY. Thank you.

Mr. Bellinger, the use of targeted killings, most prominently using armed drones, is a form of use of armed force and ought to fall under the Congress' war powers. Mr. Bellinger, what is your perspective on the interplay between the multiple sources of authority for the government's targeted killing programs and congressional oversight of these operations under the War Powers Act?

Mr. BELLINGER. The executive branch is carrying out, as I understand it, drone attacks, targeted killings, under a variety of different authorities. Some of them by the military are under the AUMF. Some of them may be under intelligence authorities, conceivably under the President's Article II authority, although I think most of it is probably authorized by Congress.

Senator MARKEY. So you suggest that we revise the War Powers Act. How would, in your view, a new authorization deal with this issue? What would be the recommendations you would make in terms of the restrictions, the notification that would have to be given to Congress?

Mr. BELLINGER. Right. I do not know that it would address the drone issue. I think you mean more generally——

Senator MARKEY. Well, the targeted killing issue, yes.

Mr. BELLINGER. Actually, the War Powers Resolution changes that most people think are necessary would address the drone issue. They have more to do with the 60-day clock.

Senator MARKEY. If we revised the War Powers Act, it would not relate to the targeted killings policy that——

Mr. BELLINGER. I mean, of course, you can revise it any way you want to revise it. I do not think I would, or have I heard anybody say, that the War Powers Resolution flaws are things that really are related to drones. They are related more to the problem with the 60-day clock and Presidents stretching their authority to avoid the 60-day clock in the War Powers Resolution.

Senator MARKEY. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Murphy?

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

I wanted to turn back to this question of the President's Article II authority in the context of a fairly extraordinary set of events that is playing out as we speak inside Syria. This morning, we have notification through the press of the fifth direct confrontation between U.S. military forces inside Syria and Syrian regime affiliated forces, none of which is authorized. Secretary Tillerson stood before us and admitted as such, that there is zero legal authority, not even through a perversion of the 2001 or 2003 AUMF, to begin

military action against the Syrian regime. And yet, it seems as this is not a series of one-off incidences. We now have five incidences in 45 days.

And so I want to explore with you the limits of the President's Article II authority in the context, not of the campaign against ISIS, but against a developing war between the United States and the Syrian regime that may end up in a major shooting conflict that occupies all of our attention in the not so distant future.

So two questions to both of you, two ways to view this.

First is the justification that we are engaged in self-defense. I would imagine there is a limit to that argument. Just because the other guys shoot first does not mean that you do not need an authorization to continue to return fire. So we are now five engagements into the argument of self-defense. How do we begin to parse when this is Article II authority and when the President needs an authorization? Simply because you are sitting in a conflict zone and somebody is shooting you, does not mean that you can engage in long-term hostilities without Congress.

Second, the justification that has been used for at least one of these attacks on the Iranian-made drones is that it is in defense not of U.S. forces but in defense of non-state actor forces that we are supporting on the ground. That seems clearer. I mean, that seems to me that there is no way that is an Article II authority.

And so I would love for you to confirm whether my suspicions are right on the second count and to address the limits of Article II authority with respect to this justification of self-defense.

Mr. BELLINGER. Well, we can divide this up.

Let me agree with something Dr. Hicks said I think just before you came in, which is I think both of us would like to see clarity out of the administration about their legal position. When I was legal advisor at the State Department, I mean, this was sort of my credo, that when the United States is doing edgy or controversial things legally, we ought to say why we are doing them. We as the United States believe in the rule of law. We believe that we are acting legally. We always try to do that. And if we are, we ought to say why. Others may not always agree, but we ought to say what we are doing. And when I was legal advisor, I tried very hard to explain our actions, and I would like to see those same things here. I would like to see clarification on the strikes against the chemical weapons in response a month or so ago and now.

Like you, I have a hard time seeing that Congress authorized the use of force against Syria in the 2001 AUMF or that it authorized the use of force against Syrian aircraft because they were doing something to groups that we were supporting. I have not yet heard the administration's position. So I would like to hear that, but I do not really see how it can be justified under the 2001 AUMF because Syria is not one of the nations that committed the 9/11 attacks and it is not a co-belligerent with Al Qaeda. So I assume, therefore, it must be under the President's Article II authority. And there it would have to be under a national interest test, and for us to know that, we really would have to know more about what was the national interest that the President saw.

Finally, that is all a matter of domestic law. As the legal advisor to the State Department, I also want to make sure that we are act-

ing consistent with international law. And so your points about self-defense I think are also important. We do not appear to be defending ourselves. We were defending someone else, but it is not clear, at least to me until I learn more, that there was a collective right of self-defense. But this is why I think we would like to hear more about the administration's justification.

Dr. HICKS. I agree with everything Mr. Bellinger said. I would very briefly add my recollection is that in the 2014 consideration of an AUMF, Secretary Kerry was called before this committee. I think the same should be done now with Secretary Tillerson, broadly speaking on the legal basis for ongoing military operations to include, obviously, inside Syria.

Senator MURPHY. Thank you.

I think this question of Article II authority is really important. National interest is very broad. Others would say it is imminent threat. That is a really important distinction for us to consider moving forward.

The CHAIRMAN. On behalf of the committee, today we will ask formally what authority they are relying upon for this, and it will go out today.

I will say, though, the dilemma we find is that just as some of the limitations you referred to earlier about no ground troops in countries which, let us face it, is part of the Menendez effort in 2014, there were numbers of members that wanted to limit our ability to have ground troops.

And so what we have begun to do as a nation is we rely upon proxies. So we are, in fact—the SDF is a group that we have armed, that we have trained. And what has happened is the Assad regime and Russian airplanes have come against them with the very group they are supporting.

So I mean, we cannot have it both ways. I mean, if we are not willing ourselves to send ground troops in, if we are going to rely upon proxies—and we do that in many cases because they are indigenous and they can actually govern after the fact—we do have to somehow, in an AUMF, make accommodations for the fact that if they come under attack from others and we are giving them close air support or support of other kinds, we have got to figure out a way to address that.

And I am more than willing for you to enter into this since no one else is here, but would you guys like to respond as to how we might write an AUMF that takes into account that, to the extent we can, we are going to fight through proxies? They may come under threats. How do we deal with that?

Mr. BELLINGER. I will take a first stab. I think this is something that really we can do together as a policy matter and legal matter.

As a policy matter, you are absolutely right, Senator. I understand that if we are going to be supporting people in another country and then they get attacked, we want to be able to provide them some support as a policy matter.

As a legal matter, though, it really is much harder in that we do not, I think, under the AUMF or under international law, have a right to be using force in another country that has not consented to the use of force if we are not defending ourselves—it is a right of self-defense against us—or defending collectively some other

country. It is a stretch for me to see that we have a legal right, either authorized by Congress under the 2001 AUMF or under international law, to use force to defend a group that we are arming as a legal matter. But I certainly understand your point as sort of a policy or moral matter.

Dr. HICKS. We have to have a strategy. We have to understand what the goals are. And then we have to have a legal basis that supports that. I think we are completely disconnected, frankly, on all these elements. And I think that has been true for some time, to be somewhat fair to the administration.

But I just want to foot stomp the point that Mr. Bellinger made on international law. We are short, if you will, all around. There is not a U.N. resolution. This is not an ally to whom we have a treaty obligation. We do not have it covered under the AUMF. If we had a sense of the policy and strategy that we as a Nation want to pursue, we could create for ourselves a legal basis. But I think we are operating in a void of both strategy, policy, and then of course the legal basis.

The CHAIRMAN. So both of you are going to be relied upon in the upcoming weeks for input. I know that we are going to need to have likely another hearing because of all that has occurred this morning.

And I am going to go ahead and call this to a close. If you could, the record will be open until the close of business on Thursday. I know you have other jobs, but to the extent you could answer fairly promptly. We are actually going to be engaging you very directly from the committee at our level today.

But we thank you both for being here. I think this has been very, very helpful.

And with that, the meeting is adjourned.

[Whereupon, at 11:35 a.m., the hearing was adjourned.]

Additional Material Submitted for the Record

RESPONSES TO ADDITIONAL QUESTIONS FOR THE RECORD SUBMITTED TO HON. KATHLEEN H. HICKS BY SENATOR CORY A. BOOKER

Yemen

Question 1. The 2001 AUMF states that "the President has the authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." This broad definition does not explicitly define what actions are or are not sanctioned by the AUMF.

- With this in mind, do you believe American military assistance and support (ie in air-refueling, munitions targeting assistance, and logistical support) for the Saudi-led interventional against Houthi forces is permitted by the existing AUMF?

Answer. It is my view that the military assistance provided by the United States to the Saudi-led coalition is not subject to the 2001 AUMF because it does not constitute a "use of force." Rather, it involves the use of U.S. military assets short of direct use of force. If the United States sought to take direct military action against Houthi forces in Yemen, it would require a legal basis to do so, whether under the 2001 AUMF or another provision of law.

Question 2. Current American involvement in Yemen has been complex. There has been a long running military engagement against AQAP which has only increased since the Trump administration took office.

In tandem with this, the Trump administration has been providing the Saudi-led coalition, which is fighting against Houthi rebels and security forces allied with former president Ali Abdullah Saleh—NOT AQAP—with logistical, material, and intelligence support.

- Given that the Houthis are not covered by the 2001 AUMF and military action against AQAP has been conducted with minimal transparency, do you think the administration has produced adequate legal justification for engaging in hostilities against both AQAP and the Houthis?

Answer. I believe the Obama administration provided adequate justification for direct military action against AQAP, arguing that the 2001 AUMF confers authority to use force against AQAP as an "associated force" to the Al Qaeda terrorists responsible for the September 11th, 2001 attacks. The legal conclusion aside, as I stated in my testimony, I do believe that the United States would benefit from replacing the 2001 AUMF with a new authorization acknowledging how much the security environment has changed over the last two decades. Doing so would strengthen America's principled commitment to the rule of law and lend credibility to the institutions designed to create, carry out, and enforce such laws. At present, my understanding is that U.S. support to the Saudi-led coalition does not involve direct use of force and thus is not subject to an AUMF. If the United States sought to take direct military action against Houthi forces in Yemen, it would require a legal basis to do so, whether under the 2001 AUMF or another provision of law.

Yemen Humanitarian Disaster

Question 3. The U.S. Air Force currently provides in-air refueling to Saudi Arabia and allied aircraft operating in Yemen, under an acquisition and cross-servicing agreement (ACSA).

- When the Saudi Air Force bombs a marketplace full of civilians, does it mean that U.S. Air Force assets are involved in an air campaign that has caused thousands of civilian casualties?

Answer. I am concerned any time U.S. military force or assistance is associated with the creation of civilian casualties. My understanding is that the United States has, to date, only provided logistical support, intelligence sharing, and other advice to the Saudi-led effort in Yemen when it deems that support to be in the U.S. national interest and after it has been requested. When making such decisions to pro-

vide support, the United States should be strongly weighing the possible humanitarian effects of downstream action and use its influence to minimize civilian casualties. That influence can include the withholding of requested assistance or the conditioning of that assistance on demonstrated improvements in preventing civilian deaths.

Question 4. You say in your testimony, "a robust congressional role in use of force decisions can spur consideration of policy alternatives, raise important strategic considerations, and build public support." I agree.

Today, we see 17 million people—almost two thirds of the population—critically food insecure, two million children under the age of five acutely malnourished, and a cholera epidemic that quickly spiraling.

- In your view, what are the legal ramifications of this kind of military cooperation with a foreign power that could not conduct sorties over Yemen without U.S. refueling assistance?

Answer. I believe the United States is always responsible for considering the legal, moral, and ethical ramifications of its military assistance policies. I am not a lawyer and am unaware of specific legal ramifications, if any, in this instance.

Question 5. Had Congress considered and debated an AUMF against Houthi rebels, would we have had a better understanding of the humanitarian consequences that we see today, and have prepared a coordinated and targeted humanitarian relief effort to alleviate the suffering of innocent families that have been caught in the How could a thorough deliberation of an authorization for the use of military force against the Houthis potentially saved thousands of lives?

Answer. It is my view that the military assistance provided by the United States to the Saudi-led coalition is not subject to the 2001 AUMF because it does not constitute a "use of force." Rather, it involves the use of U.S. military assets short of direct use of force. If the United States sought to take direct military action against Houthi forces in Yemen, it would require a legal basis to do so, whether under the 2001 AUMF or another provision of law.

As I stressed in my testimony, however, Congress has a major role in improving the strategic discourse for U.S. national security policy overall. Congress should deliberate the U.S. role in the Yemen Civil War and use its Article I powers, including the power of the purse, as it believes appropriate to advance U.S. foreign and security policy.

AUMF

Question 6. War authorizations confer extraordinary powers on the president. Wartime rules were designed for the unique circumstances of armed conflict between opposing armed forces.

The United States has long been a global leader on human rights, leveraging its example to influence other nations to improve their own human rights records.

The United States has criticized other nations for improperly invoking wartime authorities in the name of national security. But the ability of the United States to level this criticism effectively demands that it demonstrate that its own use of wartime authorities is lawful and appropriate.

- Dr. Hicks, do you believe continued reliance on ill-defined authorities or questionable legal theories that enable the use of wartime authorities outside the lawful boundaries of war not only harms U.S. leadership on human rights, but U.S. national security as well?

Answer. The continued reliance on an ill-defined authority or questionable legal theory that enables the use of wartime authority outside the lawful boundaries of war does harm to U.S. leadership on human rights and national security. The United States currently faces an array of threats from violent extremist groups that necessitate counterterrorism operations in disparate parts of the world. Without a proper contemporary debate that focuses on these specific issues and threats, it is possible that our actions could have unintended second and third order consequences that negatively impact both our human rights agenda and U.S. national security. Congress should thus repeal the 2002 AUMF and a repeal and replace the 2001 AUMF as I described in my testimony.

LETTER TO THE COMMITTEE FROM *THIRD WAY*



June 20, 2017

Senator Bob Corker
United States Senate
425 Dirksen Senate Office Building
Washington, DC 20515

Senator Ben Cardin
United States Senate
509 Hart Senate Office Building
Washington, DC 20515

Re: Authorizing the Use of Military Force

Dear Chairman Corker and Ranking Member Cardin:

One of the most pressing global security challenges is the threat posed by the Islamic State of Iraq and al Sham (ISIS) to the United States and its allies. Candidate Trump argued that he had a secret plan to defeat ISIS and said his generals would provide a plan within 30 days of inauguration. Yet, over 150 days in, the Trump Administration has failed to articulate a coherent, unified strategy to deal with this threat. In fact, the Administration's current ISIS strategy lacks any sense of clarity and threatens to sink the U.S. further into a conflict that could squander our blood and treasure.

To avoid this outcome, Third Way believes Congress should use the need for a new Authorization for Use of Military Force (AUMF) to force the Administration to develop and articulate a clear strategy for dealing with ISIS without dragging the country into a broader conflict with the Syrian regime or the Russian Federation. Developing such a measure will ensure that the Administration has the statutory authority to fight ISIS. But most importantly, a new AUMF will give the American people, military, and Congress a greater sense of clarity as to the U.S.'s long-term goals in the conflict, helping to avoid mission creep and excessive U.S. entanglement in a potential quagmire.

Background

The Islamic State of Iraq and al Sham (ISIS), a violent extremist movement, grew out of the ashes of Al Qaeda in Iraq and the Syrian civil war. In 2014, the group shocked the world by seizing vast sections of Iraq and Syria and incorporating them into a self-declared state. It also engaged in a concerted campaign of war crimes and genocide against minorities in its captured territory.

At the request of the Iraqi government, President Obama sent over 1,500 military advisors into Iraq and conducted over 150 airstrikes there to break ISIS's momentum, protect U.S. personnel, and save thousands of Iraqi religious minorities. On September 10, 2014, President Obama announced a four-part plan for an expanded effort against ISIS. This plan included: (1) a systematic campaign of airstrikes; (2) increased military assistance to forces on the ground; (3) a regional political effort to work with allies; and (4) humanitarian assistance to populations targeted by ISIS.

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At the time, the President welcomed Congressional support for this effort and affirmed "we are strongest as a nation when the President and Congress act together." However, despite the President's openness to legislative action, Congress never passed a measure authorizing operations against ISIS.

Since 2014, the U.S. has continued the campaign that President Obama launched against ISIS, with more than 7,000 troops currently deployed in Iraq and Syria[1] and 17,632 air strikes having been conducted.[2] This involvement has only increased under the Trump Administration, which recently announced its plans to "accelerate" the conflict and grant U.S. commanders more flexibility in conducting anti-ISIS operations.[3] Further, the Trump Administration is reportedly deploying an additional 3,000 to 5,000 troops to Afghanistan to combat ISIS elements and other militants in that country.[4]

The conflict in Syria has become more perilous recently, as ISIS has been driven from its strongholds and clings to a few last cities. ISIS's reduced land holdings mean that the various forces combatting it, many with conflicting agendas, are now fighting in relatively close quarters, raising the possibility of conflict escalation. Nowhere is such a risk more clear than in Deir ez-Zor, one of the last strongholds of ISIS in Syria. There, the proximity of Kurdish and U.S.-supported forces to those of the Syrian regime and its Russian and Iranian supporters, not to mention ISIS militants, creates a proverbial powder keg that could easily erupt into broader conflict. Recent Iranian strikes against U.S.-backed groups in the area and the downing of a Syrian jet by U.S. forces further warn of the potential for broader conflict.

Given the increasing involvement of U.S. forces in the fight against ISIS, and the risk of escalation, now is the time for Congress to consider and pass legislation that provides necessary tailored authorization for the nation's effort against ISIS.

1. Left unchecked, ISIS will continue to threaten the U.S. and its allies

As of December 2016, ISIS controlled around 23,300 square miles of territory in Iraq and Syria (an area roughly the size of West Virginia) and had 12,000 to 15,000 battle-ready fighters.[5] Although these numbers are a substantial decrease from 2014 levels, they represent an entity with an established presence that can be used to project violence against civilians abroad.

ISIS can export violence abroad because, despite recent setbacks, it still commands substantial resources. Although U.S. airstrikes destroyed around $500 million of ISIS's cash reserves in early 2016, the group still has vast amounts of capital.[6] Recent reporting from the British organization Conflict Armament Research reveals that ISIS has been manufacturing tens of thousands of weapons on "an industrial scale."[7] ISIS has also begun developing and using weaponized drones,

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[1] http://www.cbsnews.com/news/trump-gives-pentagon-power-to-determine-u-s-troop-levels-in-iraq-syria/
[2] https://www.defense.gov/News/Special-Reports/0814_Inherent-Resolve/
[3] https://www.theguardian.com/us-news/2017/may/28/james-mattis-defense-secretary-us-isis-annihilation
[4] https://www.nytimes.com/2017/06/18/world/asia/us-troops-afghanistan-trump.html
[5] http://www.bbc.com/news/world-middle-east-27838034; http://www.cnn.com/2016/12/14/politics/white-house-isis-numbers/index.html
[6] http://abcnews.go.com/International/us-airstrikes-destroy-500-million-isis-cash-reserves/story?id=37010061
[7] http://www.independent.co.uk/news/world/middle-east/isis-islamic-state-weapons-manufacturing-rockets-bombs-ammunition-iraq-factories-mosul-mortars-a7473321.html

and it likely still possesses many of the Soviet-made tanks, U.S.-made armored vehicles, and small arms that it has captured from Syrian and Iraqi government forces.[8]

That ISIS will keep threatening civilians abroad can be readily inferred from its lack of restraint in dealing with civilians in its territory. Its fighters have slaughtered, kidnapped, and enslaved members of ethnic and religious minorities, subjecting them to barbaric punishments like crucifixion and immolation. Further, it has trumpeted the beheadings of two American journalists, James Foley and Steven Sotloff, American aid worker Abdul-Rahman Kassig, Japanese nationals Haruna Yukawa and Kenji Goto, and British aid worker David Haines.

Recent attacks and revelations lend further credence to the assertion that ISIS will continue threatening the U.S. and Europe. Individuals directed, inspired, or enabled by ISIS have conducted terrorist attacks in locations as far-flung as Orlando, San Bernardino, Paris, and Berlin. Intelligence sources also believe that ISIS is currently developing "laptop bombs" which could target the U.S. and Europe by evading airport security screenings. This threat is only compounded by the fact that many of ISIS's fighters have European or American passports, making it easier for them to return home to conduct terrorist operations.

In order to stop this threat, Congress should pass an Authorization for the Use of Military Force (AUMF) against ISIS as part of a broader political plan for Iraq and Syria. But in doing so, Congress must act strategically and deliberately.

2. Because defeating ISIS will be a difficult, long-term effort, it is incumbent on Congress to pass a new Authorization for the Use of Military Force

In his September 10, 2014 remarks, President Obama asserted that he had all the authority he needed to attack ISIS under the 2001 AUMF and Article II of the Constitution. President Trump has also relied on the 2001 AUMF as justification for his operations against ISIS. However, some legal experts have raised concerns about relying on the 2001 AUMF, as ISIS is not an associated force of al Qaeda and did not exist at the time that authorization was passed.

Whether one believes that the President currently has full authority, limited authority, or no authority to act against ISIS, Congress should provide a new, specific AUMF against ISIS. In fact, President Obama welcomed such an action and asked Congress to update the AUMF to address emerging terrorist threats. More recently, Secretary of Defense Jim Mattis also expressed his support for Congress passing a new AUMF. Yet despite such executive branch support, Congress has done almost nothing to enact a new authorization.

Although Congress has refrained from passing a new AUMF over the last three years, Congress should now make passing one a priority for three primary reasons:

1. The campaign against ISIS will not be over quickly. We will have victories and suffer setbacks. Before our military commits more troops and resources to a sustained and difficult conflict, America's leaders should reach consensus about the need to send our troops into harm's way.

[8] http://www.independent.co.uk/news/world/middle-east/isis-weapons-drones-uav-programme-development-weaponised-explosives-surveillance-terrorist-groups-a7371491.html; http://www.dailysabah.com/mideast/2014/07/03/isiss-weapon-inventory-grows

2. Congress will have to repeatedly make decisions about action against ISIS, from funding the military, to reprogramming existing funds, to explaining the campaign to their constituents. Members of Congress should be on record with their position on a war of this magnitude.
3. The President's efforts to strengthen the international coalition to defeat ISIS will be enhanced if Congress has clearly shown its support for this action. Currently, U.S. allies may question the nation's commitment to fighting ISIS, given divisions within Congress. However, Congressional authorization would assuage such concerns and ensure a more robust approach to fighting terrorism.

3. Congress should pass a new, tailored authorization as part of a broader political and military plan to degrade and ultimately destroy ISIS.

Congress should assert its authority as a co-equal branch of government to debate and vote on plans for war and, through authorizations and appropriations legislation, define and clarify the scope and limits of what is certain to be an extended military campaign.

At the same time, Congress must avoid the mistakes of the past and pass an authorization that clearly defines the scope and limits of anti-ISIS action. Third Way recommends that Congress focus on the following parameters:

- Specificity: The authorization should be limited to ISIS and should not be used to justify going after a wider range of terrorist groups.
- Geographic limits: The authorization should be limited to areas where there are active ISIS-involved armed conflicts. Congress should not authorize military action everywhere, but only where necessary to defeat ISIS on the battlefield.
- Avoiding a ground war: The authorization should specify that no ground troops are to be used in direct combat operations. If a President were to deem it necessary to send ground troops, the Administration should be required to return to Congress for further authorization.
- Reporting requirements: At regular intervals, the Administration should be required to report to Congress on the broader political, military and humanitarian plan for the military campaign, including the legal rationale for such action.
- Expiration: The authorization should expire so that each session of Congress would vote on authorizing continued action—every 18 months or two years.

When drafting a new AUMF, lawmakers should be cognizant of some thorny questions, foremost among them, "What should be the scope and end goal of U.S. involvement in Syria?" Because the United States has the consent of the Iraqi government, strikes in that country are clearly in keeping with international law. But in Syria, strikes or support of opposition forces against ISIS could metastasize into conflict with Russia, Iran, the Assad regime, or anti-Western forces battling Assad. Therefore, before giving the Administration the go-ahead to continue intervening in Syria, Congress should press the President to clearly define a long-term strategy for U.S. military involvement. Specifically, Congress should condition a Syria-oriented AUMF on the Administration articulating its stance on whether Assad should remain in power, whether it envisions a partitioned Syria, and

how it proposes to manage tensions between Syria's multiple ethnic groups and between Syrian Kurds and Turkey.

Conclusion

ISIS is a barbaric terrorist group. Its growth and recent actions have made it a paramount threat to our allies, our people in the region, and the U.S. homeland. President Obama was right to strike ISIS and then present a plan to combat them, and President Trump is right to continue Obama's campaign against the group. However, before immersing U.S. troops further in the conflict, Congress should pass legislation further specifying and defining the goals and extent of continued military action.

All too often since the invasion of Iraq, U.S. policy has been shaped by a pursuit of means, not ends. This lack of clearly defined objectives—regional, national, and local—has hamstrung the effective implementation of policies in the Middle East. Given this history, future military action must come in the context of a broader political strategy that addresses the underlying drivers behind the growth of ISIS. Lawmakers should work to clearly define such strategic ends and political objectives while providing a tailored authorization for military force.

Sincerely,



Mieke Eoyang
Vice President for Third Way's National Security Program

STATEMENT FOR THE RECORD SUBMITTED BY *HUMAN RIGHTS FIRST*

Statement for the Record of Human Rights First

United States Senate Committee on Foreign Relations
Hearing on Congressional Authorizations for the Use of Military Force

June 20, 2017

Introduction

Within days of the 9/11 attacks, Congress passed an authorization for use of military force ("AUMF") against those who "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 or harbored such organizations or persons."[1] This language is widely understood as authorizing force against al Qaeda, who planned and committed the attacks on the United States on 9/11, and the Afghan Taliban, who had harbored al Qaeda before and after the attacks.

The 2001 AUMF is also expressly limited to using force to prevent future acts of terrorism against the United States by the entities responsible for 9/11, not their associated forces, successor entities, or unaffiliated terrorist organizations. Indeed, Congress expressly rejected the executive branch's request for broad and open-ended authority to use military force against other terrorist groups without specific authorization from Congress.[2]

Yet for nearly 16 years, longer than any war in the nation's history, the executive branch has been using the 2001 AUMF as the primary legal basis[3] for military operations against an array of terrorist organizations in at least seven different countries around the world.[4] Some of these groups, like ISIS and al Shabaab, not only played no role in the

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[1] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note), *available at* https://www.congress.gov/107/plaws/publ40/PLAW-107publ40.pdf.
[2] *See* David Abramowitz, The President, the Congress, and the Use of Force: Legal and Political Considerations in Authorizing the Use of Force Against International Terrorism, 43 Harv. Int'l L.J. 71 (2002); Gregory D. Johnsen, 60 Words And A War Without End: The Untold Story Of The Most Dangerous Sentence In U.S. History January 16, 2014, Buzzfeed, *available at* https://www.buzzfeed.com/gregorydjohnsen/60-words-and-a-war-without-end-the-untold-story-of-the-most?utm_term=.yfdMEx3qa#.clg0N7zOo.
[3] The executive branch has also relied on the 2002 Iraq AUMF to justify its counter-ISIL campaign. *See e.g.,* Stephen Preston, The Legal Framework for the United States' Use of Military Force Since 9/11, Remarks at the American Society for International Law, *Washington, DC, April 10, 2015*, *available at* https://www.defense.gov/News/Speeches/Speech-View/Article/606662/.
[4] Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related Operations, December 2016, *available at* https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf.

9/11 attacks, but did not even exist at the time Congress authorized the use of force in 2001.[5]

The executive branch's continued reliance on the 2001 AUMF for military operations far beyond what Congress originally authorized undermines Congress' important constitutional role as the branch responsible for the decision to go to war. As Senator Todd Young noted during a keynote speech at the Heritage Foundation last month, the founders entrusted Congress with the decision to go to war to "avoid foolish, hasty, unnecessary, and perpetual wars that tend to accrue debt and erode liberty."[6] The lack of any sunset provision or reporting requirements in the 2001 AUMF also restricts the ability of Congress to conduct meaningful oversight over military operations and the foreign affairs of the United States.[7]

This untenable state of affairs has other dangerous consequences as well. Continued reliance on outdated and ill-defined war authorizations that blur the line between war and peace undermine national security, U.S. leadership in the world, and human rights both at home and abroad.

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[5] It is worth recalling that in 2014 when the claim that the 2001 AUMF applied to ISIS was first made, national security law experts from both sides of the aisle were astounded. *See e.g.* Robert Chesney, *The 2001 AUMF: From Associated Forces to (Disassociated) Successor Forces,* Lawfare Blog, September 10, 2014, *available at* https://www.lawfareblog.com/2001-aumf-associated-forces-disassociated-successor-forces. Before the announcement, law professor Ryan Goodman had noted the "remarkable consensus of opinion" among experts "that ISIS is not covered by the 2001 AUMF." *See* Ryan Goodman, *The President Has No Congressional Authorization to Use Force against ISIS in Iraq*, June 19, 2014, *available at* https://www.justsecurity.org/11873/president-congressional-authorization-force-isis-iraq/. National security expert Ben Wittes commented that extending the 2001 AUMF to ISIS "is not a stable or sustainable reading of the law." *See* Ben Wittes, Not Asking the Girl to Dance, September 10, 2014, *available at* https://lawfareblog.com/not-asking-girl-dance. And former State Department legal advisor Harold Hongju Koh considered a new AUMF to be the only "lawful way to fight the Islamic State" and prevent a "constitutional battle over the president's prerogative to conduct unilateral war." *See* Harold Hongju Koh, The Lawful Way to Fight the Islamic State, August 29, 2014, *available at* http://www.politico.com/magazine/story/2014/08/the-lawful-way-to-fight-the-islamic-state-110444_full.html#.WUXKrhPyut9.

[6] *Is it Time for Congress to Pass an ISIS-Specific AUMF?,* The Heritage Foundation, May 1, 2017, *available at* http://www.heritage.org/defense/event/it-time-congress-pass-isis-specific-aumf.

[7] Recent entanglements with Iranian and Russia-backed pro-Assad forces in Syria, where the U.S. is fighting ISIS, demonstrate just how far the 2001 AUMF has been stretched. *See* Kate Brannen et al., White House Officials Push for Widening War in Syria Over Pentagon Objections, Foreign Policy, June 16, 2017, *available at* http://foreignpolicy.com/2017/06/16/white-house-officials-push-for-widening-war-in-syria-over-pentagon-objections/.

Ill-Defined War Authorities Undermine National Security, U.S. Global Leadership, and Human Rights at Home and Abroad.

War authorizations confer extraordinary powers on the president, powers that outside of war would amount to egregious violations of human rights. Wartime rules were designed for the unique circumstances of armed conflict between opposing armed forces. As a result, the laws of war sometimes permit killing as a first resort, detention without charge or trial, and the use of military tribunals—actions that are otherwise contrary to basic American values and human rights.

The United States has long been a global leader on human rights, leveraging its example to influence other nations to improve their own human rights records. The United States has rightly criticized other nations for improperly invoking wartime authorities in the name of national security. But the ability of the United States to level this criticism effectively demands that it demonstrate that its own use of wartime authorities is lawful and appropriate. Continued reliance on ill-defined authorities or questionable legal theories that enable the use of wartime authorities outside the lawful boundaries of war not only harms U.S. leadership on human rights, but U.S. national security as well.

The current status quo puts the United States at odds with allied nations, counterterrorism partners on the ground, and local populations whose help is critical to effective counterterrorism. As a result of doubts about the lawfulness or legitimacy of U.S. actions or policies, allies and partners withhold critical cooperation, consent, and intelligence information. Local populations turn against the United States, fueling terrorist recruitment and propaganda and increasing attacks against U.S. and allied forces. Assuring U.S. allies, counterterrorism partners, and local populations that the United States respects human rights and the rule of law—including important limits on where, when, and against whom wartime authorities may be employed—will improve cooperation, undermine terrorist recruitment and propaganda, and reduce attacks against U.S. forces.

Setting the country on a new course is also needed to ensure that the United States does not set dangerous precedents that are detrimental to its long-term interests. The policies, practices, and legal justifications used by the United States today will be used by other states tomorrow. Expansive interpretations of a state's authority to use wartime powers—such as lethal force as a first resort, military tribunals, and detention without charge or trial—embolden other states to use such practices. Constraining the use of these exceptional authorities to circumstances meeting the legal threshold for armed conflict and to where their use is militarily necessary, will provide a model for other states on how to use wartime authorities lawfully, strategically, and responsibly.

Not only is it unlawful to apply wartime authorities to address terrorist threats off the battlefield, it is not necessary. The United States has a robust array of diplomatic, law enforcement, and intelligence resources to mitigate the threat of terrorism. And ultimately, partner nations in which terrorist threats reside must take the lead to address

those threats head on, and effectively, with the support of the United States. The United States also retains the authority to act in self-defense, including through the use of military force, when there is an imminent threat that cannot be addressed through other means. Wartime authorities such as an AUMF are not necessary to take such action.

By tailoring congressional war authorizations to the conflicts to which they are intended to apply and conducting regular oversight of war, Congress provides a crucial check on the executive branch, ensuring that presidents do not stretch wartime killing, detention, and trial authorities beyond the bounds of armed conflicts authorized by Congress.

Recommendations for Drafting Authorizations for Use of Military Force

Any new war authorization passed by Congress should be clear, specific, carefully tailored to the situation at hand, and aligned with the international legal obligations of the United States to respect state sovereignty, human rights, and the boundaries of wartime rules. Careful drafting is critical to prevent any new AUMF from being stretched to justify wars not authorized by Congress, to ensure ongoing congressional engagement and an informed public as the conflict proceeds, and to prevent the authorization from being used in ways that undermine human rights or U.S. national security.

To meet this standard, Human Rights First recommends that any new authorization for use of military force include the following elements[8]:

Specify the enemy and the mission objectives:

Any new AUMF should clearly specify the entity against which force is being authorized, the mission objectives or purpose for authorizing force, and where force may be used. These elements prevent the executive branch from overstepping Congress's intent, discourage mission creep, and ensure that the authorization will not be used to justify unlawful or perpetual armed conflict. Authorizing the president to use force against unknown future enemies,[9] for undefined purposes, or in unknown locations is an unconstitutional delegation of Congress's power to declare war. It is also unnecessary for national security. The president has authority to defend the nation from sudden

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[8] These elements have been recommended and endorsed by numerous national security experts from across the political spectrum. *See e.g.,* Goldsmith et al., *Five principles that should govern any U.S. authorization of force,* Washington Post, *available at* https://www.washingtonpost.com/opinions/five-principles-that-should-govern-any-us-authorization-of-force/2014/11/14/6e278a2c-6c07-11e4-a31c-77759fc1eacc_story.html?utm_term=.334aca4237fa. These elements have also gained the support of a coalition of human rights, civil liberties, and faith groups. *See* "Re: Authorizing the Use of Military Force." Letter to Senator Bob Corker and Senator Ben Cardin. June 19, 2017, available at http://www.humanrightsfirst.org/sites/default/files/AUMF-letter-final-text-June-19-2017.pdf.

[9] Should Congress to choose to authorize force against the associated forces of a group named in the authorization, it should carefully define the term associated forces in a manner that complies with the laws of war. Congress should not authorize force against so-called "successor entities." *See* Human Rights First, *Authorizing the Use of Force Against ISIS: How to Define "Associated Forces", available at* http://www.humanrightsfirst.org/sites/default/files/AUMF-Associate-Forces-Issue-Brief.pdf.

attacks under Article II of the Constitution and Article 51 of the U.N. Charter. Moreover, Congress can authorize force against new threats when and if such threats arise.

Reporting requirements:

Regular and detailed reporting helps promote democratic accountability, maintain legitimacy both at home and abroad, ensure compliance with domestic and international law and enables Congress to fulfill its critical oversight functions. To properly keep Congress and the public informed of the scope and progress of the mission, the president should provide regular reports detailing at minimum: the entities the administration believes are covered under the new AUMF, the factual and legal basis for including these entities in the AUMF, the number of civilian and military personnel killed, and the legal analysis the administration is relying on for undertaking new actions. This information is critical for proper public transparency and engagement and enabling Congress to exercise its constitutional oversight responsibilities over a continuing armed conflict.

Compliance with U.S. obligations under international law:

For over 200 years the Supreme Court has held that domestic statutes must not be interpreted to conflict with U.S. obligations under international law if there is any other plausible interpretation.[10] An explicit statement in an AUMF that operations must only be carried out in compliance with U.S. international legal obligations would bolster global confidence in the United States as a national that complies with the rule of law and is committed to its obligations to respect state sovereignty under the U.N. Charter and customary international law, treaty and customary law-based human rights law, and the requirements of the law of armed conflict, where applicable. Such a statement would enhance the legitimacy of the mission, aid the effort to win hearts and minds, and encourage cooperation from allies, and partners.

Supersession/sole source of authority provision:

Any new AUMF should include language that makes it clear that it is the sole source of statutory authority to use force against the named enemy in the authorization. This is important to avoid overlap, confusion, or loopholes that could be used to evade the requirements of either an existing or new AUMF. For example, as the executive branch has claimed that the 2001 AUMF and 2002 Iraq AUMF already provide authority to use force against ISIS, a new ISIS AUMF should either repeal the 2001 AUMF and 2002 Iraq AUMF, or include language that makes it clear that the new ISIS AUMF is the sole source of statutory authority for using force against ISIS.[11] Failing to include such clarifying language or to repeal old AUMFs opens the door for the executive branch to rely on the 2001 AUMF to avoid the requirements of the new ISIS AUMF.

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[10] *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

[11] The Obama Administration claimed that the 2001 and 2002 AUMFs already authorize force against ISIS. Failing to clarify that a new ISIS AUMF supersedes these authorizations confuses rather than clarifies the administration's powers. *See* Jen Daskal, *Why Sunset and Supersession Provisions Are Both Needed in an Anti-ISIL AUMF*, Just Security, March 18, 2015, *available at* https://www.justsecurity.org/21220/sunsets-supersession-alternatives-another-cpc/.

Sunset clause:

Sunset provisions have been included in nearly a third of prior AUMFs.[12] They act as a forcing mechanism that guarantees continued congressional oversight and approval as the conflict evolves, providing a safeguard against perpetual armed conflict or executive branch overreach. Sunsets require Congress and the administration to come together to reexamine the AUMF at a future date in light of current conditions, and if necessary, reauthorize and/or refine the legislation to suit those new conditions. As former general counsel for the CIA and Department of Defense Stephen Preston has explained, requiring Congress to reauthorize an ongoing conflict does not signal to the enemy that the United States plans to walk away from the fight at a set date.[13] Rather, he explained, a properly structured reauthorization provision with a mechanism for renewing the authority in advance of the sunset would signal to our partners and adversaries that the United States is committed to its democratic institutions and will fight the fight for as long as it takes.

Conclusion

The founders of this nation recognized the profound significance of going to war and wisely assigned this power to Congress. If and when Congress passes a new war authorization, that authorization should reflect the hard lessons of the last decade and a half by including the above elements. If Congress cannot reach agreement on an authorization that meets these requirements, it should not pass one.

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[12] *Ending the Endless War*, National Security Network, February 2015, *available at* http://nsnetwork.org/cms/assets/uploads/2014/08/ENDING-THE-ENDLESS-WAR_2.2015-UPDATE.pdf.
[13] *Is it Time for Congress to Pass an ISIS-Specific AUMF?*, The Heritage Foundation, May 1, 2017, *available at* http://www.heritage.org/defense/event/it-time-congress-pass-isis-specific-aumf.

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