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AUTHORIZATION FOR THE USE OF MILITARY FORCE AND CURRENT TERRORIST THREATS

HEARING

BEFORE THE

COMMITTEE ON FOREIGN AFFAIRS
HOUSE OF REPRESENTATIVES

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AUTHORIZATION FOR THE USE OF MILITARY FORCE AND CURRENT TERRORIST THREATS

TUESDAY, JULY 25, 2017

HOUSE OF REPRESENTATIVES,
COMMITTEE ON FOREIGN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 10:00 a.m., in room 2172 Rayburn House Office Building, Hon. Edward Royce (chairman of the committee) presiding.

Chairman ROYCE. This hearing will come to order.

Today we are going to review a critical national security issue: The role of Congress in authorizing the use of military force. We have a very distinguished panel to help us do so.

Our Nation continues to face the threat of radical jihadist terrorism. We have confronted this deadly movement with some measure of success, largely because of the skill, the dedication, and the sacrifice of the brave men and women of our armed services. But as recent attacks on the United States and our allies—such as the United Kingdom—show, the threat remains high. Our response must be coordinated, using information and economic tools, too.

Today, most U.S. combat operations are conducted under the Authorization for the Use of Military Force, or the AUMF, that was enacted following the vicious September 11th, 2001 attacks on our country. That AUMF has been used against al-Qaeda, the Taliban, and what have since become known as "associated forces." Nearly 3 years ago, the Obama administration determined that those forces include ISIS, which originated as al-Qaeda in Iraq.

The continued reliance on this legal authority has spurred debate. Some maintain that the 2001 AUMF has been stretched too far. Some believe that Congress—most of whose members were not here in 2001—should debate and reauthorize our military engagement. We have Members of Congress who have fought these wars, whose voices carry strong weight.

Over the last several years, this committee has conducted more than 45 hearings related to conflicts fought under the AUMF and we have often met in classified settings with military commanders and other officials to review the grave terrorist threat against our Nation. I know that our members on both sides of the aisle take their responsibilities very seriously. We have had many conversations about the AUMF.

I believe that the President has the authority under the 2001 AUMF to defeat and destroy ISIS. Key outside experts and officials from the previous administration who have appeared before this

committee have testified to this. But I also believe that a new and updated authorization for the use of military force would be ideal. The challenge is getting agreement on what exactly it should contain.

Proposed replacements vary widely. Some would empower the Commander in Chief. Others would constrain him. Some would target groups. Others would target ideologies. Some are limited in time and place and type of military force. Others are unlimited.

What I cannot support is any effort to repeal the 2001 AUMF before reaching consensus on these issues. We face determined enemies—al-Qaeda, ISIS, and the Taliban—absolutely committed to harming us. There shouldn't be any signs of wavering in our fight.

Today's witnesses will shed light on a few key questions: Does the 2001 AUMF provide sufficient legal authority to deal with all of today's threats? Does continuing to rely on that authorization create any operational challenges or legal dangers? What should—or shouldn't—be a replacement and what should be included in that AUMF?

Authorizing the use of military force is a critical and solemn congressional responsibility. This committee will continue its focus on it.

I will now turn to Ranking Member Engel for his statement.

Mr. ENGEL. Thank you. Thank you, Mr. Chairman. Thank you for calling this hearing.

To our witnesses, welcome to the Foreign Affairs Committee. We are grateful for your time and expertise.

The role of Congress in authorizing and overseeing the use of American military force around the world is really such an important issue.

Some of us have been trying to advance this debate for the last several years. But for the most part, the topic has remained on the back burner in the halls of Congress.

I am glad we are focusing on it today because I think the need for congressional leadership is more important now than ever.

The authorization for the use of military force passed by Congress in 2001, and I was here then, authorized the President to take military action against, and I quote, "those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11th, 2001, or harbored such organizations or persons."

In the intervening years, it has been used as a legal justification for military force in a host of countries around the world. Today, it is the legal basis for the fight against ISIS.

That gives you a sense of just how broadly this authorization has been interpreted by successive administrations.

I was here when we passed this measure nearly 16 years ago, and I have to say that none of us envisioned we would still be relying on it nearly two decades later to fight an enemy that didn't even exist when the Twin Towers came down. It has essentially become a blank check.

Now, whatever you think of President Obama's foreign policy, his administration did come to Congress and ask for an updated authorization.

The current administration has not, and what concerns me now is that we have seen escalating military activity on a number of fronts—ratcheting up the use of force in Afghanistan, a pledge by the administration to ramp up the fight against ISIS, reckless talk about expanding the Guantanamo Bay Detention Facility—which even President Bush wanted to close—declaring parts of Somalia so-called "areas of active hostilities," which decreased oversight of air strikes and increases the risk that American forces could be drawn into clan conflicts, and strikes against the Assad regime and associated forces.

Now, I am not saying that we shouldn't do some of this. I am not saying that we should withdraw from these challenges.

The fight against ISIS is critical to protect the national security of the United States and our allies. We have seen too many murdered children and families and must continue to ensure that Assad does not use chemical weapons and we have invested too much blood and treasure in Afghanistan to stand by and watch it fall back into the hands of extremists.

But we have to ask ourselves: Are we comfortable sending American service members into harm's way based on a virtually limitless 2001 authorization? If so, what will be the next skirmish supposedly covered by this 16-year-old measure? Extended hostilities toward Assad's forces? Shooting down a Russian MiG? This, to me feels like a slippery slope.

So Congress needs to do its job. We need to do what we should have done years ago and pass a new authorization governing the conflicts we are engaged in today. And frankly, even though we call it an authorization, what we need is a limitation.

The 2001 authorization is too broad. It needs to be put out to pasture and scaled back. We need an authorization tailored to the challenges we face today, one that gives the administration the tools it needs to ensure our security without dragging us into another war, turning the slippery slope into a dangerous cliff.

Congress has the power to do this and we need to act. But for us to craft a measure with the right boundaries we need to know what strategies the United States is pursuing in these global hot spots.

We have U.S. troops on the ground in Syria but we still don't have a clear sense of the end game there or when the troops will come home.

With the conflict in Afghanistan once again heating up and a disturbing spike in civilian casualties, we have yet to learn the Trump administration's approach to America's longest war.

And now that we have received the administration's plan to deal with ISIS, I am not clear how it differs at all from the approach of the last administration.

We haven't heard anything from the administration about how it intends to win the peace in all these places once the fighting is over.

I can tell you one thing—slashing funding for diplomacy and development is the wrong approach that the administration is doing. Planning a war without planning to secure the peace is a sure path toward future conflict and instability and if we don't have a strong

State Department and USAID, we are taking away the tools to build that long-term solution.

You cannot make foreign policy flying by the seat of your pants, especially when it comes to our men and women in uniform. The administration should be up here explaining how they plan to deal with these conflicts, not careening from crisis to crisis.

But one way or another, we, Congress, need to act. It is time to retire the 2001 AUMF and stop shirking our responsibility. I have an approach that I have been working on. Other members have offered their views as well.

If these approaches aren't perfect at first, it doesn't mean we can throw up our hands and walk away. It means we need to work across the aisle to find the right answer and the right approach.

So I look forward to hearing from our witnesses. I thank you again, Mr. Chairman. I want to hear from our witnesses about the right way to grapple with this problem.

Before I yield back, I would like to ask unanimous consent that Representative Barbara Lee be allowed to ask questions after all members of the committee have had their chance at this morning's hearing.

There is strong interest in this issue from the advocacy community. We have received statements for the record from Human Rights First, Third Way, and the Constitution Project as well as a letter from a coalition of human rights, civil liberties, and faith-based organizations and I would also like to ask unanimous consent to enter these documents into the record.

Chairman ROYCE. Without objection.

We are pleased to welcome our colleague, Congresswoman Barbara Lee from California.

And as to your suggested approach there, Mr. Engel, I quite concur. I think it needs to be bipartisan.

This morning we are pleased to be joined by a distinguished panel that we think will shed light on this.

The Honorable Michael Mukasey served as the 81st Attorney General of the United States and as a U.S. district judge in the Southern District of New York.

We have Brigadier General Richard Gross, partner at the FH&H law firm in northern Virginia. Previously General Gross served for over 30 years in the U.S. Army. He was the legal counsel to the chairman of the Joint Chiefs of Staff.

We have Mr. Matt Olsen, a lecturer on law at Harvard Law School. Previously, Mr. Olsen served as the director of the National Counterterrorism Center.

So without objection, the witnesses' full prepared statements will be made part of the record and all members will have 5 calendar days to submit any statements or questions or any extraneous material for the record.

Judge, would you like to begin? Thank you.

STATEMENT OF THE HONORABLE MICHAEL B. MUKASEY (FORMER ATTORNEY GENERAL OF THE UNITED STATES)

Judge MUKASEY. Thank you very much, Mr. Chairman.

Before I make any remarks, I'd like to thank both the chair and the ranking member for having invited me and for holding this

hearing, which is, as you both pointed out, enormously important and represents a real political commitment to putting this Congress on record as it should be with this country and I really appreciate that.

I am not going to read my statement. It is in the record. I would simply make two additional points that are additional to what I said in my prepared remarks, one having to do with the sunset provision, which I endorsed simply because it does provide for this added opportunity on every several years to recommit to a course of action.

Obviously, there are authorities that have to remain in force notwithstanding the arrival of a sunset so that, for example, people detained in an initial encounter, notwithstanding the sunset there would have to a be a separate determination with respect to them. It doesn't become a home free all for them.

And secondly, with respect to a requirement or statement of strategy, which I did not touch on in my remarks but I think that, obviously, it is important to have a general idea of what you are going to do. But a statement of strategy that tells your adversaries what it is you plan to do and how it is you plan to do it I don't think is well taken and, as I believe the ranking member pointed out, micro managing any combat is a dangerous thing. So that that ought to be taken into account.

So far as our not having been able to envision being in Afghanistan 16 years on from 9/11, I should point out that when the bombers hit Pearl Harbor, they did not also drop leaflets that said, don't worry, folks, this is all going to be over by 1945.

You never know when at the beginning of combat how it is going to end. That is the nature of a conflict like this. But I don't think that the fact that we don't precisely know how and when should prevent us from opposing to the extent we can what we are up against.

Thank you very much.

[The prepared statement of Judge Mukasey follows:]

STATEMENT OF MICHAEL B. MUKASEY

HOUSE COMMITTEE ON FOREIGN AFFAIRS

HEARING ENTITLED 'AUTHORIZATION FOR THE USE OF MILITARY FORCE AND CURRENT TERRORIST THREATS

JULY 25, 2017

I am grateful to the Chairman and to the Ranking Member for this opportunity to address issues surrounding the current authorization for the use of military force (AUMF), passed in the immediate aftermath of the September 11, 2001 attacks. Specifically, those issues are: whether the existing AUMF gives adequate authority to address current, critical operations against Al Qaeda, the Taliban, and ISIS; whether reliance on the existing AUMF presents problems; whether it is important to update or replace the current AUMF and what should be included in or excluded from any new AUMF.

I. **Need for an AUMF**

Any discussion of those issues must proceed based on an understanding of why an AUMF is necessary in order to protect the country. Is an AUMF necessary for the executive, in the person of the President, to employ force in defense of the nation? The War Powers Resolution of 1973, which became law when Congress overrode President Nixon's veto, has been the subject of controversy since it was passed. It requires the President to notify Congress within 48 hours of using the armed forces of the United States overseas, and requires that such forces be removed within 60 days, unless that period is extended or an AUMF is enacted. Every President since Jimmy Carter has

taken the position that the War Powers Resolution is unconstitutional as a violation of the separation of powers provided for in the Constitution, yet none have challenged it in court and Presidents have filed about 130 reports of the use of armed forces abroad as required by the law.

Because of the Armed Forces Resolution, it is arguably necessary to have an AUMF in place in order to have the laws of war rather than the laws of civilian society govern interactions between our troops and the enemies they encounter on the battlefield. The laws of war permit the detention and interrogation of enemy fighters without the need for formal charges or the conventional warnings to the detainee as to the right to remain silent or to counsel. Moreover, detention may continue for the duration of the conflict in which the detainee participated, or until the detainee ceases to present a danger to the United States.

The importance of detention is obvious. When someone is captured participating in terrorist activities against the United States, the first requirement is to protect against resumption of those activities. Catch and release is not an acceptable formula. The importance of interrogating captured terrorists cannot be overstated. Signals intelligence is useful, even important. But with increased successful use of encryption and other devices of concealment by terrorist networks, reliance human intelligence is vital if we are not to "go dark" in attempting to track and frustrate terrorist plans. Further, General Michael V. Hayden, former Director of the CIA, has likened intelligence activities to trying to assemble a jigsaw puzzle. Signals intelligence can provide many pieces,

although it is not even clear which of them belong in the puzzle one is attempting to assemble; human intelligence can provide a look at the picture on the box, and show where all the pieces fit.

II. The Current AUMF

It has become increasingly apparent, certainly since 2001 if not before, that whether we acknowledge it or not, those who adhere to a militant Islamist ideology regard themselves as at war with the West in general, and the United States as the principal embodiment and defender of Western values. Our constitutional system, on the other hand, does not appear to permit the authorization of force simply against adherents to an ideology, but only against particular state or non-state actors who adhere to that ideology. That limitation requires us to assure that the AUMF is current as to the identity of those state and non-state actors who regard themselves as being at war with us, and with whom we are, through no choice of our own, at war as well.

The current AUMF, passed in the immediate aftermath of the attacks of September 11, 2001, authorizes the use of armed force against those persons and entities responsible for those attacks, and against Iraq. The authorization of force against Iraq is irrelevant; the authorization of force against those persons and entities responsible for the attacks is likely inadequate and has necessitated the tracing of the lineage of current terrorist groups, including ISIS, to either Al Qaeda or the Afghan Taliban, which are specified in the current AUMF. ISIS is arguably an offshoot of Al Qaeda, but using this

tracing of origins – terrorist DNA, as it were – is an inefficient way to determine whether a particular group is covered. For example, the current AUMF specifies that it applies to the Afghan Taliban, which created the anomaly that Faisal Shahzad, apprehended in connection with an attempted bombing in New York's Times Square in 2010, was not subject to it because he received support from the Pakistani Taliban rather than the Afghan Taliban. As a result, he received the perverse benefit of treatment as an ordinary criminal. The same can hold true for members of Al Shabab or even of AQAP.

The identification of state and non-state actors in the AUMF should be as broad as possible, so as to avoid coverage being lost as the result merely of a change of name by a group, for example, but not so inclusive so as to sweep in state or non-state actors with whom we have no conflict – Iraq, for example.

Another shortcoming of the current AUMF, although it does not appear in text of the law, arises from its having been passed more than 15 years ago, before many now in Congress were serving, and before many now voting were of age. Quite simply, many now in Congress have no stake in the current AUMF. That leaves them free to criticize steps taken under the current law even as they deny any responsibility for the law itself. That state of affairs, coupled with an electorate that includes many who were not eligible to participate politically at the time of enactment of the original AUMF, results in a lack of commitment among Members of Congress and the public to decisions vital to this country's defense.

In addition, it might be useful for an AUMF to address issues of detention so as to make it clear that those captured may be detained for the duration of the struggle against the groups to which they belong, or until they no longer present a danger to the United States.

III. A New AUMF

A new AUMF should correct the deficiencies noted above, insofar as the current law is both over-inclusive (for example, by including Iraq among its targets), and under-inclusive (for example, for not including the Pakistani Taliban). A new statute should also embody a legislative recognition that long-term detention of unlawful combatants is necessary and appropriate.

I have not been a fan of sunset provisions in authorizing legislation for intelligence gathering measures or other activities relating to our defense in our struggle with Islamist militants. However, I recognize the need for periodic adjustment of laws that enable us to conduct that defense so as to meet current needs, as well the need for periodic recommitment to that defense by our citizens and our legislators. Therefore, I would recommend a five-year sunset provision that would assure that adjustment and recommitment, even as we acknowledge that the struggle is not likely to end within the sunset period.

Finally, I believe that if a new AUMF better specified who the enemy is and what is necessary someone to qualify as an enemy combatant, there is no reason why it should not include authorization for the use of force against Americans who travel abroad to participate in terrorist activity against the United States. I believe it would be anomalous for example, if we were to authorize the use of lethal force against a terrorist leader abroad, but refrain simply because that leader is in the company of an American who travelled abroad to help him. The Supreme Court has already held, more than once, that Americans who join our foreign enemies have no claim to protection superior to the protection given those foreign enemies. Our legislation should recognize that.

Chairman ROYCE. Thank you, your Honor.

General.

STATEMENT OF BRIGADIER GENERAL RICHARD C. GROSS, USA, RETIRED, PARTNER, FLUET HUBER + HOANG, PLLC (FORMER LEGAL COUNSEL TO THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF)

General GROSS. Thank you, Chairman Royce. Thank you, Ranking Member Engel and members of the committee. I am very grateful for the opportunity to——

Chairman ROYCE. Make sure, General, that you've got that red button on. There we go.

General GROSS. It was.

Chairman ROYCE. And maybe pull it a little closer would be the other suggestion.

General GROSS. Yes, sir.

Again, it is a privilege to appear before the committee today. I am purposely going to keep my remarks brief.

What I hope to offer the committee is a military, legal practitioner's view of AUMFs and in particular the 2001.

As you mentioned, I retired after over 30 years in the U.S. Army, both as an infantry officer and as a judge advocate. I was the legal advisor to multiple joint and special operations task forces with multiple deployments to Afghanistan and Iraq.

I was also the legal advisor for the Joint Special Operations Command, NATO ISAF, U.S. Forces Afghanistan and U.S. Central Command, and in my final 4 years I was General Dempsey's legal advisor on the Joint Staff when he was the chairman of the Joint Chiefs of Staff.

I worked closely when I was on the Joint Staff with the DoD general counsel, the National Security Council legal staff, and the interagency lawyers groups on national security law issues to include counterterrorism operations.

I dealt with the 2001 and 2002 AUMFs multiple countless times over those 4 years both in the context of specific targeting operations as well as more general discussions on the scope of the AUMF and proposals to revise or amend it. Many of those discussions actually took place here in Congress in both the Senate and the House in briefings, hearings, and informal discussions with members and congressional staff.

My views on the 2001 AUMF have not changed since I retired from the military. I continue to feel the 2001 AUMF is adequate. It contains adequate legal authority for the use of military force against the Islamic State of Iraq and Syria, which was a view first adopted by the previous administration and I believe to be the position of the current administration.

I recognize, however, that reasonable minds disagree on this point and many have voiced criticisms of the decision to rely on the 2001 AUMF as the domestic legal authority to conduct military operations against ISIS.

While I believe the 2001 AUMF is adequate to address the ISIS threat, I also believe it would be prudent for Congress to enact the new AUMF to specifically address the threat of ISIS and other terrorist groups for a variety of reasons.

First, a new AUMF would reflect the current will of the American people as exercised through their elected leaders regarding our ongoing operations against ISIS, al-Qaeda, the Taliban, and other terrorist groups.

A new AUMF would also define the current scope and extent of our military's mission against terrorist organizations, and finally, a new AUMF would signal congressional support to the U.S. armed forces.

As the committee considers what provisions a new AUMF might contain, please allow me to give you my perspective as a practitioner.

When I review an AUMF proposal, I think of it in terms of the mission—who, what, when, where, and how. Against whom are we using force, what force is authorized, and for how long? Where is the use of force authorized? Finally, how are we authorized to use that force? Are there restraints or restrictions?

To be clear, I do not think it is helpful nor desirable to have all of these elements in an AUMF, a point I will expound upon more in a moment.

With these elements, there is necessarily a trade-off between transparency and certainty, on one hand, and flexibility for commanders on the other.

The more descriptive or proscriptive a provision of AUMF is, the less flexibility it may afford the President and military commanders to pursue a dynamic ever-changing enemy terrorist group.

I would urge the committee to carefully consider that balance as it takes up the AUMF proposals.

The most critical provision of an AUMF is the who—identifying the enemy against whom force may be used. Our current enemies do not wear a uniform, hide among civilian populations, and operate in a dynamic, disperse network of clandestine cells. This makes defining them challenging.

Given that, there should be some flexibility in the AUMF to account for an ever-changing and expansive nature of the enemy while also defining with affiliates and co-belligerents rise to the level of associated forces.

The what element defines the scope of the authorized force. The 2001 AUMF authorized the President to use all necessary and appropriate force. This same language is also used in the Senate Joint Resolution introduced by Senators Flake and Kaine.

This particular language provides maximum flexibility to commanders. Other elements—when, where, and how—often appear in AUMF proposals, but these elements may create unintended consequences. I will discuss each of these in turn.

The when or for how long element usually arises in the form of a sunset provision which results in the automatic termination of the AUMF after a set period of time. These are generally included as a forcing function, a means of ensuring periodic review of the authority granted by Congress.

However, sunset provisions may also create legal uncertainty for the President and military, particularly as the expiration date approaches without action to extend or reauthorize the AUMF.

Sunset provisions could also be interpreted by both adversaries and coalition partners as a lack of resolve and could potentially embolden adversaries to wait this out.

The where element is typically reflected as a geographic limitation. This provides certainty and transparency but may not afford the President and military commanders the flexibility necessary to pursue the enemy outside the named countries.

Terrorist groups often seek safe haven in ungoverned and under governed spaces and publically announcing geographic limits in an AUMF may encourage adversaries to seek those countries out.

Finally, the how element, which occasionally appears in some proposals, may be the most problematic, in my opinion. These are provisions that attempt to specifically define how the military will be used, a role normally reserved for the President and the military commanders.

For example, some proposals seek to prohibit combat roles or boots on the ground, and one past proposal included a prohibition against the use of the military in enduring offensive ground combat operations.

Provisions like these may significantly restrict the flexibility of the President and military commanders to adapt to a constantly changing dynamic enemy.

I want to mention two final points. First, one should consider the AUMF in the broader context of other sources of law and policy. There are other sources of law and authority that act as restraints on the use of military force to include international law, domestic law, U.S. policy and the orders of the Commander in Chief and combatant commanders.

Second, I want to assure the committee that before any military force is used, there is a robust review process in place.

Up and down the military chain of command, senior commanders advised by trained and experienced staffs—including intelligence officers, operations officers, and judge advocates—review operations for compliance with the applicable law and policy, and for consistency with the orders of superiors in the chain of command.

In counterterrorism operations, the AUMF is central to that robust review process. During my 30 years in the military it was my experience that commanders and their staffs worked very hard to ensure that all operations were conducted morally, legally, and ethically, and I have no doubt they will continue to do so in the future.

I look forward to your questions. Thank you.

[The prepared statement of General Gross follows:]

Testimony of Brigadier General Richard C. Gross, US Army (Retired)

Partner, Fluet Huber + Hoang PLLC, and Former Legal Counsel to the Chairman of the Joint Chiefs of Staff

"Authorization for the Use of Military Force and Current Terrorist Threats"

Foreign Affairs Committee, U.S. House of Representatives

July 25, 2017

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

I am purposely keeping my remarks brief today. What I hope to offer the Committee is a military legal practitioner's view on the Authorization for the Use of Military Force (AUMF).

I retired in December 2015 after serving over 30 years in the United States Army, both as an Infantry Officer and later as a Judge Advocate. Following the tragic events of 9/11, I served as the legal advisor to several joint and special operations task forces, deploying multiple times to Iraq and Afghanistan. I also served as the legal advisor for the Joint Special Operations Command, the NATO International Security Assistance Force (ISAF)/U.S. Forces-Afghanistan, and U.S. Central Command. During my final four years of active duty, I was the Legal Counsel to the Chairman of the Joint Chiefs of Staff, General Martin Dempsey.

During my final assignment in the Pentagon, I worked closely with the Department of Defense General Counsel, the National Security Council Staff Legal Advisor, and the interagency lawyers group on national security law issues, to include counterterrorism operations. I dealt with the 2001 and 2002 AUMFs on countless occasions during those 4 years, both in the context of specific targeting operations and in more general discussions on the scope of the AUMF and proposals to revise or amend it. Some of those latter discussions took place in the House and

the Senate, in briefings, hearings, and informal discussions with members and Congressional staff.

My views on the 2001 AUMF have not changed since I retired from the military. I continue to believe the 2001 AUMF contains adequate legal authority for the use of military force against the Islamic State of Iraq and Syria (ISIS), a view first adopted by the previous administration that also appears to be the position of the current administration. I recognize, however, that reasonable minds disagree on this point, with some voicing criticism of the decision to rely on the 2001 AUMF as the domestic legal authority to conduct military operations against ISIS.

While I believe the 2001 AUMF is adequate to address the current ISIS threat, I also believe it would be prudent for Congress to enact a new AUMF to specifically address the threat of ISIS and other terrorist groups, for a variety of reasons. First, a new AUMF would reflect the current will of the American people, as exercised through their elected leaders, regarding our ongoing operations against ISIS, al Qaeda (AQ), the Taliban, and other terrorist groups. A new AUMF would also define the current scope and extent of our military's mission against terrorist organizations. Finally, a new AUMF would send an important signal of Congressional support to the U.S. Armed Forces.

As the Committee considers what provisions a new AUMF might contain, please allow me to give you my perspective as a military legal practitioner. When I review an AUMF proposal, I think of it in terms of the mission: who, what, when, where, and how. Against whom are we using force? What force is authorized, and for how long? Where is the use of force authorized? Finally, how are we authorized to use that force—are there restrictions or constraints? To be clear, I do not think it is helpful nor desirable to have all of these elements in an AUMF, a point I will expound upon more in a moment.

With these elements, there is necessarily a trade-off between transparency and certainty on one hand and flexibility on the other. The more descriptive (or proscriptive) a provision of the

AUMF is, the less flexibility it may afford the President and military commanders to pursue a dynamic, ever-changing enemy terrorist group. I would urge the Committee to carefully consider that balance as it takes up AUMF proposals.

The most critical provision of an AUMF is the "*Who*"—identifying the enemy against whom force may be used. Our current enemies do not wear a uniform, hide among civilian populations, and operate in dynamic, dispersed networks of clandestine cells. This makes defining them, in a static AUMF, challenging. Given that, there should be some flexibility in the AUMF to account for the ever-changing and expansive nature of this enemy, while also defining which affiliates and co-belligerents rise to the level of "associated forces" and therefore fall under the scope of the AUMF.

The "*What*" element defines the scope of the authorized force. The 2001 AUMF authorized the President to use "all necessary and appropriate force"; this same language is also used in the Senate Joint Resolution introduced by Senators Flake and Kaine. This particular language provides the maximum flexibility to the President and military commanders.

Other elements—When, Where, and How—often appear in AUMF proposals, but these elements may create unintended consequences. I'll discuss each of these in turn.

The "*When*" (or "for how long") element usually arises in the form of a sunset provision which results in the automatic termination of the AUMF after a set period of time. These are generally included as a forcing function: a means of ensuring periodic review of the authority granted by Congress. However, sunset provisions may also create legal uncertainty for the President and military, particularly as the expiration date approaches without action to extend or reauthorize the AUMF. Sunset provisions could also be interpreted by both adversaries and coalition partners as a lack of resolve, and could potentially embolden adversaries to "wait us out."

The "*Where*" element is typically reflected as a geographic limitation. This provides certainty and transparency, but may not afford the President and military commanders the flexibility necessary to pursue the enemy outside the named countries. Terrorist groups often seek safe haven in ungoverned and under-governed spaces, and publicly announcing geographic limits in an AUMF may encourage adversaries to seek out those countries where the AUMF does not authorize military force.

Finally, the "*How*" element, which occasionally appears in some proposals, may be the most problematic. These are provisions that attempt to specifically define how the military will be used, a role normally reserved for the President and military commanders. For example, some proposals seek to prohibit combat roles or "boots on the ground"; one past proposal included a prohibition against the use of the United States Armed Forces in "enduring offensive ground combat operations." Provisions like these may significantly restrict the flexibility of the President and military commanders to adapt to a constantly changing, dynamic enemy.

I want to mention two final points. First, one should consider the AUMF in the broader context of other sources of law and policy—an AUMF is not the final word when it comes to military operations. There are many other sources of law and authority that act as restraints on the use of military force, to include international law (the U.N. Charter, treaties, the Law of Armed Conflict, etc.); other domestic law; U.S. policy; and the orders of the Commander-in-Chief, the Secretary of Defense, and Combatant Commanders.

Second, I want to assure the Committee that, before any military force is used, there is a robust review process in place. Up and down the military chain of command, senior commanders, advised by trained and experienced staffs, including intelligence officers, operations officers, and judge advocates, review operations for compliance with applicable U.S. domestic and international law, including the law of armed conflict, and for consistency with the policies and orders of superiors in the military chain of command. In counterterrorism operations, the AUMF is central to that robust review process. During my 30 years in the military, it was my

experience that commanders and their staffs worked very hard to ensure that all operations were conducted morally, legally, and ethically, and I have no doubt they will continue to do so.

I look forward to your questions. Thank you.

Chairman ROYCE. Yes, Mr. Olsen, please.

STATEMENT OF THE HONORABLE MATTHEW G. OLSEN, LECTURER ON LAW, HARVARD LAW SCHOOL (FORMER DIRECTOR OF THE NATIONAL COUNTERTERRORISM CENTER)

Mr. OLSEN. Thank you, Chairman Royce and Ranking Member Engel and members of the committee. I am honored to be here this morning to address this very important issue.

I am also pleased to join with such distinguished witnesses, Judge Mukasey and General Gross, this morning.

I approach these issues from the perspective of my two decades working as a government official tackling national security and intelligence and law enforcement matters under both Republican and Democratic administrations.

From this vantage point, my bottom line up front is that the importance of updating and clarifying the 2001 AUMF is quite clear. By renewing this authority in light of the current terrorism landscape, Congress can provide its explicit authority for our counterterrorism efforts while at the same time exercising that responsible oversight that is consistent with Congress' role under the Constitution.

So my views are based on my time in the intelligence community as well as my time at the Department of Justice.

I most recently served as the director of the National Counterterrorism Center, which is an agency that provides intelligence analysis and the integration of intelligence about counterterrorism. I was responsible for briefing the President and the National Security Council as well as the strategic operational planning of counterterrorism activities.

I also served in national security leadership roles at the Department of Justice, including having the privilege of working under Judge Mukasey for a period of time at the Justice Department.

So let me begin briefly by emphasizing the dynamic and persistent threat that we face from terrorist groups. In short, the range of threats that we face from terrorists today is more diverse, more fragmented, and more geographically expansive than at any time in recent history.

The so-called Islamic State, or ISIS, presents the most urgent threat to us. Its sanctuary in Syria and Iraq, while significantly diminished recently by the U.S.-led military coalition, has enabled that group to regroup and train and then execute external attacks, including more recently in Europe.

The rise of ISIS more generally reflects the transformation of the jihadist threat over the past several years. ISIS and other groups have taken advantage of unrest in the region to expand their reach and establish safe havens. As a result the terrorism threat now comes from a decentralized array of networks and organizations. They include al-Qaeda, al-Qaeda's affiliates, and then a range of violent jihadist groups that share al-Qaeda's ideology.

So it is against this backdrop of this very evolving and persistent terrorist threat that I think it is clear that the 2001 AUMF is ill-suited to today's threats. It was enacted just days after 9/11. It provided the authority to use all necessary and appropriate force against those responsible for the 9/11 attacks.

Years later, the terrorist groups threatening the United States have changed but the 2001 AUMF remains the foundational authority for the use of force.

The AUMF has now been invoked over 37 times in at least 14 different nations and against more than half a dozen terrorist groups. It is unlikely, as you said, Ranking Member Engel, that Members of Congress who voted for the 2001 AUMF would have contemplated that the law would be used in this manner today.

This lack of clarity about the scope and applicability of the 2001 AUMF in today's threat landscape has the potential to undermine our efforts to use force against terrorist groups that evolve or emerge and have emerged over the past 16 years.

At the same time, it is my view that the AUMF's lack of time limits and reporting requirements and the open-ended definition of who is covered by the AUMF have undermined Congress' ability to conduct effective oversight of the use of military force.

So in updating the AUMF to match the current threat environment, I would suggest, respectfully, that Congress consider several issues, and I will touch on these very briefly.

First, Congress should start by specifying which groups are covered and for what purpose. The AUMF-based authorities are needed for armed conflicts against al-Qaeda, the Taliban, and ISIS but these authorities are not needed for groups that don't pose a similar threat. That is one.

Two, Congress should set a time limit on the AUMF to ensure continued congressional approval, engagement, and oversight as these conflicts evolve.

I believe that a sunset signals to our partners and our adversaries that the United States is committed to use the force required to combat the current threats we face even as we sustain the fight for as long as it takes.

And then third, Congress should include reporting requirements for the executive branch. The regular and detailed reporting to Congress and therefore to the public about the war effort is vital to our democracy and it is necessary for Congress to fulfil its oversight obligations and thereby strengthens the legitimacy of the mission overall.

In conclusion, Mr. Chairman, the terrorist threat facing the Nation is persistent, it is complex, and it is evolving. I believe that Congress should update the increasingly outdated 2001 AUMF to explicitly provide a mandate for the use of force but subject to appropriate congressional oversight and constraints.

I believe that fulfilling this responsibility will show our troops that Congress is behind them, it will assure our allies and partners that the United States is committed to human rights and the rule of law, and it will demonstrate to our enemies that we are committed to their defeat.

I look forward to your questions.

[The prepared statement of Mr. Olsen follows:]

House Foreign Affairs Committee Hearing
on
"Authorization for the Use of Military Force and Current Terrorist Threats"

July 25, 2017

Statement of the Honorable Matthew G. Olsen

Lecturer on Law, Harvard Law School
Former Director of the National Counterterrorism Center

Thank you, Chairman Royce, Ranking Member Engel, and distinguished members of the committee. I am honored to have this opportunity to appear before you to address the critical issue of authorizing the use of military force in the context of the evolving terrorist threat.

I am pleased to participate in the hearing today along with such distinguished witnesses, former Attorney General Michael Mukasey and former Legal Counsel to the Chairman of the Joint Chiefs of Staff Richard Gross. I was privileged to work for Judge Mukasey at the Justice Department when he was the Attorney General.

I approach these issues from the perspective of my years of service as a national security lawyer and counterterrorism official in the executive branch. From this vantage point, the importance of updating and clarifying the 2001 Authorization for Use of Military Force ("AUMF") is clear. By renewing this authority in light of the current terrorism landscape, Congress can provide explicit authority for our counterterrorism efforts, while exercising responsible oversight consistent with Congress's role under the Constitution.

I dedicated more than two decades to public service as a government attorney and official on a range of national security, intelligence, and law enforcement matters under both Republican and Democratic administrations. Most recently, I was the Director of the National Counterterrorism Center, an agency responsible for operating as the government's hub for terrorism intelligence and analysis. In this capacity, I was responsible for briefing the President and National Security Council on terrorism threats and trends and for the strategic operational planning of counterterrorism activities to help ensure we implemented a whole-of-government approach to our counterterrorism efforts.

Prior to NCTC, I served as the General Counsel of the National Security Agency, where I was the agency's chief legal officer. At the Department of Justice, I held several leadership positions, including Acting Assistant Attorney General and Deputy Assistant Attorney General for National Security. Under President Obama, I served as Special Counselor to the Attorney General and led the review of detainees held at Guantanamo Bay. During Director Robert Mueller's tenure at the FBI, I served as his Special Counsel. I also worked as a federal prosecutor in Washington, D.C., for over a decade, and as a Trial Attorney in the Justice Department's Civil Rights Division.

I will begin by describing the current threat landscape and why continued reliance on the 2001 Authorization for Use of Military Force ("AUMF") for dealing with today's threats is problematic. Next, I will address the importance of carefully crafting any new AUMF to ensure that the government has sufficient authority and operational flexibility to achieve the mission without ceding Congress' power over declaring and overseeing war, and without eroding American values. Finally, I will offer some thoughts on how Congress can draft a new AUMF to achieve these ends.

Today's Threat Landscape

The need to update and clarify the 2001 AUMF stems directly from the dynamic and persistent nature of terrorism threats to the United States. Over the past several years, the range of threats we face from terrorist groups has become increasingly diverse, fragmented and geographically expansive. The continuing appeal of the jihadist narrative and the adaptive nature of these groups have led to the emergence of new threats and pose substantial challenges to the efforts of our counterterrorism community.

By any measure, the so-called Islamic State or ISIS presents the most urgent threat to our security today. The group has exploited the conflict in Syria and sectarian tensions in Iraq to entrench itself in both countries. Using both terrorist and insurgent tactics, the group has seized and is governing territory, while at the same time securing the allegiance of allied terrorist groups across the Middle East and North Africa. ISIS's sanctuary—while significantly diminished under pressure from the U.S.-led military coalition—has enabled the group to recruit, train, and execute external attacks, as we have seen in Europe, and to incite assailants around the world. ISIS has recruited thousands of militants to join its fight in the region and uses its propaganda campaign to radicalize others in the West. And at the same time, we continue to face an enduring threat from al-Qaida and its various affiliates, who maintain the intent and capacity to carry out attacks in the West.

More broadly, the rise of ISIS should be viewed as a manifestation of the transformation of the global jihadist movement over the past several years. We have seen this movement diversify and expand in the aftermath of the upheaval and political chaos in the Arab world since 2010. Instability and unrest in large parts of the Middle East and North Africa have led to a lack of security, border control, and effective governance. In the last few years, four states—Iraq, Syria, Libya, and Yemen—have effectively collapsed. ISIS and other terrorist groups exploit these conditions to expand their reach and establish safe havens.

As a result, the threat now comes from a decentralized array of organizations and networks. Specifically, al-Qaida core continues to support attacking the West and is vying with ISIS to be the recognized leader of the global jihad. There is no doubt that sustained U.S. counterterrorism pressure has led to the steady elimination of al-Qaida's senior leaders and limited the group's ability to operate, train, and recruit operatives. At the same time, the core leadership of al-Qaida continues to wield influence over affiliated and allied groups, such as Yemen-based al-Qaida in the Arabian Peninsula ("AQAP"). Indeed, on three occasions over the past several years, AQAP has sought to bring down an airliner bound for the United States. And

there is reason to believe it still harbors the intent and substantial capability to carry out such a plot.

In Syria, veteran al-Qaida fighters have traveled from Pakistan to take advantage of the permissive operating environment and access to foreign fighters. They are focused on plotting against the West. Al-Shabaab also maintains a safe haven in Somalia and threatens U.S. interests in the region, asserting the aim of creating a caliphate across East Africa. The group has reportedly increased its recruitment in Kenya and aims to destabilize parts of Kenya. Finally, al-Qaida in the Islamic Maghreb ("AQIM"), its splinter groups, and Boko Haram—now an official branch of ISIS—continue to maintain their base of operations in North and West Africa and have demonstrated sustained capabilities to carry out deadly attacks against civilian targets.

The Need to Update the 2001 AUMF

Against this backdrop, it is clear that the 2001 AUMF is not well-suited to today's evolving terrorist threats. Enacted just days after the nation was attacked on September 11, the 2001 AUMF provided the president the authority to use "all necessary and appropriate force" against those responsible for the attacks.[1] As Congress and the White House were negotiating the scope of this authorization, smoke was still rising from the ashes of the Pentagon, the number of dead was still being tallied, and fears of another attack were palpable.[2] Even under these circumstances, Congress rejected calls for an open-ended AUMF that would have given the President untethered authority "to deter and pre-empt any future acts of terrorism or aggression against the United States."[3] The 60-word authorization that Congress ultimately passed provided authority for using military force only against the perpetrators of 9/11 for the specific purpose of preventing those perpetrators from attacking the country again.

Almost 16 years later, the 2001 AUMF has now been invoked over 37 times in at least 14 different nations against more than half a dozen terrorist groups.[4] It is unlikely that members of Congress who voted for the 2001 AUMF would have contemplated that the law would authorize

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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 ("That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, .organizations or persons.").

[2] For a detailed accounting of the circumstances of the drafting and vote on the 2001 AUMF see Gregory Johnsen, *60 Words and a War Without End: The Untold Story of the Most Dangerous Sentence in U.S. History*, BuzzFeed, Jan. 16, 2014, *available at* https://www.buzzfeed.com/gregorydjohnsen/60-words-and-a-war-without-end-the-untold-story-of-the-most?utm_term=.dmGmgRyAP#.kn97pNXrR.

[3] *Id.*

[4] Congressional Research Service, May 11, 2016 Memorandum, *available at* https://fas.org/sgp/crs/natsec/pres-aumf.pdf.

the current war with ISIS. And two thirds of the House and three quarters of the Senate were not in office when the 2001 AUMF was passed.[5]

The legal and policy reasons for applying the 2001 AUMF to "associated forces" of al-Qaida and the Taliban and to ISIS have been well-documented.[6] In my experience, the executive branch has approached the decision to apply the 2001 AUMF with deliberate care and seriousness. Such a determination has been made at the most senior levels of the government, following factual reviews based on input from the intelligence community.

In particular, the decision to apply the 2001 AUMF to ISIS was based largely on the group's historic roots and close connection to al-Qaida. The government further determined that the more recent rift in leadership between ISIS and al-Qaida did not undermine this conclusion. However, this decision has been viewed skeptically by some, and there have been good faith disagreements about the application of the 2001 AUMF to ISIS. This controversy has highlighted the fact that, as terrorist groups threatening the United States continue to splinter, evolve, and emerge, it will become increasingly difficult to encompass them under the 2001 AUMF. The legal and policy arguments for applying the 2001 AUMF to groups that threaten the United States are not "infinitely elastic."[7]

Indeed, the language in the 2001 AUMF requiring a nexus to the 9/11 attacks may unduly constrain the executive's ability to use military force in certain circumstances and invite legal challenges, including to the scope of detention authority, that complicate our counterterrorism efforts.[8] At the same time, the 2001 AUMF's lack of time limits, open-ended definition of who is covered, and omission of reporting requirements have undermined Congress's ability to conduct responsible oversight of the executive in its use military force against terrorist groups.

The Founders wisely entrusted the legislative branch with the power to declare war. They recognized that war authorities confer extraordinary powers on the president and that war should not be entered into lightly nor conducted secretly. But Congress' duties do not end with

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[5] *See* Senator Jeff Flake Press Release, June 20, 2017, *available at* https://www.flake.senate.gov/public/index.cfm/2017/6/flake-nearly-two-thirds-of-congress-not-yet-elected-when-current-aumf-enacted.

[6] *See* 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/wpcontent/uploads/2016/12/framework.Report_Final.pdf; *see also* 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/.

[7] *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.

[8] *See* Charles Stimson & Hugh Danilak, The Case Law Concerning the 2001 Authorization for Use of Military Force and Its Application to ISIS, The Heritage Foundation, *available at* http://www.heritage.org/defense/report/the-case-law-concerning-the-2001-authorization-use-military-force-and-its.

authorizing war, whether through a formal declaration of war or the passage of an AUMF. Congress is also charged with overseeing the executive branch and making funding decisions. Regular oversight of military activities, including monitoring any changes on the ground and the adequacy of legal authorities, is required for Congress to fully discharge its constitutional duties.[9]

In light of changed circumstances, and with the benefit of 16 years of experience, Congress should reassess and clarify the authorities the President needs to defeat the terrorist groups we face today and the checks that are necessary to maintain an appropriate balance between the executive and legislative branches of our government.

Drafting an AUMF for Today's Threats

In drafting our Constitution, the Framers entrusted Congress with the decision to send the country into war for good reason. As James Madison famously wrote to Thomas Jefferson in 1798, "[t]he constitution supposes, what the History of all Governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care vested the question of war to the Legislature."

In exercising its constitutional responsibility, Congress should begin by conducting a careful assessment of the extent of military force necessary and appropriate for addressing today's terrorist threats. The government has a range of powerful and effective tools for fighting terrorism. Military force is certainly one of those tools, but it is not the right tool for all national security threats. Nor is military force, when it is needed, sufficient on its own. As Defense Secretary James Mattis recently testified before the Senate, "[o]ur recent experiences have reminded us that we should engage more using all components of our national power, and use military force only when it is in the vital interest of the United States, when other elements of national power have been insufficient in protecting our national interests, and generally as a last resort."[10]

In updating the authority for using military force against certain terrorist groups, Congress should assess key issues such as whom force should be authorized against, for what purpose, where, for how long, and subject to what reporting and transparency requirements. Congress should draft any new authorization to reflect Congress's intent with respect to such issues. Clear drafting and thoughtful limitations are critical to ensuring the operational effectiveness of the authority and to prevent the authorization from being used beyond the scope of Congress' intent or in ways that undermine American values or our long-term security interests.

Key issues that Congress should consider in drafting a new AUMF include:

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[9] Deciding to Use Force Abroad: War Powers in a System of Checks and Balances, The Constitution Project, *available at* http://constitutionproject.org/pdf/War_Powers_Deciding_To_Use_Force_Abroad1.pdf.

[10] Nomination Hearing Statement for James N. Mattis to be Secretary of Defense, Senate Armed Services Committee, Jan. 12, 2017, *available at* https://www.armed-services.senate.gov/hearings/17-01-12-confirmation-hearing_-mattis.

Whom Can Force Be Used Against

Armed conflicts with non-state entities like ISIS are more difficult to define than traditional wars against nations. The failure to carefully delineate the non-state entities subject to a statutory grant of authority for the use of force may lead to uncertainty and the kind of controversies that we have seen under the 2001 AUMF. This undermines Congress' role in determining whom the country goes to war against and makes it more likely that wartime authorities to kill and detain will be used beyond their appropriate scope. Congress should name the specific groups it is authorizing military force against in such a way that is precise enough to prevent unintended expansion of the authority, while also retaining sufficient flexibility to encompass groups, such as ISIS, that may go by more than one name, or may in the future rebrand themselves under another name.

For example, in authorizing force against "associated forces," Congress should clearly define the term to allow the executive branch to use military force against groups that join ISIS in the armed conflict against the United States. The definition of the term should be tailored to the requirements of the current conflict and include only those groups that have entered the fight as a party to the conflict with the United States, not groups that merely express allegiance to ISIS or could hypothetically enter the fight in the future. Defining "associated forces" too broadly would allow the AUMF to be expanded beyond congressional intent, and could allow for detention and targeting authorities beyond what is permitted under the laws of war.[11]

In this context, it is critical to remember that preemptively authorizing the president to use force against currently unknown groups is generally not necessary for our security. Under Article II of the Constitution, the president has independent authority to use military force to defend the nation from attack. If Congress believes that a more expansive use of military force is needed, it can, and should, provide the executive with the appropriate authorization at that time based on the particulars of any new threat. In addition, law enforcement and other measures short of war may be used at all times to protect the nation from newly emerging threats.

Specifying the Purposes for Authorizing Military Force

Terrorism is a persistent threat that requires an active government response at all times. Wartime authorities, however, are necessary when terrorist groups pose a sufficient threat that justifies the use of military force. It is important not to confuse our ongoing effort to fight terrorism, and the need to use force against specific terrorist groups at certain times. For example, AUMF-based military authorities are needed for the armed conflict against al-Qaida and ISIS. They are not currently needed, and should not be conferred to the executive branch, for other groups that do not pose a similar threat.

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[11] Benjamin Wittes & Jennifer Daskal, *The Intellectual—But Not Political—AUMF Consensus*, Lawfare Blog, Mar. 2, 2015, *available at* https://www.lawfareblog.com/intellectual-not-political-aumf-consensus.

To avoid this problem, Congress should clearly specify the purpose or purposes for which military force is authorized. In doing so, Congress should consult with the executive branch regarding its counter-ISIS strategy and tailor authorities to support that strategy. For instance, military force could be authorized for the purpose of protecting the national security of the United States from the threat posed by ISIS until that threat can be adequately addressed by non-military means. Failure to include a clear purpose, or authorizing force for a mission that can never be fully achieved, such as preventing all future attacks, blurs the distinction between counterterrorism and war, and risks embroiling the nation in never-ending armed conflict.

Specifying Where Military Force Can Be Used

One of the challenges that Congress currently faces in drafting a new AUMF is reaching a consensus about where the new authorities will apply. Given that non-state terrorist organizations like ISIS can move across national boundaries with relative ease, the executive branch needs the operational flexibility to use force against imminent terrorist threats and groups engaged in armed conflict with the United States, wherever they may reside.

As a result, some leaders are understandably wary of geographic limitations that will restrict the executive branch's ability to take the fight to ISIS. Others, however, are concerned about supporting an authorization that could be used to authorize the use of force anywhere in the world subject only to the constraints of international law.[12] Some AUMF proposals offer creative solutions to these competing concerns by specifying the countries where Congress is currently authorizing force and providing a mechanism for the executive branch to seek expedited approval for expanding the use of force to additional countries.

Specifying the Type of Force that Is Authorized

The question of whether to place limitations on the use of ground troops has posed a substantial challenge to Congress in considering a new AUMF. As a policy matter, on one side of the debate are those who are concerned about tying the Commander-in-Chief's hands in a fluid situation, and on the other side are those who do not want to vote for an ISIS authorization that may be used to start another ground war on the scale of Afghanistan or Iraq, at least not without an explicit vote from Congress.

Legally, some mistakenly assume that Congress simply does not have the constitutional authority to limit the use of ground troops. Neither the history of past war authorizations[13] nor U.S. case law[14] supports this view. While the Commander-in-Chief has wide strategic latitude

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[12] *See e.g.*, Remarks by Senator Rand Paul, Reviewing Congressional Authorizations for the Use of Military Force, Senate Foreign Relations Committee, June 20, 2017.

[13] For a detailed analysis finding that 37 percent of past war authorizations have included limitations on the type or amount of force that can be used, see Bill French & John Bradshaw, Ending the Endless War, at 23-26, National Security Network, February 2015, *available at* http://nsnetwork.org/cms/assets/uploads/2014/08/ENDING-THE-ENDLESS-WAR_2.2015-UPDATE.pdf.

[14] *Bas v. Tingy*, 4 U.S. 37 (1800).

once force has been authorized, Congress has the power in the first instance to decide whether to authorize "all out war" or to authorize more limited uses of the armed forces for specific purposes.

Sunsets and Renewal Provisions: Limiting the Duration of the Authority

Another issue in Congress has been whether to include an expiration date, known as a sunset. Some fear that a sunset will signal to the United States' enemies that we plan to end hostilities at that time. However, as national security experts across the political spectrum have repeatedly explained, a sunset does not end the war—unless Congress and the American people decide it is time to do so. A sunset imposes a time limit for revisiting the authorities to assess whether any adjustments are necessary. As the sunset approaches, Congress would be required to assess any changed circumstances that warrant expanding, narrowing, or, at some point, ending the use of military force. This forcing mechanism, which was lacking in the 2001 AUMF, is critical for ensuring continued congressional approval, engagement, and oversight as conflicts evolve.[15]

Such good government practices reflect our nation's strength and should not be viewed as a sign to our enemies that we plan to give up the fight. As former General Counsel of the Department of Defense and CIA recently explained, a properly structured reauthorization provision with a mechanism for revising and 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.[16] And former Secretary of Defense Ash Carter said that a 3-year AUMF sunset was a "sensible and principled provision," though the conflict would very likely last far longer.[17] A sunset is important for preventing the new authorization from being used in unforeseen ways, and I believe that a 3-year sunset is reasonable from a national security perspective.

Requirements for Keeping Congress and the Public Informed

One of the most significant improvements that Congress can make over the 2001 AUMF is to include relevant reporting requirements. Regular and detailed reporting to Congress and the

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[15] *See* Benjamin Wittes & Jennifer Daskal, *The Intellectual—But Not Political—AUMF Consensus*, Lawfare Blog, Mar. 2, 2015, *available at* https://www.lawfareblog.com/intellectual-not-political-aumf-consensus; *see also* Jack Goldsmith et al., Five Principles That Should Govern any U.S. Authorization of Force, The Washington Post, Nov. 14, 2014, *available at* https://www.washingtonpost.com/opinions/five-principles-that-should-govern-any-us-authorization-of-force/2014/11/14/6c278a2c-6c07-11e4-a31c-77759fc1eacc_story.html?utm_term=.597ab37f6d3f.

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

[17] Secretary of Defense Ash Carter, Statement on the President's Request for Authorization to Use Military Force Against ISIL before the Senate Foreign Relations Committee, Mar. 11, 2015, *available at* https://www.defense.gov/News/Speeches/Article/606652/.

public about the war effort is vital to our democracy, necessary for Congress to fulfill its oversight functions, and strengthens the legitimacy of the mission. Many existing AUMF proposals include model reporting and transparency provisions that should be considered. Examples include reporting on the legal and factual basis for any expansions of the conflict to new groups or locations, the number of civilians and combatants killed, and any changes to key legal interpretations.

Ensuring Compliance with International Law

Demonstrating to our allies and enemies alike that we are nation of laws and that we abide by our international commitments is critical to winning the fight against terrorism. As Secretary Mattis recently testified, "we must also embrace our international alliances and security partnerships. History is clear: nations with strong allies thrive and those without them wither. Strengthening our alliances requires finding common cause, even with imperfect partners; taking no ally for granted; and living up to our treaty obligations. When America gives its word, it must mean what it says."[18]

Complying with our commitments is not only important for maintaining allies and the legitimacy of the mission, but also because we want other countries to be bound by those same rules. As my friend John Bellinger told the Senate last month, "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…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 more difficult for the United States to criticize them when they do so."[19]

While all statutes must already be interpreted, whenever possible, consistently with the international obligations of the United States,[20] explicitly stating in the authorization that force used under it must comply with international law would send a strong message to our allies and enemies alike about the enduring values of our country.

Dealing with Existing AUMFs

Two AUMFs remain on the books today. The 2001 AUMF passed after 9/11 and the 2002 Iraq authorization that targeted the Saddam Hussein regime. Passing a new AUMF could mean repealing these old authorities and passing one new consolidated authority; leaving the 2001 AUMF in place and passing a new authorization for ISIS; or amending the 2001 authorization to include ISIS.

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[18] Nomination Hearing Statement for James N. Mattis to be Secretary of Defense, Senate Armed Services Committee, Jan. 12, 2017, *available at* https://www.armed-services.senate.gov/hearings/17-01-12-confirmation-hearing_-mattis.

[19] Statement by John B. Bellinger III, Reviewing Congressional Authorizations for the Use of Military Force, Senate Foreign Relations Committee, June 20, 2017, *available at* https://www.foreign.senate.gov/imo/media/doc/062017_Bellinger_Testimony.pdf.

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

Whichever approach Congress takes, it should not leave any ambiguity about how the remaining authorities apply. The 2002 Iraq AUMF is no longer needed and should be repealed. And any new authorization for ISIS should repeal and replace the 2001 AUMF, or supersede the authorities in the 2001 AUMF as pertains to ISIS if the 2001 AUMF remains in place.

Addressing Detention Authority

By authorizing "all necessary and appropriate force" against the perpetrators of the 9/11 attacks, the 2001 AUMF provides the authority for the military to detain members of al Qaeda and the Taliban engaged in armed conflict against the United States.[21] But because the application of the 2001 AUMF to ISIS remains controversial, the authority to detain members of ISIS is on less solid legal ground. If the administration were to bring ISIS fighters to Guantanamo, where detainees are entitled to bring habeas petitions, courts may determine that their detention is not lawful under the 2001 AUMF.[22]

A new AUMF that authorizes necessary and appropriate force against ISIS would provide the authority to detain ISIS fighters consistent with the laws of war. This would allow for in theatre military detention and lawful, humane interrogation approaches to gather intelligence to support the mission.

Conclusion

The terrorist threat confronting the nation is complex, serious, and evolving. Congress should update the 2001 AUMF—which is increasingly outdated given the threats the country is facing today—to explicitly provide a mandate for the use of military force and the authority that is warranted. In doing so, Congress should provide the executive branch with the operational flexibility to prosecute those wars effectively.

At the same time, it should tailor those authorities to prevent them from being used for future wars against unnamed enemies that Congress, and the American people, did not intend to authorize. Passing a properly tailored AUMF with meaningful oversight and transparency is Congress' democratic responsibility.

Fulfilling this responsibility will show our troops that Congress is behind them, bolster American leadership, assure our allies and partners that the United States respects human rights and the rule of law, and demonstrate to our enemies that we are committed to their defeat.

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[21] *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

[22] *See e.g.* Jack Goldsmith, The Practical Need for an ISIL AUMF, Lawfare Blog, Feb. 8, 2017, *available at* https://www.lawfareblog.com/practical-legal-need-isil-aumf; Charles Stimson & Hugh Danilak, The Case Law Concerning the 2001 Authorization for Use of Military Force and Its Application to ISIS, The Heritage Foundation, *available at* http://www.heritage.org/defense/report/the-case-law-concerning-the-2001-authorization-use-military-force-and-its.

Chairman ROYCE. Thank you, Mr. Olsen.

I have reviewed with interest the bipartisan AUMF over in the Senate, the Flake and Kaine measure, and I want to ask you about that.

Before I do, just a quick question on repeal and replacement. Do you believe that the 2001 AUMF should be repealed until a replacement is enacted? Because there is some debate on how that would create a problem for our national security.

And so I just would ask you outright about just repealing it now and then waiting to see if we can reach accord on a replacement.

Judge.

Judge MUKASEY. I think that would be enormously dangerous. It would set off a debate as to whether there was existing authority to conduct any of the operations we are conducting now and would signal to our adversaries a level of uncertainty that I think could invite additional attacks.

So the short answer is, no, I don't think there ought to be a repeal until there is a consensus about what is going to replace it.

Chairman ROYCE. General.

General GROSS. Yes. Sir, I agree that there should not be a repeal until there's a replacement in place, as the judge mentioned.

But in addition, it would create an enormous amount of legal uncertainty with respect to our detention operations in Guantanamo Bay and other places.

Chairman ROYCE. Mr. Olsen.

Mr. OLSEN. I share that view.

Chairman ROYCE. All right.

Now, let me go to the Flake-Kaine bill. This would authorize the President for 5 years to use force against designated groups in designated countries and it would allow the President to add new "associated forces"—as we used to use the term—if there is a spinoff group, and new countries.

But you would have to report them to Congress, which would then have the opportunity to disapprove of those expansions. That is the way the bill is set up.

So I just ask each of you what you think of that construct. Would it fix some of the ambiguities that we face with the 2001 AUMF by making sure that Congress receives clear, timely notice of the boundaries of the authority to use force?

The other aspect of this is a little more complicated—would such a delegation of war making decisions—allowing the President to add groups to the AUMF without congressional action; in other words, this associated forces if there's a spinoff terrorist group—would handling it in that way be constitutional.

So Judge?

Judge MUKASEY. I think it would be constitutional. There is a lively debate as to whether the underlying problem here—which is whether the war powers resolution back in 1973 was itself constitutional—and that has never been tested. Rather, it has been tested through a back and forth between Congress and the President, which is probably the wisest way to do it.

I think that is a rational way to treat the issue because otherwise, you have the exercise that we have now, which is we conduct a kind of DNA test on the various groups to find out whether they

do or don't carry the DNA of al-Qaeda and so far the judgment is that, for example, that ISIS does carry the DNA of al-Qaeda.

That is a respectable point of view. On the other hand, you get further and further out on the branch it starts to look increasingly strained and——

Chairman ROYCE. Let me get General Gross' view of it.

General GROSS. Yes, Mr. Chairman.

One of the things I noticed that—first of all, I do think it does a good job of laying out the authorities against the current threat.

It mentions al-Qaeda, the Taliban, ISIS. It has a provision for associated forces that is fairly clear and would help. It includes other groups that we currently have or have had operations against—al Nusra Front, Khorasan Group, AQAP, al-Shabaab, and others that are listed in here.

I can't speak to the constitutionality or not of the approval-disapproval procedures. I would refer those to a constitutional expert.

I do think it might create a lack of flexibility for the commander, a lack of flexibility for the President. As intelligence changes and they try to move quickly against an ever-changing enemy, I think that could be problematic.

Chairman ROYCE. Well, this is an attempt to reconcile that so that a quickly changing or morphing enemy—but I would assume your major point would be the time frame.

General GROSS. Yes, sir.

Chairman ROYCE. And yet, we are in a bit of a conundrum here because in order to reach consensus with members of both sides of the aisle we are wrestling with this issue of a time frame. Otherwise, it puts us right back to where we are today.

General GROSS. Yes, sir.

Chairman ROYCE. Let me go to Mr. Olsen for his——

General GROSS. Sir——

Chairman ROYCE. Yes?

General GROSS [continuing]. If I could just make one——

Chairman ROYCE. Yes.

General GROSS [continuing]. One other point. One of the things in here, the disapproval procedure for a group—as I read it, once you disapprove a group, you can't renominate that group and that seemed to me to be a——

Chairman ROYCE. Okay.

General GROSS [continuing]. Unless I am misreading it——

Chairman ROYCE. Okay. So that is a technical change that we could, in theory, address.

General GROSS. Yes, sir, because as intelligence changes——

Chairman ROYCE. Yes. Right.

General GROSS [continuing]. A group that we nominate now——

Chairman ROYCE. Right. Right.

General GROSS. Yes, sir.

Chairman ROYCE. I understand. Good point.

Mr. Olsen.

Mr. OLSEN. Yes, sir. I actually think it is a sensible and reasonable good faith bipartisan approach. It has many of the elements that I would think are appropriate, including a sunset provision and reporting requirements.

I think that the approval—or disapproval—process, that seems to me to be an appropriate way to reconcile Congress' role relative to the executive branch's role.

My suggestion would be that an approval process versus a disapproval process might be more appropriate because of the consequences or difficulty of Congress disapproving an action once it has already started to take place.

In other words, facts on the ground may make it more difficult for Congress to disapprove the additional——

Chairman ROYCE. But that would be the equivalent of having a whole new AUMF if you had an organization that changed its name.

Mr. OLSEN. Not necessarily changed its name. In other words, changing its name could still fall under the actual group itself.

But when a new associated force would be added by the executive branch, they would have to obtain the approval of Congress. I think that would be an appropriate question.

Chairman ROYCE. I see my time has expired.

Mr. Engel. Thank you, panel.

Mr. ENGEL. Thank you, Mr. Chairman. Mr. Mukasey, it seems at least—please correct me if I am wrong—that you seem to favor giving any administration a blank check in doing whatever they deem necessary to combat whatever they are combatting.

I feel—and I know a number of my colleagues feel on both sides of the aisle—that there is an important congressional role to be played here—that it is not simply a matter of passing an AUMF 15 years ago and sort of relieving it as a catch-all for every administration, both parties, because they want maximum flexibility to do whatever they want.

While I want to give the administration the tools to fight terrorism, I don't want to give them or anybody else a blank check and I don't care who is the President, Democrat or Republican.

So could you please explain to me a little bit, or clarify to me a little bit that you don't favor a blank check? Because I think from your remarks it seems to indicate that you do.

Judge MUKASEY. Okay. I don't understand what in my remarks suggests that I favor a blank check since I favored——

Mr. ENGEL. So clarify it for me, please.

Judge MUKASEY [continuing]. A sunset provision and I favored updating the list of who. So I am kind of puzzled.

Mr. ENGEL. Well, don't be puzzled. Just tell me what your views are. I am happy to hear them.

Judge MUKASEY. My views are, as I expressed them today and as I expressed them in my written statement, and my comment at the beginning about World War II not having started with a deadline remains true.

The fact is that I can't necessarily envision how all of this is going to end. On the other hand, there is nothing wrong with periodic reauthorizations, periodic reconsiderations of what it is we are doing. That is my view.

Mr. ENGEL. Well, periodic reconsiderations are fine. But if they don't happen, then are you in favor of just allowing things to continue as we have for the past 16 years?

You seem to feel very complacent about it and some of us are really angry that 16 years later we are still doing the same things.

And by the way, I voted for that 2001 authorization.

Judge MUKASEY. Hardly complacent. I favored reconsidering the AUMF for years and the fact that Congress hasn't done it has nothing to do with my complacency.

Chairman ROYCE. Okay.

Let me ask Mr. Olsen—many Americans are concerned about another escalation in U.S. military involvement overseas. While certainly there are important threats both in ISIS and, I would say, even Assad, I am very wary about getting us into another ground war in Iraq or Syria.

You provided a lot of detail in your written testimony about what an updated AUMF could include. Can you summarize how you think an AUMF would responsibly limit the authority that currently exists under the 2001 AUMF and provide greater congressional oversight and transparency at the same time?

Mr. OLSEN. Yes, certainly.

In short, I think the key is that, first, that a new AUMF be tailored to the current threat environment. That, I think, is paramount. The threats have changed. The groups have changed.

What the country faces in terms of terrorist threats have changed over the past 16 years. So updating the AUMF to reflect the current threat environment is actually an endorsement—a mandate for the current use of force in those appropriate circumstances.

I think it is also important to say that there are many instances that don't require the authorization for use of military force. In other words, there are a number of tools that the government has, speaking from my time at the National Counterterrorism Center, to take on the threats that we face and they include law enforcement, intelligence, and diplomatic tools. There is an array of capabilities that the United States has that are not the use of force which typically should be the last resort.

So updating the AUMF to reflect the current threats, that is number one. Then there are a number of other requirements that are suggested procedural elements that I think should be kindled.

First, a sunset provision—I recommended a 3-year sunset to ensure that, given how dynamic the threat is, that AUMF stays up to date. Two, that there are reporting requirements—in other words, that the executive branch be required to brief Congress and to provide reporting on the nature of the threats and what groups it is considering as associated forces.

I also think that it is appropriate to consider similar restrictions or processes to balance the flexibility and transparency that General Gross talked about, including provisions like requiring an approval or disapproval of new associated forces and limitations on particular types of activities, such as sustained ground forces and occupation of territory.

I think that is another element that Congress should consider including in an AUMF.

Mr. ENGEL. General Gross, first of all, you are much too young to have served in the military for 30 years. I don't believe it.

Secondly, do you agree with Mr. Olsen?

General GROSS. I agree with some of what he said, sir.

I mean, I think the critical thing for Congress to consider is that balance—that the more proscriptive or descriptive an AUMF is, the less flexibility a commander and the President has.

But Congress plays an absolutely critical role here and I think it is important that Congress speaks as to our current conflicts and where we ought to go with that.

Mr. ENGEL. Okay. Thank you very much.

Mr. SMITH. Thank you, Mr. Engel.

Just let me ask a couple questions. Thank you for your very incisive testimony.

Let me ask you, did the current AUMF restrict our efforts in any way over the last 16 years, and Mr. Olsen, you mentioned 37 times it has been invoked, or was it just a matter of the lawyers coming up with a way of explaining what had to be done and how do they get from here to there?

Secondly, how might terrorists read or misread a re-examination of a new AUMF? We never want to unwittingly embolden the enemy.

Could they misread this to think that a hard sunset is actually an exit strategy? Whether that is good or bad but it might embolden them.

I have been around here long enough to know that nothing in Congress ever happens quickly and I am wondering—again, on sunsets we might not get to it, even if it is expedited on some way.

Sequestration wasn't supposed to happen in terms of imposition of it and yet it did and we know it has hurt severely our military because of it. But it was supposed to be such an unthinkable outcome that it wouldn't happen.

So, a 3-year sunset, 5-year sunset—House and Senate bills have that in it. A hard sunset, could that embolden the enemy unwittingly?

And then, finally, what are the advantages, negative and positive consequences, to having a sunset date? I mean, could we just require more oversight to the existing AUMF from the administration or what does the sunset actually give us?

Judge, if we can start with you.

Judge MUKASEY. Taking the questions in order, did the AUMF limit us? In one case, I think it actually did or at least potentially did.

There was a man named Faisal Shahzad who was apprehended in New York, planning to blow up Times Square with an—with an improvised bomb.

Turned out he was funded by Pakistani Taliban rather than the Afghan Taliban with which we were familiar, and on one view of the AUMF he and his activities and those who funded him were not covered by the AUMF.

Now, he was treated as an ordinary criminal. What else was done, I don't know. But there was a lively argument as to whether or not the sources of that funding were covered by the existing AUMF when it shouldn't have. There shouldn't have been that kind of debate, number one.

Secondly, could our enemies misread it? I think our enemies could misread it unless we make the message explicit that the sun-

set provision is only to re-examine the way we focus our activities and is not and should not be read as a limit on our commitment to oppose the forces that are fighting us.

I am sure that with the clever people—clever draftsmen here we can come up with language that would convey that loud and clear.

And finally, what are the advantages of a sunset—I think what they do is refocus and recommit people who were not around when the original AUMF passed who may feel that politically it is easier to just find fault than it is to get behind something.

I am not suggesting anybody here is doing that but there is always that temptation and I think a requirement that people focus, that Members of Congress focus, provides that advantage.

Thank you.

General GROSS. Yes, sir. As far as limitations, I mean, it is—I am thinking back. There had to have been over my 4 years times when there were individuals who were nominated for looking at military targeting operations that did not follow them—that we couldn't find the authority within the AUMF to go forward.

If I could remember the details they would be classified. But I can't imagine I went 4 years. I just seem to recall there were times that individuals didn't fit under the AUMF.

As far as the sunset, I agree with what the judge said. I think the positive consequences, if you will, of a sunset provision are requiring that re-examination.

It sets a date certain when both sides will—both sides being both the President and the executive branch and the Congress—will know the deadline is coming up and begin to re-examine that and look at that.

I think the negative consequences—those that I pointed out in my testimony—it does create a lot of legal uncertainty.

As you approach that deadline and as you get real close to that line, and particularly if you cross that line without a new authorization, there is a lot of uncertainty with whatever military operations are ongoing at that time and whatever detention operations are going on at that time.

So that creates quite a bit of uncertainty there.

Mr. OLSEN. Yes, sir.

I think, first, on the question of the AUMF and whether it has restricted the government's actions I think the answer is yes, if you look, for example, at detainees at Guantanamo.

Judges have found in several cases that individuals at Guantanamo did not fit within the AUMF. I think an appropriate exercise of judicial oversight to look and see what the contours of the law are, who is part of al-Qaeda, who is an associated force, and making a determination, I agree with General Gross as well.

Operational activities have looked at individuals and determined they did not fall within the AUMF; again, I think appropriately so.

So I think that is, again, a reasonable exercise of executive and judicial branch discretion and judgment about who falls within. So that is one.

Quickly, on the other two, the question of whether a sunset would embolden our enemies—I think exactly the opposite, to be quite honest.

I think the reassertion of the authority to use military force on a timely basis really sends the message to our enemies that Congress, on behalf of the American people, stands behind our troops and is saying we are continuing to authorize force. I think it sends a message of commitment and dedication to the fight.

And then, third, on the sunset, I think the pros and cons—I think one thing to consider, I would respectfully suggest, is that this particular conflict, now the longest in U.S. history, is different from conventional traditional wars we have come to know in World War II and in the past, and therefore a sunset is appropriate, given that terrorism is going to be with us. That is a fact. So the use of a sunset is appropriate under those circumstances. Thank you.

Mr. SMITH. Thank you.

Thank you, all three of you.

Brad Sherman.

Mr. SHERMAN. Our Founders wrestled with this issue over 200 years ago. They knew that by vesting—they could have vested all power in the executive branch, thereby achieving security, secrecy, and flexibility.

They chose not to. But the advocates of Presidential power keep pretending that they did and we are told that we would be best off if the executive branch could make all the decisions with secrecy and flexibility, and we should trust that because, well, our men and women in uniform and the Pentagon in general will be careful or that Congress can exercise oversight and consultation.

That is not what the Constitution provides. It vests in Congress not only the power to declare war but control over the money that funds military operations. It also makes the President Commander in Chief. So how do we wrestle with those competing constitutional provisions?

President Jefferson did and he is far more familiar with the Constitution than any of us. Americans had been attacked in the Mediterranean by the Bay of Tripoli. Not our allies attacked, not civilians of another country attacked—American ships were attacked and before sending our naval forces—basically most of the military power of the United States to the Mediterranean, to the shores of Tripoli—he sought congressional authorization, which was provided on February 2, 1802.

The advocates of unlimited executive power without the need for congressional authorization—I am willing to do that as soon as we elect a President who is wiser than Jefferson.

So in 1973, we passed the War Powers Resolution, known as the War Powers Act, that allows the President to do pretty much what he or she wants for 60 to 90 days but does provide real restrictions.

Since then, every President has said that they don't recognize the binding power of the AUMF but they will often act consistent with it.

The most recent clear violation, because our attacks on ISIS may be authorized by the 2001 AUMF but was not authorized by an AUMF, was our many months of operations against Qaddafi. Qaddafi wasn't associated with Saddam Hussein or al-Qaeda and we were told at that time that as a substitute for congressional authorization maybe there would be a U.N. resolution or NATO or coalition of the willing.

The fact is that at least in that circumstance the President, and others have as well, simply violated the War Powers Act.

What we did, though, in 2011, at least in the House of Representatives, is provide a way to enforce the War Powers Act, because although the War Powers Act is argued by some to violate the constitutional right to be Commander in Chief, no one doubts Congress' right to control what happens to appropriated funds.

And so in 2011 I proposed an amendment—failed the first time, finally got it passed—to say that no funds shall be spent in contravention of the War Powers Act and that has been part of the base bill for defense appropriations ever since, as it will be this year.

We don't need to pass a new AUMF to show the world we support our troops. We provide funds for them and support them in so many other ways. But repeal now replace later doesn't work for health care. I don't know if it will work here but I know I am very much opposed to it in health care.

And while I think the general has argued that specificity is the opposite of flexibility, I would point out that vague authorization—a blank check, if you will—is the opposite of democracy.

My question for all three panellists is, would you advise a President that the War Powers Act is not constitutionally binding on the President or is it the law of the land that the President must adhere to? Can I get a one-word answer from each? Mr. Olsen.

Mr. OLSEN. My experience, Mr. Sherman, is similar to yours, which is that, at least with the Obama administration where I was most familiar, that——

Mr. SHERMAN. I need a one-word answer. I've got limited time. I will go on to the general.

Mr. OLSEN [continuing]. That it was considered to be something that the administration complied with.

Mr. SHERMAN. Something they will comply with because it is convenient or something that is legally binding?

General, why don't you answer?

General GROSS. Sir, I am not a constitutional expert.

Mr. SHERMAN. Okay. I will go to the judge.

Judge MUKASEY. I give the same answer that every Attorney General since Jimmy Carter's Attorney General gave, which is yes.

Mr. SHERMAN. Yes, it is binding?

Judge MUKASEY. No. Yes, it is unconstitutional.

Mr. SHERMAN. Yes, it is—okay. I will follow that up with one quick question.

Can Congress legally provide that moneys provided by the defense approps bill cannot be spent in contravention of that act?

Judge MUKASEY. Sure.

Mr. SHERMAN. So that is the way to enforce it.

I will yield back.

Judge MUKASEY. That is a way.

Mr. SMITH. Chair recognizes the gentleman from California, Dana Rohrabacher.

Mr. ROHRABACHER. Well, first and foremost, I would like to thank our chairman, Mr. Royce, and Mr. Engel for calling this hearing. I think this is the type of hearing we need to have where

you have various points of view being expressed and on a very important issue for us to understand.

So and I will have to say that my depth of knowledge has been increased due to your testimony today and I thank the witnesses for that.

Let me just note some of the points that have been made. But first, Mr. Sherman mentioned Thomas Jefferson's sending this issue to Congress.

Let us note that Thomas Jefferson also, when sending this issue of how to deal with the Barbary Pirates in Tripoli, he received a certain, how do you say, instructions from Congress. Yes, he did and he disobeyed them.

And in fact, I am sure our witnesses know about the William Eaton effort that overthrew the Government of Tripoli, which was done in direct contradiction to what Congress had instructed the President to do.

So with that note, there are various interpretations about various things that were going on during that time period.

We do know that Congress has—as Mr. Sherman noted—that we do have the authority here and we need to exercise that. The executive branch, obviously, has the major portion of authority. I do not believe that—and one of the points made today was that when you limit a commitment to a goal, that is a bad thing.

We should not be limiting—if we have a goal and it is verified by Congress, we shouldn't put limits on a commitment to the goal but instead the AUMF is actually a commitment to get the job done in a timely manner and I think that that is a very legitimate analysis. We aren't limiting the commitment.

We are just telling people if you got a commitment to military action, you better get it done and that this is not just going to linger forever.

The sunset provisions, which were the majority of discussion today, are vital for us to understand. I would have to say that authorizing—telling someone that you only have between now and then before you have to get a reauthorization in no way, I believe, weakens our position.

The fact is that if indeed the American people are supportive of a military action and the Congress knows that—and the military and our executive branch knows they are going to have to come before the government again to have an approval, that if the American people are not supportive of it, maybe that sunset should be able to function and we should maybe walk away.

Maybe we should have walked away from Vietnam 4 years into the action rather than let it linger 10 years. And I left Vietnam in 1967 and I was just there a couple months—I was not in the military—I was doing some things up in the Central Highlands and I knew we were going to lose then. I knew—I walked away. I said, we are going to lose this war, and there were 30,000 casualties after that. So it would have been a good thing for us to have to re-evaluate after 4 or 5 years that whole Gulf of Tonkin resolution.

So I appreciate, again, you giving us, really, food for thought today. The one example, the Guantanamo example—what was your point in that in terms of saying that when you had some authorization of force that it didn't include certain prisoners in Guantanamo

that we shouldn't have had then? What was the point of that whole example?

Mr. OLSEN. Yes, sir. My comment was with respect to the application of the existing AUMF to the current detainees at Guantanamo and the fact that the executive branch and the judicial branch have determined on a number of occasions that individuals at Guantanamo did not fall within the purview of the AUMF. I suggest that was an appropriate exercise of that judgment.

But the other issue is the lack of certainty around the existing AUMF as it applies to ISIS and how that might affect detention operations.

Mr. ROHRABACHER. Then could that be interpreted as, again, how do you say, fine tuning? Are we going to micro manage?

When we permit something to happen that we should be micro managing it in that way, again, determine what enemies are going to be going to Guantanamo and what enemies are not?

Mr. OLSEN. Well, respectfully, I wouldn't suggest that is micro managing for Congress.

Congress would name the group—the organization that is subject to the AUMF and then it would be up to individual cases based on the facts—the executive branch, with oversight from the judicial branch—to determine who falls within that definition.

Mr. SMITH. Time of the gentleman——

Mr. ROHRABACHER. Thank you very much.

Just for the record, I believe in sunsets but I also believe that once you have provided an authorization of force that the executive branch should be able to do their job and do it right.

Thank you.

Mr. SMITH. Mr. Deutch.

Mr. DEUTCH. Thank you, Mr. Chairman. I would like to thank you and the ranking member for holding today's hearing. It is one that this committee should be having and, frankly, I think we would all agree it is one that we should have had many times over the recent years.

I know, Mr. Chairman, that both you and the ranking member believe strongly in the jurisdictional prerogative of this committee to lead on the authorization of the use of military force.

So I hope that today is only the start of what will become a serious conversation about the situation we find ourselves in where we continue to rely on an AUMF post-911 in order to guide every military action that we take around the world.

For more than 4 years now, we have not been having a serious conversation at all in this Congress about this. Discussion about a new AUMF does bubble up. It comes up when we are reacting to a new horror in the Syrian conflict, whether it was after the 2013 chemical weapon attack or the latest decision by the administration to strike Assad's air base in April.

In 2015, the Obama administration sent a proposed AUMF to Congress. We did not consider it. We did not consider an alternative. It is a hard conversation to have and we passed.

I know it is hard. There are divisions on both sides of the aisle. But not having a conversation at all, a real robust debate in the United States Congress, just because it is hard is an abdication of our responsibilities to represent our constituents.

It is clear that relying on the 2001 AUMF for the new fight against terror is no longer the best option to protect this country and our men and women in uniform.

It is even more clear that the AUMF for the Iraq war has to be repealed. So let us at least start where we have some agreement.

Our inaction only enables this administration—or any administration, frankly—to continue operating militarily with a free pass from the American people—a free pass from the United States Congress.

I am deeply concerned about what happens when Congress continually refuses to act and that is what I would like to ask about.

Mr. Olsen, I will start with you. Every time Congress consents to the President using military force without prior congressional approval, whether it is in Libya or in Syria, the President seems to rely on Congress' failure to act as evidence in support of even stronger unilateral executive war powers.

Does the lack of congressional action on authorizing force increase the likelihood that this President and future Presidents will engage U.S. troops in more conflicts without congressional consent?

Mr. OLSEN. Well, I think the answer to that question is yes. In other words, the consistent failure for the Congress to act does tend to erode Congress' appropriate role under the Constitution over time relative to the executive branch in, one, declaring war but also exercising appropriate oversight over the executive branch.

I think there is that potential for an erosion of congressional authority in this particular space.

Mr. DEUTCH. General Gross.

General GROSS. Sir, at the level that I operated for the things that I did that conversation didn't go on.

The conversation that went on as a practitioner was here's the proposed operation, here's the proposed enemy or person or group or target or objective, and is there legal authority right now under the existing framework to conduct that military operation? And that is the conversation that I participated in.

Mr. DEUTCH. Judge Mukasey.

Judge MUKASEY. I can answer it only from a legal perspective. A congressional failure to act is considered probably the weakest kind of legislative evidence because it can show a whole lot of things other than endorsement.

That said, I certainly agree that there ought to be a reconsideration and a reauthorization.

Mr. DEUTCH. General Gross, just a question about the Syrian conflict specifically. On the one hand, the question is how do we ensure that a new AUMF both gives us the flexibility we need to go after various actors and at the same time or can it at the same time help reduce the risk of unintended military conflict with other actors in Syria?

General GROSS. Well, sir, I think that is a good question and I think the Flake-Kaine amendment does that—the proposal.

You define the groups that you are going after. You can, obviously, define geographic limits but that wouldn't, in this case, do that, and you define other parameters, as Congress would deem appropriate, and that provides the framework within where we have to operate.

And so if a certain force in a certain country doesn't fit within the definition of the named groups or fit within the definition of an associated force, then the AUMF can't be the source of domestic law for that particular operation.

Mr. DEUTCH. And if the AUMF can't be the source of domestic law, then you are violating—it would be a violation of the AUMF.

General GROSS. Not necessarily because the President can and often does fall back on their Article 2 authority which then kicks in the War Powers Resolution and the 60-day. There is still authority for the President under Article 2 and Presidents from both parties have relied on that throughout history as the authority.

Mr. DEUTCH. That wouldn't have been authorized before.

Thank you. Thank you to our witnesses and thank you, Mr. Chairman.

Mr. SMITH. Mr. Wilson.

Mr. WILSON. Thank you, Mr. Chairman. Thank each of you for being here today on this very important issue.

As a member of this committee and the House Armed Services Committee, and as the grateful dead said, four sons serve in Iraq, Egypt, and Afghanistan in the global war on terrorism, I particularly appreciate the efforts that you are expressing today. I also agree with the comments of Chairman Ed Royce that any effort to repeal the 2001 authorization for use of military force without having more effective replacement that does not place arbitrary restrictions on the present military commanders.

This is so important because if we play around with the wording we should always be mindful that we are dealing with illegal enemy combatants who are not in uniform who will be placing American families at risk.

We have a circumstance of where ever changing—their names are changing, the people are changing, the places are changing. Over and over again we see them using civilians as human shields, targeting civilians, as we saw again yesterday—incredibly enough, mass murder again in Kabul. Over and over we see this.

For each of you, we have had administrations that have claimed the AUMF is not strictly necessary—a new one. They claim that they possess ample legal authority to prosecute the war against al-Qaeda and associated forces such as ISIS.

Just last week, General Joseph Dunford, chairman of the Joint Chiefs of Staff, stated, "We are now relying on the 2001 authorization for use of military force. What I have said is we have all the legal authority that we need now to prosecute al-Qaeda, ISIS, and other affiliated groups."

For each of you, do you agree with the assessment that the 2001 AUMF provides, in the words of General Dunford, all the legal authority?

Beginning with Judge Mukasey.

Judge MUKASEY. If we are talking legal authority and we are talking ISIS, I believe the answer is yes. But that doesn't mean that we ought not to reauthorize and ought not to pass a new AUMF.

If the question is whether the military efforts now in the field are backed by legal authority, I believe they are.

Mr. WILSON. Thank you.

And General.

General GROSS. I would agree with that answer, sir, in the sense that it is adequate for ISIS, al-Qaeda, Taliban, and associated forces.

Mr. OLSEN. I agree with both of those comments that the current interpretation is appropriate and that there is adequate authority.

I think it is important, though, to emphasize this notion that it is simply adequate but I think there is a consensus among all three of us that it is appropriate to update the AUMF for a variety of reasons, including the dynamic threat and how it has changed, and to really clarify how it applies to ISIS, which remains a controversial interpretation to this day.

Mr. WILSON. Well, thank you to each of you. But the key thing is that we are operating under legal authority properly for our military.

And General Mukasey, thank you for identifying the Taliban distinctions—Afghan versus Pakistani. The 2001 AUMF—and this is a question for you—has been used against al-Qaeda, the Taliban-associated forces, groups that have joined al-Qaeda or the Taliban in their fight against the United States.

So far, they have included al-Qaeda affiliates in the Arabian Peninsula, Libya, and Syria, al-Shabaab and ISIS from North Africa to the Philippines.

Are there terrorist groups that pose a serious threat to the United States that do not have enough of an al-Qaeda or Taliban nexus to qualify as associated forces under the 2001 AUMF? If so, is the threat urgent enough that they be included in a new AUMF?

Judge MUKASEY. It may be that Hezbollah, potentially, poses that threat. Whether they can be traced to organizations that were active against us at the time the AUMF was passed, I seriously doubt.

There are separate entities that ought to be perhaps the subject of a separate AUMF like the Somali pirates and so on, but that is something beyond, probably, this hearing.

Mr. WILSON. And I appreciate your raising that—Hamas, Hezbollah, the pirates. It is incredible what the American people face and our ally, Israel, simultaneously.

And, General Gross, I am really going to conclude by thanking you for your service. I served, myself, 31 years Army Guard Reserves.

But as a fellow JAG officer, I am particularly grateful for your service and for all three of you.

So thank you and best wishes on your service.

Mr. SMITH. Mr. Keating.

Mr. KEATING. Thank you, Mr. Chairman. I want to thank the chairman and the ranking member for having this important hearing and taking a leadership role on really an important issue that Congress has gone silent on for many years now.

I want to also thank our witnesses and thank you for your service to this country and thank you for being here to share your thoughts on this.

Our success and what we have had as a game plan has depended so much, and I think in the future will depend on so much of our ability to deal as a coalition with other countries.

To me, going it alone is perilous in today's world. And I just want to ask, particularly Mr. Olsen at first, we have on one hand, counterterrorism to balance, but we have on the other a coalition to maintain dealing with this—a coalition that has been with us during such difficult times.

Now, in the absence of having a new AUMF and making those lines clearer, given some of the dialogue that has occurred with our allies and with our NATO allies, the failure to do that, going forward, what could you see as a problem in keeping our coalition together if things aren't defined? Or do you think we are better off keeping the flexibility that appears to be there now?

Mr. OLSEN. So, first of all, let me agree wholeheartedly with your observation about the importance of the United States taking on terrorist groups as part of a broader coalition. I think we have seen operationally over time that there is really no question about our effectives when we work with our allies, whether those are our European allies or our partners in the region and that has been proven over and over again.

Mr. KEATING. I would say yes, that—to interrupt you with that—our long-term success it is essential because we can win militarily but holding that area, too.

So it is not just our allies that are participating. It is the world community that we are seeing now where the people have a stake in the action on the ground and will hold what we are able to accomplish militarily against ISIS or other groups.

Mr. OLSEN. Absolutely right. I totally agree with that, and I do think—bringing it back to this discussion—that including in a new AUMF both some requirements for a sunset and reporting requirements, they reassure our allies about how we view this conflict, that it is not never ending, that there is the support of the American people as voiced through Congress as well as a clear commitment to the application of international law, which is an important element to our allies.

I believe in developing and building a coalition that will be sustained not just in the short term through military conflict, as you point out, but over the long haul, which is required, I think, for our success.

Mr. KEATING. Yes.

General Gross, too, if you could comment on the other aspect of having countries with a stake in the action, being able to hold that territory when we see terrorist groups like ISIS moving forward. It is important for our coalition to be maintained but it is also important to have nations on the ground willing to hold that territory.

General GROSS. No, sir. I couldn't agree more. I mean, fighting in a coalition really is virtually essential today to have the capabilities, the international credibility, the support.

Different countries bring different things to the fight and I think we are stronger for it when we fight as a coalition than when we try to go it alone. And so I agree completely.

My experience, talking to allies—and we often had discussions on legal authorities—is they tended to focus more on whether or not there was an international legal basis for a particular military operation because if we didn't have one they didn't have one.

And so that tended to be the focus. They were concerned with domestic legal authority, particularly when it came to detention operations because often some countries might not have a domestic legal basis for detaining someone in a particular theater or operation and therefore they couldn't and they might want to transfer detainees to a country that did and so they would be concerned that the country receiving detainees had a domestic legal authority for that.

So that tended to be when that conversation came up. But for the most part, the international legal basis was the focus of discussions country to country when you talked about legal authority.

Mr. KEATING. Do you see the ability right now, because a lot of this is about timing—do you see the ability right—or, really, do you see any warning signs that our failure to act as a Congress could endanger future coalitions, going forward?

General GROSS. I don't—again, I think if they felt like we had some authority internationally—under international law and domestic law to continue operations that would be their focus.

It is just hard for me to say how much they pay attention to whether or not Congress is acting. I just can't recall ever having those discussions.

Mr. KEATING. Great. I yield back.

Mr. DUNCAN. I thank the gentleman.

The Chair will now recognize himself for 5 minutes.

Drone strikes—we had this debate back when the Libya involvement was going on and whether the AUMF authorized drones strikes in Libya.

Can you cover—and I will ask Mr. Olsen first—drone strikes and how they fit in this AUMF wherever they may occur, whether it is Middle East, North Africa, Africa proper. How do you feel about that?

Mr. OLSEN. Well, certainly, from a legal perspective and from a domestic law perspective, when the government considered carrying out a lethal strike, whether by drone or otherwise—one of the critical determinations or considerations was whether the target fell within the authorization for use of military force.

So the application of the AUMF to a particular proposed individual was certainly part of that discussion.

I do think, from my own experience in the last administration where there were heightened standards in place for carrying out drone strikes—again, these are typically—I am thinking of strikes off of the hot battlefield in places like Yemen or Somalia, not Afghanistan, for example—that the heightened standard of requiring a near certainty of no civilians being killed was an appropriate way to, as a policy matter, impose a standard that, again, we are in a new era of warfare where we are taking legal action outside of a hot battlefield. That seemed to me to be both appropriate and actually operationally workable, in my experience under the last administration.

Mr. DUNCAN. Are we seeking authorization of using airspace where drones are flown?

Mr. OLSEN. I don't think so. That is more a question probably better posed to somebody who is actively operating in the military. But my expectation would be no.

Mr. DUNCAN. Right. So I remember at Benghazi the argument was made that we didn't have over flight rules to send in help for the guys in Benghazi but yet there was a drone flying overhead providing live real-time feed.

So I am in conflict with whether we had over flight permission or not in that instance. Do you care to comment?

Mr. OLSEN. Well, the only thing I would say, when I think of Benghazi, in a successful military operation I think of the apprehension of Abu Khattala in his home on the Mediterranean in Benghazi and who is now here in the United States facing trial for his role in the Benghazi attacks. That was certainly a very successful military operation which was carried out in combination with our law enforcement authorities.

Mr. DUNCAN. Right. So thank you for that.

I want to shift gears a little bit and talk about the adequacy of current legal authority in the AUMF, and although most would agree that the new and updated AUMF would be a good thing, especially because of the signal it would send to our troops overseas.

I wonder about the legal authority, and General Dunford recently said that, let me see, I don't have the date for that—"We were relying on the 2001 AUMF. What I have said is that we have all the legal authority that we need right now to prosecute al-Qaeda, ISIS, and other affiliated groups even though they are not ISIS, as mentioned."

Do you agree with the assessment of both the Obama and Trump administrations that the 2001 AUMF provides, in the words of General Dunford last month, "all legal authority that we need right now to prosecute al-Qaeda, ISIS, and other affiliated groups?"

General.

General GROSS. Sir, I like to say adequate legal authority but that is probably mincing words. I mean, it provides legal authority.

As a lawyer, when I advise a commander you talk about the amount of legal risk and the amount of legal clarity, and in a case where a law is very clear and it is bright line, you can say that absolutely this law applies.

If the speed limit is 25 miles an hour, I can say that you're going 25 absolutely you are complying with the law. On the other hand, if the law says you must drive a reasonable speed for the conditions and if someone says, I am driving 25, does that comply with the law? Maybe.

And then you identify the legal risk and you say the conditions are this and that. And so in this case, I think we can say that the 2001 AUMF is adequate to provide legal authority for going against ISIS on its own terms. It doesn't say ISIS. It says al-Qaeda, Taliban, and organizations, et cetera, and you have that language.

And so as we made the determination that ISIS was a follow-on successor, really the same organization as al-Qaeda in Iraq and had never cut that tie, then we felt like that was adequate to provide the——

Mr. DUNCAN. ISIS and al-Qaeda would argue with you over that but——

General GROSS. Well, and again, that is where the legal risk comes in. You could imagine reasonable minds disagreeing with that and saying——

Mr. DUNCAN. So we have advisors and maybe limited combat troops in Syria right now, or western Iraq and possibly Syria. I am extrapolating from what I read in the news. Does the AUMF cover countries like Syria?

General GROSS. It doesn't mention countries, sir.

Mr. DUNCAN. Right.

General GROSS. It mentions, you know, who——

Mr. DUNCAN. Groups.

General GROSS [continuing]. Enemy groups.

Mr. DUNCAN. Right.

General GROSS. And so if you were conducting operations——

Mr. DUNCAN. Do you think that is wherever they crop up?

General GROSS. Well, there is no geographic limitations in the 2001 AUMF. There are other sources of international law and domestic law that provide constraints and restraints on issues like violating another country's sovereignty and things like that. So you——

Mr. DUNCAN. So I am going to use a total hypothetical here—and the press is covering this. This is totally hypothetical.

But let us just say that Abu Sayyaf terrorists evolved into an ISIS organization in the Philippines. Does the AUMF authorize the United States to go there to fight that ISIS-affiliated group?

General GROSS. I don't know, and that would be one where you would have to examine the intelligence, examine all the facts that you have at hand.

You would have to decide or make a legal determination if they can be considered an associated force of al-Qaeda or the Taliban.

What we don't know—one of the uncertainties is, we have always determined as a legal matter that an associated force of al-Qaeda or a group that is part of al-Qaeda would fall under the AUMF.

I don't know that we have ever looked at an associated force of ISIS, and whether or not they have done that since I left I don't know and I can't recall whether we looked at that.

And so now you are starting to get more and more attenuated and so the legal risk raises that you may say, yes, this falls within the AUMF but reasonable minds can disagree and a court or someone else may say no, that wasn't what we intended with that law. My——

Mr. DUNCAN. So just—I agree—so just a last question. My time has expired. The Houthis in Yemen—are they an ISIS-affiliated group? We have had military strikes there. I am just asking.

General GROSS. I don't know enough of the current intelligence and facts about that.

Mr. DUNCAN. Just trying to get my head wrapped around what this AUMF covers, what it may not cover, and going forward what we might need to include for potential future threats.

General GROSS. So the current AUMF as it has been interpreted by the administrations, you would have to look at whether or not they are an associated force—and we have a definition that we have used for associated force—must be both an organized armed group that has entered the fight alongside al-Qaeda and a co-belligerent with al-Qaeda in hostilities against the United States or its coalition partners.

That is the definition of associated force that the previous administration adopted and used and that is what I used as my working definition for legal analysis.

I don't know what the current administration or the current lawyer on the joint staff is using. But I can't imagine that has changed significantly.

Obviously, Senator Flake and Kaine have put their own definition in their proposal, which defines associated force, and if enacted that would become the definition you would use to analyse that.

Mr. DUNCAN. I thank you for that.

And I will now go to Mr. Bera.

Mr. BERA. Thank you, Mr. Chair.

You know, our founders in the design of our country really laid out a brilliant design. But part of that brilliance was a separation of powers giving, very clearly, Congress in Article 1 the ability to declare war; giving the Commander in Chief, our President, the ability to execute on those plans. Doesn't seem ambiguous.

But as we are having conversations here, the current AUMF is rife with ambiguity in there, and I think it is consistent. Just listening to each of the witnesses, I think each of you is consistent that it would be appropriate to update the AUMF. Is that correct? And I think just listening to my colleagues on both sides of the aisle we also think it would be appropriate to update the AUMF.

Now, there is recognition it is not going to be easy. It is going to require vigorous debate. It is going to require, you know, talking to our military commanders, talking to the executive branch.

But we owe it to our men and women who are making that ultimate sacrifice to their families to clear up this ambiguity—to give them a clear sense that the American people are with them—to give them a clear sense of what their mission is. That is our job as Members of Congress.

I would argue we are not doing our job by not having the courage to engage in what are not easy conversations. But that is what we ought to do.

I guess I will ask you, General Gross. By having that debate, by giving clear definitions, removing some of the ambiguity, that sends a message to our troops, does it not?

General GROSS. Yes, sir.

Mr. BERA. So we ought to and, again, we shouldn't do the easy things. The American people expect us as their representatives to engage in the necessary things and it is pretty clear from the discussion and dialogue that updating this AUMF that is 16 years old is absolutely necessary, particularly given that the majority of us, as Members of Congress, weren't here when this AUMF was authorized.

So if we are actually going to do it, many of you have referred to the Flake-Kaine amendment and framework as a potential starting point.

I guess starting with you, Mr. Olsen, would that be a reasonable starting point if we were to debate this?

Mr. OLSEN. I do think that is a reasonable starting point. If I could just go back to your introductory comments about the current ambiguity.

I think it is worth pointing that, again, the AUMF that we are operating under now actually mentions no groups. It doesn't mention al-Qaeda. It doesn't mention the Taliban.

It talks about those organizations and individuals responsible for the attacks of 9/11. So it is tied to a particular heinous act of terrorism which occurred 16 years ago.

So as you get to groups like Abu Sayyaf or the Houthis, whether they are tied to other groups, you get into this area of extreme ambiguity and that is why I think you hearing from this panel a consensus view, as you expressed, of support for updating the AUMF. So yes, and I do think that the Kaine-Flake bill is a sensible starting point for that discussion.

Mr. BERA. General Gross.

General GROSS. Yes, sir. I think it is a good starting point and I know in particular Senator Kaine has been a deep thinker on this issue and I can remember talking to his staff years ago about this. So he has given it a lot of thought.

Mr. BERA. Judge Mukasey.

Judge MUKASEY. I agree that it is certainly a sensible starting point as long as we remember that it is a starting point and that it is going to need the debate that you referred to.

But certainly it is a good place to start and some of the comments that were made today about, for example, adding groups on either an approval or disapproval basis is something that ought to be considered.

Mr. BERA. So, again, we have a starting point, and I am not suggesting that it is the end point. It is the starting point of a debate that we ought to have, that the American people expect us to have and, most importantly, that we owe to our troops—our men and women and their families.

There is no greater responsibility that we have when we send someone's son or daughter, mother or father, husband or wife, into harm's way and, again, I feel that this body owes it to them to have that debate.

Also, when we talk about a sunset provision, from my perspective that is not an expiration date. That is a forcing function to have this body evaluate where we are, update and refresh and perhaps end an AUMF but also perhaps reinforcing an AUMF.

And is that the right interpretation when we are talking about sunset provisions?

General GROSS. Sir, except that—I mean, I think by its own terms, at least for the Flake-Kaine bill, it expires at the end of that 5-year period if Congress hasn't acted.

And so I think that risk of uncertainty in particular with, for example, detainees who are currently held, that the authority could lapse to hold them and therefore you have to look at that.

Ongoing operations that were being conducted under that AUMF arguably would expire and then, you know, that would set off a debate.

So, if there were to be a sunset provision, and I am not taking a position one way or the other. I am just pointing out different pros and cons, if you will. There might be ways to design language such that the AUMF expires but there's a tail of authority that sur-

vives that would allow detention for a certain period of time or ongoing operations or et cetera.

Now, I don't know how to write that but I know you all have——

Mr. BERA. But, again, that is our job, right?

General GROSS. Yes, sir. Exactly.

Mr. BERA. Thank you. I will yield back.

Mr. DUNCAN. Gentleman's time is expired.

The Chair will now go to Mr. Perry from Pennsylvania for 5 minutes.

Mr. PERRY. Thanks, Mr. Chairman. Thanks, gentlemen. General Gross, thanks for your time and uniform service.

Gentlemen, you all referenced the Flake-Kaine legislation, and I should be familiar but I am not. But can you tell me if it identifies the enemy or an enemy by name?

General GROSS. Yes, sir, it does.

Mr. OLSEN. It does. I can tell you, it identifies ISIS, al-Qaeda, Taliban, and their associated persons or forces.

Mr. PERRY. All right. So it seems to me, and I have had an AUMF that I have offered in the past and I have one sitting right in front of me that I have offered again this session, which seems somewhat analogous to the ones that Mr. Flake and Mr. Kaine have authored, or offered.

But I feel like we are lacking in identifying correctly the enemy and that has been my frustration because the enemy keeps changing, whether its name, whether its affiliations.

We are attacking ISIS now under the provisions of some associate with al-Qaeda when they both eschew one another at least in name even though they have the same eventual ultimate goal.

And then you have the myriad list of different actors, which ebbs and flows and changes on a regular basis. Mine determines that the enemy and the use of force would be against Islamist extremism, which seems to be whether you determine that is fundamentalism, the strict following of the Koran by generally Sunni groups as opposed to Shi'a or something else. It seems to me that that can be described that way and cover all these groups, and I go on further.

I include, of course, al-Qaeda and ISIS, AQAP, AQIM, al-Shabaab, Boko Haram, al-Nusra, Haqqani, the Taliban, Houthis, Khorasan, Hezbollah, and then I put substantial supporters, associated forces, or closely-related successor entities.

Now, I, too, agree, obviously, since I have authored this that we need to refresh this and we need the American people's and Congress' involvement in it.

I would take some issue with the time frame. As a person who has been privileged to serve in uniform as well, I just see that as an opportunity for opposing forces to use that to be victorious when we cannot.

And I don't know how you have a time frame imposed and then say, well, we are going to refresh this and we are going to get the will of the American people but then we are going to continue operations while that is occurring. I don't know how you skin that cat, quite honestly.

As a former military commander, you have to have the latitude to fight the battle and if there is going to be a time frame, a limita-

tion on that—at the same time, I don't think this should be forever but that is not our choice.

We have an enemy and they get a vote, as we all know, right. We always say no plan survives first contact, right. The enemy gets a vote.

And so let me ask a very pointed question because I am looking—General Gross, you would name ISIS. Mr. Mukasey, you would say that it should be as broad as possible and, Mr. Olsen, you say all necessary and appropriate force.

I think mine is fairly broad. I know it mentions all necessary and appropriate. I only mention ISIS as one of the co-conspirators under the guise of Islamist extremism.

With that, is there a problem with using Islamist extremism? Is there a problem with that phraseology, number one? And number two, regarding Guantanamo Bay in particular, how do we make sure that we are inclusive of those detainees?

I think you touched on that a little bit. But under the context of this language, what could I be missing? What do I need to know?

Mr. OLSEN. Well, I would say, respectfully, that your approach would be over broad. In other words, identifying the enemy by a belief system, essentially.

Extremist Islamists would not be sustainable and it would be essentially an open-ended war with people who have a particular——

Mr. PERRY. Who have an open-ended war with us right now and change their names on a regular basis and their affiliations and their geographic locations.

Mr. OLSEN. Again, respectfully, your suggestion would be based on someone's viewpoints and, obviously, that would be quite extraordinary in terms of our history to identify an enemy by those terms and I think unprecedented. So I would not recommend that approach.

I do think there is the opportunity to identify groups, to use international law principles to identify those associated with those groups is—again, we are talking about the most extreme use of our nation's capabilities—that is, use the military force—and therefore should be reserved for those circumstances against those groups who do pose the most significant threat to us.

So I would not recommend an approach as broad as you have suggested.

Mr. PERRY. Gentlemen?

Judge MUKASEY. There is one additional problem there and that is you identify this as extremism. There are people who believe that the literal interpretation of the Koran, even to the point where it involves people crashing airplanes into buildings to bring down Western civilization, is not an extremist view—that it is a mainstream view.

We shouldn't have to get into that debate. I think it is much safer to identify particular groups and their affiliates and go after them.

How Islamic society generally deals with extremism or our view of what constitutes extremism is really up to them. It is not, I think, subject to a military solution.

Mr. PERRY. Can I have the general answer?

General GROSS. Sir, where I struggle with this is I look at an authorization for use of force as a response to an enemy who has attacked us—an organized armed group. And therefore there is some value in identifying by groups as enemy combatants as opposed to the Islamist extremism.

Without having the opportunity to look at your proposal I don't know how I would define that. I would have to have some guidance if that were the law to help me advise a commander on who fits within that or who doesn't.

So it would need to be fleshed out. It does seem to be a bit broad—I mean, just speaking frankly.

The language I do like that I don't see in the Flake-Kaine bill is the successor language. I think that is important. I know that has been in previous proposals.

Mr. PERRY. And it is mine as well. But I——

General GROSS. Yes, and I don't see it in this one that would allow—if al-Qaeda or ISIS or another group changed to a different organization I don't know how we would treat that under this.

Mr. PERRY. Thanks.

I yield.

Chairman ROYCE. Thanks, General.

We go to Gerry Connolly from Virginia.

Mr. CONNOLLY. Thank you, Mr. Chairman, and welcome to our panel.

Mr. Olsen, Article 1 Section 8 of the Constitution states Congress shall have the power to declare war and to raise and support armies and other armed forces.

Article 2 that follows that, Section 2, designates the President shall be Commander in Chief of the nation's armed forces.

Do you think those are ambiguous or vague declarations in the Constitution in terms of the enumeration of powers?

Mr. OLSEN. No, and I think, as other members of the committee have pointed out, it does strike me to be a particularly wise approach that our Framers imposed in terms of separating powers.

Mr. CONNOLLY. But you said the consistent failure of Congress to act erodes congressional authority relative to the executive when it comes to war powers. Are you contending that the failure to act here in Congress over many decades has in fact compromised the language in the Constitution with respect to Congress' power to declare war?

Mr. OLSEN. No.

Mr. CONNOLLY. Okay.

Mr. OLSEN. No, I do think that over the past 16 years that Congress' failure to update the AUMF has allowed the executive branch, or really required the executive branch, to undertake interpretations of the AUMF that have been, as a result, controversial.

Mr. CONNOLLY. So are there implied powers in Article 2 Section 2 with respect to the role of Commander in Chief or the President? I mean, not as enumerated——

Mr. OLSEN. I am not a constitutional scholar but I do believe that there certainly would be implied powers under the Commander in Chief authority under Article 2.

Mr. CONNOLLY. And almost every Commander in Chief has so claimed, going back to James K. Polk.

Mr. OLSEN. I defer to your expertise on that question.

Mr. CONNOLLY. Okay.

Mr. OLSEN. That sounds right.

Mr. CONNOLLY. Right. Although as recently as Franklin Delano Roosevelt, people forget he asked Congress to declare war against Japan after Pearl Harbor. He did not ask Congress to declare war against Germany and Italy.

He waited until Hitler, several days later, declared war on us—considered one of his biggest mistakes—and then Congress declared war on Germany and Italy. So Franklin Delano Roosevelt still deferred to that Article 1 power before he engaged with Hitler, who was really kind of the prime focus of Churchill and FDR. But he still deferred to the congressional power.

So there are implied powers of being Commander in Chief—I got to protect the country even if Congress isn't in session, I got to make decisions about troop deployments. I even go further—I actually deploy and kind of notify you later.

Are there implied powers for Congress in this declaration of war power? Do we have implied power? Since the executive claims implied powers, do we have some?

Mr. OLSEN. I certainly think in the sense of conducting oversight, implied powers in terms of not only the authority to declare war but also to appropriate funds, there is an implication, certainly, in terms of providing oversight over how those funds are used.

Mr. CONNOLLY. Well, one could argue that what we are debating today the AUMF has such an implied power. Because it is not a declaration of war but it is an authorization to use force that we grant, delegate, to the executive, correct?

Mr. OLSEN. I think that is correct.

Mr. CONNOLLY. Does the delegation of such authority ever get stale and expire on its own, even if we don't have a statutory sunset provision? Is it ad infinitum?

Mr. OLSEN. I would think that the authorization for the use of force, unless it is extinguished in some other act of Congress, would stay on the——

Mr. CONNOLLY. Goes back to implied powers. Presumably, it is implied at some point that the original purpose for the original authorization expires, either through natural causes or over time, even if it isn't enumerated. Now, we are not operating on that principle at the moment but it is worthy of examination.

Is the War Powers Act constitutional?

Mr. OLSEN. I would defer to Judge Mukasey on that question. Yes.

Mr. CONNOLLY. Judge Mukasey.

Judge MUKASEY. No.

Mr. CONNOLLY. No. So there we go again. Here is somebody representing the executive branch who decides they have all kinds of implied powers and, oh by the way, they get to enumerate whether our statutory expression of our powers in Article 1 are constitutional and they get to cherry pick what they will and won't abide by.

And I would contend, with respect, that there are serious implied powers in Article 1 and that it is not the purview of the executive branch to determine on its own the constitutionality of any cir-

cumspection or circumscribing with respect to the Commander in Chief's powers. That is why it is Article 2, not Article 1.

My time has expired.

Chairman ROYCE. Thank you, Mr. Connolly.

We go to Adam Kinzinger of Illinois.

Mr. KINZINGER. Well, thank you, Mr. Chairman, and thank you all for being here and bearing with us. It is really important.

What Mr. Connolly was saying, I think it is essential to remember that I think when our Founders were writing the Constitution they understood that you cannot have 535 commanders in chief because we never agree with anybody.

We can debate things and everything else but the reality is when it comes to making decisive decisions overseas, time-reactive decisions, destroying an enemy, that is—can only be invested in one person and that is the President of the United States.

I actually would agree with the judge. I am not sure that the War Powers Act would pass the constitutional test. But our power is to simply declare, I believe that a state of war exists as enumerated in the Constitution and then we can have power through appropriating money, et cetera.

I was very concerned when a colleague of mine attempted to basically withdraw the current AUMFs out of provision because, as was discussed a little earlier, I fear that that would have immediately—I mean, if we believe that we can debate and pass a new AUMF in 6 months, I want to point to sequester and some of these other things in Congress that we have taken up to the time limit and actually not been able to successfully compel us to an answer.

And I would hate to think that—so I am an Air Force pilot—I would hate to think that my colleagues would one day wake up and not have the legal authority to destroy our main enemy and that is, frankly, what we would run into.

I do support a new AUMF in the current construct where we are at, but I don't think there can be any time limit on it and there can be no limitation on what the President can do because that makes us Commander in Chief.

And I think what is being missed in all of this is ISIS—yes, ISIS is an enemy. This is a generational fight that we are in against terrorism.

This is not just about destroying troops on the battlefield now, which is extremely essential to do, but this is about understanding that hard and soft power come into play here and that this military fight, I truly believe, will be going on for the rest of my life to some extent.

And so the 7- and 8-year-olds in the refugee camps today are the ones we need to be focussing on to deny ISIS or the next generation of ISIS or whatever we call them their ability to recruit their next recruits.

So, General, I want to ask you, you know, as I mentioned, I supported——

Mr. CONNOLLY. Would my friend yield?

Mr. KINZINGER [continuing]. I supported—yes.

Mr. CONNOLLY. Real briefly. You know I respect you. I would say that what you have just enumerated is unlimited power delegated, in my opinion, unconstitutionally, to the executive.

You took issue with the expression of our power and the War Powers Act being constitutional or not. What you have just said, if we acted on would be an unprecedented delegation of power to the executive——

Mr. KINZINGER. Well, I—with respect——

Mr. CONNOLLY [continuing]. Virtually conceding our war powers——

Mr. KINZINGER [continuing]. With respect, and I appreciate that.

Mr. CONNOLLY. I thank my friend for yielding.

Mr. KINZINGER. I appreciate that. But I believe that when you put 535 Members of Congress into the Commander in Chief seat and you state you have an enemy—we have an enemy right now, which is terrorism.

So we give the President the authority to destroy terrorists and we can't put a time limit on it because we don't know how long it is going to take.

It is the internally-displaced refugees now that are prime recruiting ground if we don't give them hope and opportunity.

So, General, just to ask you, if we tie the hands of the President and the military by putting restrictions in the AUMF or we sunset the provision, do you think that will have negative repercussions on the overall fight in this war?

General GROSS. Well, yes, sir, it could. It depends on what those restrictions are. For example, if you put a 5-year sunset on it, it certainly wouldn't restrict operations for the first 4 years and 364 days.

But then if there is not a new AUMF in place to replace it, then if it sunsets and expires then that would create issues.

If you wrote in provisions, I mentioned some examples in my testimony—for example, a no boots on the ground or no enduring large-scale combat—then those restrict the ability of the President and military commanders to plan and they would have to plan operations that were consistent with the AUMF and it might take options off the table that they needed.

Mr. KINZINGER. And one of the things you know, General, as I do, as everybody here does, no plan survives the first contact with the enemy.

So you never know what you need or what you don't need. And so our job through the construct of the War Powers Act, which hasn't been thrown out by the courts so I accept it, is to give the President the authority to declare war on our end, to say that a state of war exists, and give him the authority to do what he needs to do.

Judge, I know you talked about this earlier. I wasn't here and I apologize, so maybe you are repeating yourself. But can you talk about what would happen the moment these current 2003 and 2001 AUMFs are rescinded? What would be the legal implications?

Judge MUKASEY. Well, I think questions would be raised principally about detention since that is where the rubber meets the road.

As far as ongoing military operations, obviously, there would be a debate about that. There would be uncertainty about that.

But although the discussion before began the analysis of Article 2 powers at Section 2, I would go back to Article 2 Section 1, which

begins with the words "the executive power shall be vested in a President of the United States."

It doesn't say, all except a little bit of it. Doesn't say, these particular instances of it. It says, the executive power. That means all of it.

Mr. KINZINGER. Thank you.

I yield back. Thank you.

Mr. YOHO. [presiding]. The Chair now will recognize Ms. Kelly of Illinois.

Ms. KELLY. Thank you, Mr. Chair, and welcome to the witnesses.

In addition to granting military authority to the President, this bill would also require the President to send Congress a comprehensive strategy to defeat ISIS.

But as we know, the U.S. fight against ISIS is not just military. It is political, it is economic, and diplomatic.

How will the President's strategy address the economic and political pressure needed to defeat ISIS and to prevent successor uprising? Whoever wants to answer.

Judge MUKASEY. Obviously, that would be up to each President to respond to. Since this is an authorization for the use of military force, I think the sense is that the strategy indicated here is a military strategy.

But I certainly agree with the implication of your question, which is that it is going to take a lot more than simply military strategy to do it and that is something we are going to have to resolve more broadly in the political debate that we have and in the way that the Congress authorizes the activities not only with the military but also, for example, with the State Department and other entities that carry on the fight in other forums.

Mr. OLSEN. I would just suggest that your question does raise an important point, as Judge Mukasey said, and that is that including a reporting requirement in an AUMF would enable Congress to actually have the opportunity to review the military strategy—again, not substituting its judgment for the executive branch on how to execute the war but actually being able to review the strategy and thereby exercise, I think, Congress' appropriate role under the Constitution.

Ms. KELLY. Okay. Thank you.

How do you feel or what provisions do you feel should be included in an AUMF dealing with, like, cyber terror—I mean, wars not fought in the same exact way anymore and what do you think about that?

General GROSS. Well, ma'am, you know, the provision in the current AUMF that is reflected in the Flake-Kaine example, and I believe Mr. Perry's—as he mentioned as well, his proposal talks about all necessary means or language similar to that. And that would include, I think, cyber authority subject to other laws and, as I mentioned in my opening statement, there's always other laws—international law, other domestic law, U.S. policy, et cetera. So the AUMF alone might give authority that there might be some other source of law that might restrain or constrain in some way.

But we would look to all of that, or they would look to all of that, as they analysed a particular operation to see, is this a lawful

enemy under the AUMF? If so, is this a lawful means of force to use against that enemy in this setting.

Ms. KELLY. Anybody else?

Mr. OLSEN. No, I would just agree with General Gross on that question. I think that is the right answer.

Ms. KELLY. And believe it or not, I yield back the balance of my time.

Mr. YOHO. Thank you.

The Chair will now recognize Mr. Brian Mast of Florida.

Mr. MAST. Thank you, Chairman.

General Gross and Mr. Olsen, you have both spoken extensively about the who as the most critical part of the AUMF. General, you said who was most critical and you actually said how was the most problematic piece of everything you listed. Mr. Olsen, you said of the three things you listed that Congress should consider you said who as the first one that you'd mentioned so take that at a priority list.

So I want to talk to you both a little bit about how you determine who—get to the bottom of that a little bit, and who we should be considering.

Not to use who too many times, but do you think that we should be considering those who conduct acts of terror? Rapid fire this if you want.

Mr. OLSEN. As an initial question, yes. You want to look at who poses that degree of threat to us. I think that is a starting point. I don't think that is the dispositive question in any sense.

Mr. MAST. I take your head shaking as a yes?

General GROSS. Yes, sir. As I was telling Mr. Perry, I think you start with the premise that this is a response to an act of armed conflict—an act of war.

And so as we look, and I will use the word enemy—as we look to define who is the enemy that Congress and the President have decided to use the military element of power against.

And so there are numerous terrorist groups all over the world but they may not be an enemy in the sense that they have opened up armed conflict against the United States and therefore it wouldn't be, in my view, appropriate to add them to an AUMF. Really, an AUMF——

Mr. MAST. Considering whether it was on U.S. soil, a U.S. Embassy, a U.S. warship, some other threat oversea somewhere?

General GROSS. All of those are threats to the United States—yes, sir.

Mr. MAST. What about those who conduct acts of genocide—Bashar al Assad, somebody else? Somebody conducting an act of genocide against their people. Should that be somebody, in your opinion, that we should consider in an AUMF?

Mr. OLSEN. Again, I think the reference must be made to whether this is an act of armed conflict against the United States and, again, there are other sources of law—international law, Article 2 authority, a backdrop Article 2 authority—for the President to take steps in the absence of an AUMF to protect the country. I think——

Mr. MAST. And you advocate primarily or only for those that have conducted some sort of kinetic action against the U.S.?

Mr. OLSEN. Again, certainly, as a starting point, and then the question is, are we in an active armed conflict with a particular group before I think it would be appropriate to include them in an AUMF.

Mr. MAST. Would either of you look at an AUMF for those that have conducted cyber terrorism—a nonkinetic action?

Mr. OLSEN. So I think—again, if I could just answer a little bit more fulsomely, I think there is a risk in looking at every threat through the lens of an AUMF and deciding that we want to use military force against that threat.

There is a whole range of options that the government has whether it is a cyber threat, whether it is a humanitarian question or issue.

There are lots of things the government has the ability to do that are short of the authorization for the use of force against that particular threat or group and I think that it is appropriate to reserve the use of an AUMF only for those groups that rise to the level of posing a threat that is an active armed conflict against the United States.

Mr. MAST. Okay. General, when we are considering, as Members of Congress, an AUMF, do you think we should be looking at the extent of military force that would be needed to bring us to victory or bring us to success?

Should that be a consideration? Should we be looking at whether it could lead to only conventional weapons or nuclear weapons or expected casualties—KIA? Should that be a consideration for us when deciding an AUMF?

General GROSS. Sir, are you saying a consideration of the other side's capabilities or our capabilities?

Mr. MAST. If it could lead to nuclear war, should that be something we should consider or the amount of KIAs that we could expect as a result of a use of military force—should that play a role in our decision as Members of Congress for an AUMF?

General GROSS. Well, I would think you would consider all factors involved with such an important and serious step. As you consider whether or not to authorize armed conflict, authorize the use of military force, I would hope all those considerations would come into play because it is a serious decision to authorize military force against another entity whether that is a nation, an organization, a group, a person. It is a big step. So I would hope yes.

Mr. MAST. So then I would ask, do you think that Members of Congress should have access to the operation's orders that exist out there with the Department of Defense—the war plans—when we are considering an AUMF—you know, the mission, the commander's intent, the center of gravity, disposition of forces both allied and those that we consider aggressors? Should we have access to operation's orders?

General GROSS. I don't know. It depends on how far down. I mean, I know that there are regular reporting requirements. I know we came over frequently to both the Senate and House Armed Services Committees and by invitation to other committees, although that is within your jurisdiction and I don't fully understand that, to be clear. But I do know that we make a wealth of—or made a wealth and they still do, I assume—a wealth of informa-

tion available. At what level that becomes appropriate, how far down, not because we are hiding anything but just that the amount of stuff you would see.

So if we are talking wave top, large-scale campaign plans against nation-states, that might be informative for you all if we are talking about a battalion's operation order to conduct a particular objective in Afghanistan in a district. It seems like that might be below the level where Congress ought to be focused, in my opinion.

Mr. MAST. My time has expired. I thank you for your comments, gentlemen.

Mr. YOHO. I thank the gentleman from Florida.

We will now go to Mr. Schneider from Illinois.

Mr. SCHNEIDER. Thank you, Mr. Chairman, and I want to thank the witnesses for not just your service to the country but your generosity with your time and insights today. It is very much appreciated.

As others have said, I agree with the consensus that it is long overdue that this body has had the debate that there is clearly a need for an updated AUMF. So I thank you for that. My colleague from Illinois indicated—I don't want to misquote him but it was—essentially, I believe he said simply that Congress simply has the power to declare a state of war exists. But, in fact, the last declaration of war was World War II. We are operating currently under an AUMF, something that is distinct, issued in 2001. Maybe just briefly if you could indicate the difference between an AUMF and a declaration of war.

General GROSS. I will take a first stab, sir. Again, not a constitutional scholar but I have heard other people who speak on this. First of all, we have only declared war five times and the last time was World War II. You all have only declared war five times. And there is some thought that perhaps that is reserved for nation-state on nation-state traditional international armed conflict—that you wouldn't declare war in a setting where—now, that doesn't talk about Korea or Vietnam, which were both nation-states.

There is some thought that a declaration of war is—I am being careful with my words—is perhaps with the passing of the U.N. Charter, which is an attempt to outlaw offensive war—in other words, declaring war on another nation without some justification of self-defense or so forth—that perhaps declarations of war are no longer something nations do since the passage of the U.N. Charter. To my knowledge, there hasn't been a declaration of war since World War II.

Mr. SCHNEIDER. Right. And I am going to reclaim my time just because it is limited. But same with you, General Gross. In your testimony, you talked about within an AUMF it establishes definitions. It creates parameters, as you laid it out as the why, the who, what, when, where, how questions, and those parameters distinct from what we are talking about with a declaration of war, I guess turning to the whole panel, is it within the authority of Congress to establish parameters of how we engage, where we engage, who we engage?

Judge Mukasey.

Judge MUKASEY. How? I don't think so.

Again, Article 2 Section 1 begins with, the executive power—all of it. Deciding how we should exercise an authority that Congress says the President should have, I think, is an invasion of that executive authority.

Mr. SCHNEIDER. General.

General GROSS. Yes. As not being a constitutional scholar, I would say that you would have to look at the specifics and see whether or not that rose to the level of a conflict between the executive and the legislature. But I certainly think it is within the parameter of Congress to draft and enact an authorization for use of military force.

Mr. SCHNEIDER. Mr. Olsen.

Mr. OLSEN. In preparing for this hearing, looking at the case law on this particular question, I do think that the law supports Congress' authority to impose some limitations on the types of activities that can be undertaken by the executive under a grant or authorization for the use of force. Again, there are serious policy judgments about where to draw the line between Congress and the executive branch and how to execute a war. But I do think that the law supports an appropriate role for Congress in setting some limits whether it is occupying territory or extensive use of ground forces.

I think the law is clear that Congress has authority to impose those limitations on the executive branch.

Mr. SCHNEIDER. And my understanding, just for clarification, all of you have said you support the idea of an AUMF having a sunset. Is that correct?

Mr. OLSEN. Yes, from my part.

General GROSS. I didn't take a position either way.

Mr. SCHNEIDER. Okay.

General GROSS. I just point it out.

Mr. SCHNEIDER. All right. To the extent that sunset is a parameter, would there be circumstances beyond time that would suggest it should come back to Congress to review a change? We have talked about the morphing of organizations. They can change their names. They can change their geography. But if it morphs into a completely different dynamic, are there times where an AUMF reaches a limit where it should come back to Congress to review and refine? Judge.

Judge MUKASEY. Again, that is a policy choice rather than a legal choice and it is up to this body to decide whether an unlimited piece of legislation ought to come back to be limited or to be reconsidered.

Mr. SCHNEIDER. And I asked the question—let me state it in a specific context. As we look and are considering a refined AUMF, going forward, we have a conflict taking place in Syria now. It has multi facets to it. It is going to change many times over from the time whatever we decide to the time we get to whatever hopeful conclusion we achieve a peaceful—what I ultimately believe will be a non-military solution. But I am concerned that there will be a moment in that conflict that we need to ask ourselves, again, questions—how far do we go?

And my time has expired but if the panel wants to touch on that at all, I would welcome that.

Mr. OLSEN. If I may, just very briefly, because I do agree that the situation in Syria, as complicated as it is, highlights the need for clarity with respect to the use of force and I do think that you are correct in the Congress' authority to set parameters and to require whether it is an approval or a disapproval process some mechanism for reviewing the expansion of authority whether it is to new groups or new geographic areas such as new countries and I think Syria is a prime example of why that is a prudent thing for Congress to do.

General GROSS. And I would just add, by necessity I never think of a single conflict just because it is inside a country.

There are multiple conflicts going on inside Syria and so if something happened that the United States was no longer acting within the authority of its AUMF and found itself acting against another enemy, whether that was a nation-state or some other organized armed group, then we would need to have some domestic legal authority for that conflict separate from the one with ISIS.

Mr. YOHO. Thank you for your response.

Mr. SCHNEIDER. Thank you. I am over time. I appreciate the extended time.

Mr. YOHO. We will now go to Mr. Garrett from Virginia.

Mr. GARRETT. Thank you, Mr. Chairman.

It is like I live in a parallel universe sometimes when I am in this town. Daniel Patrick Moynihan, who I hold in high regard, once suggested that you are entitled to your own opinions but not entitled to your own facts, and Vandenberg famously said that politics should stop at the water's edge. But when I listen to my esteemed colleague make his introductory remarks where he said he is "not clear on the administration's plans to deal with ISIS and how it differs from the last administration, if it does," I thought, where am I?

So I am going to use such hard-line conservative sources as the Huffington Post, CNN, and the Atlantic to try to address his concerns and inability to differentiate.

On June 8th of this year, CNN said, "Iran calls Trump's ISIS response repugnant." I don't think the Iranians criticized the last administration so vociferously.

On June 29th, Huffington Post said, "U.S.-supported forces retake Mosul." The Atlantic, on May 20th, said, "The scramble for a post-ISIS Syria is beginning."

And ABC News, on July 20th, said, or quoted a former three-star general who said, "It's simple. We are winning. They are losing."

Let us contrast that to the previous administration. ABC News, June 29th, 2016, said, "ISIS 2 years later: From JV team to international killers."

November 14th, 2015, CNN said, "Obama declares ISIS contained"—the day before the Paris attacks. Newsweek, April 19th, 2016, said, "Obama: Mosul will be recaptured from ISIS by the end of this year." We know how that turned out.

And The New Yorker, January 10th, 2017, said, "During President Obama's 8 years in office jihadis gained more turf, more followers, and more money."

So I wish that my colleague who said he couldn't differentiate between the policies of the previous administration had looked not at

policies but at results because I think they are relatively easily differentiated. Sorry. I couldn't help myself there.

We talked early in this hearing about repealing the AUMF and then replacing it. I will submit—and, again, I apologize—I have limited time—that that is incredibly dangerous, in my estimation, because historically what I think we have learned is that the Article 2 branch will exercise executive authority without authorization where they deem it necessarily and candidly, I think constitutionally they almost have a duty to do that. And historically, I think it is telling what Andrew Jackson said after the court ruled: They have made their ruling—now let us see them enforce it.

So we have a duty here. I would adopt the comments of my colleague from the other side of the aisle, Congressman Deutch, not doing a new AUMF is an abdication of our responsibility and our duties and, candidly, unfortunately, it seems that we abdicate more frequently sometimes in this body than we act.

But I think it is our responsibility to review the circumstances in light of obvious changes over the course of 16 years and then act appropriately to authorize and fund, because that is our Article 1 responsibility, our Government as it pursues the enemies of this Nation and ensures, hopefully, peace and stability, and that is prosperity and opportunity for our posterity.

I would also, however, reference positively the comments that my colleague, Mr. Kinzinger, who said, and I will paraphrase, that we are at war not with a nation but an idea and that we need to focus on that 7-year-old displaced child in a camp somewhere because you can't declare victory against an idea and have it be a fait accompli.

You have to create circumstances where individuals have hope, have a pathway to opportunity, because it has been my observation that you are much less likely to strap an explosive vest to yourself when you aspire one day to be a doctor or a lawyer or a teacher.

So we need to look to the future but we also need to aggressively prosecute those who would do us harm. My fear is that we have all too often in the past looked at what the needs of the moment were and not looked to the long-term needs. We articulated early upon being sworn into office that we should never engage in regime change without contemplating just what might fill the vacuum. And so specifically, as it relates to Syria, and again, I want to advocate very clearly that we should enact a new AUMF, that we should not repeal the existing AUMF until the day after the old one goes into effect because creating a vacuum means something will fill it.

But, specifically, as it relates to Syria, everyone knows the horrific acts of Assad but are there—and maybe I am a little bit afield, Mr. Chairman—are there any viable entities to run that nation as it currently exists on a map who wouldn't be equal to or worse than Syria?

Jabhat Al-Nusra, Jabhat Fateh al-Sham are essentially co-opted by al-Qaeda, right? And then there is ISIS. You have got the Kurds, who have no desire to run that country, and the country who has no desire to be ruled by Kurds.

So open-endedly, as we authorize an AUMF and we act in Syria, don't we need to be careful that we don't create a circumstance

where what follows is worse than—if conceivable, than what we have now?

I will yield back, but that one can be rhetorical but——

Mr. YOHO. Thank you, sir.

Mr. GARRETT [continuing]. I think I know the answer.

Mr. YOHO. Appreciate your comments.

We now go to Mr. David Cicilline from Rhode Island.

Mr. CICILLINE. Thank you. Thank you, Chairman.

I want to thank our chairman and ranking member for giving us the opportunity to explore this important issue and really thank our three witnesses for helping to inform this discussion.

I am extremely concerned by the escalation of violence in Syria in recent months and by the extremely broad and, in my view, incorrect interpretation that this administration has taken of its authority to take military action in Syria. Let me be clear that I also had deep reservations about some of the Obama administration's actions in the region, which I voiced openly at that time.

However, the missile strikes, the shooting down of a Syrian Government plane, and other actions that the Trump administration has taken have seriously ratcheted up American military engagement in Syria without congressional input or authorization.

I know many of my colleagues share my deep concerns and that is why more than 60 of them have joined me in sending a letter to the President raising their serious concerns about his actions and reminding him that the Constitution requires him to seek congressional approval for military actions and I would ask unanimous consent that this letter be entered for the record.

In my view, the 2001 AUMF needs to be repealed and replaced by an authorization that is tailored to the threats that we currently face, not the threats of almost two decades ago. It is clear that the President of any party will use a broad interpretation of the existing authorization to justify their use of military force. It is up to Congress to reassert our role and consider a new authorization for the use of military force.

However, let us be clear. This President has presented no strategy for dealing with ISIS, no strategy for ending the brutal reign of the Assad regime, and no strategy for engaging with other terrorist threats around the globe.

And here is my first question—is it not correct that the President must come to Congress with a plan, with an actual strategy, and then seek congressional authorization for any part of that plan that requires the use of military force—that it cannot be done in the reverse when we imagine what the plan is and sort of estimate what we think the use of military force would be to support the plan, it doesn't exist.

So don't we have to first have a plan and a strategy from the President that says, here is what we will do to defeat ISIS and here is the force that I need to execute that plan? Anyone disagree with that?

Judge MUKASEY. Yes.

Mr. CICILLINE. You disagree. Why?

Judge MUKASEY. Because even declarations of war simply declare that a state of war existed. They did not declare how the plan was

to be, how the plan was to be executed, what strategy was to be pursued, and what any limits were.

You cannot declare in advance how you intend to achieve a victory.

Mr. CICILLINE. So, Judge, do you then think that there is no limitation to congressional action with respect to the use of military force—that it is simply a declaration of war or not? That Congress doesn't have the ability to limit?

Judge MUKASEY. No. It can limit as to who is the enemy.

Mr. CICILLINE. That is it? Not as to——

Judge MUKASEY. It can limit—it can, although the question whether it should—limit as to where.

Mr. CICILLINE. But if in fact Congress has the ability to limit who and where and maybe something else, doesn't it make sense that the President of the United States should share with Members of Congress what that plan is, what that strategy is, so we can make a determination as to whether or not the use of military force ought to be authorized?

Judge MUKASEY. No, because that would mean that we would have 535 commanders in chief of the armed forces——

Mr. CICILLINE. No. It would mean we would have Congress——

Judge MUKASEY [continuing]. And the executive power is vested——

Mr. CICILLINE [continuing]. Playing that role of authorizing the use of the——

Judge MUKASEY [continuing]. In one person.

Mr. CICILLINE. Okay. I understand that there is a sense that the executive branch should have maximum flexibility in this area. But I think most of us understand the American people are very concerned about authorizing a President to take us into another war like Iraq and Afghanistan. So in what ways, General and Mr. Olsen, do you think Congress can provide a check on the President's authority to deploy ground troops, which is an issue which we hear a lot about from constituents and some sense that we can engage in this fight without the use of ground troops? In what ways can Congress or should Congress impose limits on the President's use of military force?

Mr. OLSEN. I do think there is a very important policy judgement for Congress to make here and I, too, think Congress, as I mentioned before, has the legal authority to impose some restrictions along the lines of, for example, limiting ground troops.

To your question before—the conversation with Judge Mukasey, I think it is important to take into account the current nature of this conflict—in other words, the difference between Japan bombing Pearl Harbor and a declaration of war or even al-Qaeda attacking us on 9/11 and the authorization of use of force days later.

We are in a very long struggle with a very complicated, dynamic, and persistent enemy, which I think does suggest that it is appropriate for the executive branch to come to Congress and explain who is the enemy, how are we going to attack it, where do we need to use force, and that should inform how Congress imposes any restrictions on the use of such force, because at the end of the day, Congress speaks for the American people.

Every member of this committee has individuals in their district who are fighting on the front lines in this conflict and I think as the representatives of the American people, Congress has an extraordinarily important role to speak for the American people and impose appropriate restrictions on how that force is exercised.

Mr. CICILLINE. Thank you.

Mr. YOHO. The gentleman's time has expired.

Mr. CICILLINE. Mr. Chairman, I don't think you ruled on my unanimous consent request to put into the record the letter that we sent to President Trump signed by 60 of my colleagues. I would just ask unanimous consent it be placed in the record.

Mr. YOHO. Accepted.

The Chair will now recognize Mr. Ron DeSantis from Florida.

Mr. DESANTIS. Thank you, Mr. Chairman.

Judge, what distinction do you draw, if any, between a declaration of war and an authorization for the use of military force?

Judge MUKASEY. Hard to draw that distinction. As has been pointed out, we have declared war only five times in our history. We have fought many, many more wars. It is possible that a declaration of war would apply simply to the conventional nation-state situation. But I think what we are talking about is the question of how and whether our armed forces are deployed rather than distinctions between AUMF and a declaration of war.

Mr. DESANTIS. The criticism that is sometimes lodged is oh, you guys are doing authorization of force—you haven't declared war—somehow that is an illegitimate use of force. You don't think that that carries any water, correct?

Judge MUKASEY. I do not.

Mr. DESANTIS. When, in your judgement, is congressional authorization needed for force? Obviously, if Congress declares war or authorizes it, the President's good—if we are attacked or he is fending off an attack. But there are certain times in the middle where a President could potentially engage. If you look at some of the hot spots that are not necessarily covered by an AUMF, whether it is a North Korea threat or Iran, when does it come to where Congress has to authorize it, in your judgement?

Judge MUKASEY. That is a political decision that is made in the tug of war between Congress and the executive. We have this Constitution and there is a lot of play in the joints and that is where the tug of war goes on. I can't sit here and tell you a priori precisely where it is necessary for the Congress to assert itself. But I shouldn't have to.

Mr. DESANTIS. So how about the funding—what I want to get at is how the funding power interacts with the authorization. You, in your testimony, said you would be willing to live with a 5-year lapse, although I think you would prefer no lapse, correct, if you just had your druthers or——

Judge MUKASEY. I would prefer no lapse in dedication and commitment. Part of the problem is that when you pass a resolution in 2001 and it gets to be 2017 and you have people scratching their heads about how it all happened and how we got here, that means that there has been a lapse in commitment.

Mr. DESANTIS. If we do the 5-year and it lapses but then Congress continues to dedicate funding for the military effort, do you consider that to be implicit authorization?

Judge MUKASEY. It is a de facto authorization and that has happened in other settings and that is what I mean by the tug of war and the political interaction.

Mr. DESANTIS. Because we had this issue with the Obama administration. He wanted an authorization of force that limited the use of force. First of all, I don't think that that would make sense anyways. But if you are going to try to limit it if there is a political concern wouldn't it be better to authorize the force and then use the funding mechanism to say okay, we don't want ground troops in Syria and then just limit it that way rather than tie the hands at the start of the conflict?

Judge MUKASEY. The funding power is a sharp-edged instrument, but it can certainly be used.

Mr. DESANTIS. Let me ask you this question. We are debating on this committee, Judiciary, some other ones, about whether or not that we should designate the Muslim Brotherhood as a terrorist organization. I know you were involved in terrorist cases as a judge and as Attorney General. What is your recommendation for us? Should we consider them a terrorist organization or not?

Judge MUKASEY. My sense is that it is the State Department that draws up the list of foreign terrorist organizations rather than Congress. The——

Mr. DESANTIS. Well, let me just correct—what we are doing is we did a bill out of the committee last year saying Congress believes and then urging the secretary of state to make the determination.

Judge MUKASEY. Based on what has been their slogan ever since they were founded that ends with "jihad is our way and dying in the way of Allah is our highest hope," yes.

Mr. DESANTIS. No, I agree with you. I think that that should be done. I have urged the administration to do it.

Mr. Chairman, thanks for holding the hearing. I think the witnesses have been really good so thank you, guys. And we should debate this. We should update the AUMF. I think it could be done. I think it would be actually one of the few times we actually have an insightful debate on the House floor for a change. So I am all for it but we have got to understand—I think all of you do—that this is a threat that is not going away. It evolves and the idea that we are only going to target the people who are actually responsible for 9/11 and not open our eyes to the fact that we have militant jihadists waging war against us and other parts of the world. I just think that doesn't cut it. So we have got to update it and do it right. Thanks.

Mr. YOHO. I thank the gentleman from Florida.

We will now go to Ms. Barbara Lee from California.

Ms. LEE. Thank you, Mr. Chairman. Thank you all very much. It has been a very enlightening and important hearing. Now, I am glad to be back. I was on this committee for 11 years and I was here during the debate around the authorization of the 2001 authorization.

However, that never came to this committee. Three days after the horrific events of 9/11 it went straight to the floor. So this com-

mittee never had a chance to weigh in on that. The resolution, as was mentioned earlier and read, it was 60 words, it was overly broad, and it did set the stage in the framework for perpetual war. I think now it is about 20 percent of members who are here today were here during that period. And so I have been consistently trying to repeal that authorization and I want to clarify what several have said earlier including Chairman Royce.

The amendment I offered, I have been offering it for many years but this year in Appropriations Committee—I serve on Approps now—which was adopted was an amendment that would repeal the 2001 resolution but it would give Congress 8 months, mind you—8 months to come up with a new one prior to its repeal. Somehow it has been misunderstood and misconstrued that I am saying let us repeal it and then take as long as we want.

So that is not the case and I want to make sure everyone knows that because that would be irresponsible and I would not offer such an amendment. So we would have 8 months after the repeal to come up with a new one and the repeal would stay in effect until we came up with a new one.

I wanted to ask just with regard to our national security strategy. Mr. Olsen, you mentioned the toolbox in which we have in our counterterrorism efforts and that every non-military strategy should possibly be used before the use of force. So I would like to ask all of you how do you view preventing conflicts in the first place and what do you think about a 30 percent cut to the State Department and USAID funds in terms of our strategies to prevent the use of force and wars—the necessity for the use of force.

And then secondly, on what basis should we authorize the use of force? I mean, General, you mentioned terrorism is going to be with us. You know, we can't continue to use force everywhere in the world.

How do we really refine and know which groups, which nations, which organizations are real threats to our national security or do we continue to, in many ways, get embroiled in civil wars that will just provide the United States the—well, it would be assured that we would be in the civil wars in perpetuity?

So, Mr. Olsen, could you start?

Mr. OLSEN. Sure, I will start and I will say that I agree with the point that you raised about the importance of a whole of government approach to our counterterrorism efforts. I think that is something that everyone I served with over two administrations, both Republican and Democrat, agreed with and that it was the necessary approach. In fact, the comments more recently of Secretary of Defense Jim Mattis have agreed with that as well, calling the use of military force a last resort in our counterterrorism fight.

So there is broad agreement on that point. There is broad agreement on all the different tools that are available from law enforcement to economic to diplomatic and I think a number of the comments that have been made today during this hearing about the fact that this a, at some level, a struggle for ideas and that countering the ideology that fuels terrorism is part of our efforts and a lot of that is done out of the State Department. And so that is a critical component of our overall counterterrorism strategy.

General GROSS. Yes. I couldn't agree more, Congresswoman. I mean, I love Secretary Mattis' quote he is famous for: "If you are going to cut the State Department's budget, I need a bigger budget for bullets," the idea being that that is just going to generate more conflict without diplomacy.

I agree that all the elements of national power ought to be brought to bear and the military ought to be a last resort. I don't think you will find anyone in the military who likes war. I mean, it is just the horrific results of war and the toll on family and on our service members and civilians. We would like to avoid war whenever possible and so I agree with you 100 percent.

We need diplomacy to work. We need other elements of national power to come into play first, and I think as Mr. Olsen has pointed out, we often look for the military as that one solution and therefore it is an important solution but it is not the solution to every problem.

Ms. LEE. Thank you. Thank you, Mr. Chairman, and I guess I would just conclude by just saying as we talk about and debate a new authorization, we have to remember this in terms of preventing the use of force as we discuss a new, if we ever do, authorization to use force because, clearly—and I did vote against it because, for me—I was the only one who voted against it—it was just too broad and I knew it would set the stage for where we are now.

So I thank you for this hearing and I would hope that as we debate this that what we just talked about is part of that debate so the Members of Congress can understand that our actions do lead to reactions that could continue these spiral of events where we may be able to pull back at some point and try to prevent further acts of terrorism if we do it differently. Thank you again.

Mr. YOHO. I thank Ms. Lee and I thank your hard work for trying to bring the AUMF to an end, and I have been on several of your bills and I think we need to keep fighting that and we will get this clarified. So thank you for your comments and your time.

Gentleman, I am the last one here and so the end is near. Here we are 16 years into this AUMF and as has been pointed out, a lot of the Members of Congress including myself were not here when that happened and so what I have seen is an open-ended war.

And General Gross, you commented that the current AUMF may not be legal to go after ISIS in Country X or an affiliated Group B that develops later because now ISIS is in the Philippines. We have got reports in South America, and without a clear definition and a mission statement, this has morphed into a war in a designated area, in a region, to what we see today, and my fear is if we don't bring this under closure or get closure to this, where are we going to be in 5, 10, 15 years from now.

And I don't want to have to think about if Congress had declared war on Nazism or imperialism during World War II, would our country still be at war today. What are your thoughts on declaring war on an ideology versus a nation-state like Germany or Japan back in World War II?

General GROSS. I will take the first stab, sir. And first of all, just to be clear, I don't think I said you couldn't go after ISIS in different countries because I think there is adequate legal basis for

them as an enemy, which leads into the question you just asked. An AUMF really should focus on an enemy, an enemy force, whether it is a group, a person, or an organization who has attacked the United States and against whom should we use military force.

And so declaring war or authorizing military force against an ideology or an idea makes it difficult for me to put in the terms of armed conflict and what I understand to be both international law, international humanitarian law, the law of armed conflict.

You know, it deals with enemies, not with ideas, and so that is what makes that difficult. I mean, you could define it, I suppose, in such a way that you could get to the enemy. But, to me, you define an enemy. You define against whom you can use military force.

Mr. YOHO. Mr. Olsen, did you have something you want to say?

Mr. OLSEN. I just wanted to add, briefly, that I totally agree it would be both legally and operationally extraordinarily problematic to define the enemy in terms of an ideology. It would not work on either of those dimensions, legal or operationally. I would also just quickly point out that even in the immediate aftermath of 9/11, so days after 9/11 under the extraordinary circumstances that were occurring in this country at that point, Congress pushed back on an executive branch request for a grant of authority to use military force against terrorism and aggression.

So a broad grant of authority the executive branch asked for and Congress pulled back and only authorized use of force against those responsible for 9/11 to deter future acts of terrorism. So precedent exists even in those extraordinary times for Congress' role here.

Mr. YOHO. What I saw was an—and Ms. Lee brought it up—is it didn't get debated in committee. It went right to the House floor. I don't want to call it a knee-jerk reaction but it was a rapid response. Had we had that debate, we might have had things clarified as far as the direction, the commitment, and we have been struggling with this for the last 5 years that I have been here and the idea somebody brought up, should an AUMF sunset with that administration, with the ability to be renewed to carry into the next administration, does anybody have a thought on that?

Judge?

Judge MUKASEY. I don't know that the tenure of administrations really coincides with the ebb and flow of events, you don't necessarily have an occasion for passing an AUMF at the beginning of an administration so that if you get to the end of an administration you get an AUMF, what do you do?

Do you then have it lapse until the new administration comes into force? I think that it has to be responsive to the events rather than to the change of administration.

Mr. YOHO. I guess the biggest thing is, so that we don't get these open-ended conflicts that morph from what we went to the conflict in Afghanistan in 2001 to where we are now where it is spread throughout. You know, we went after al-Qaeda. We went after the people that committed the atrocities of 9/11. But yet, now we have got ISIS that has come out of the morphing of the terrorist groups at that time.

What happens when ISIS is gone? There is going to be an ISIS 2.0 or 3.0 the next generation. And so without a clear definition,

this is in perpetuity. It is like the war on poverty or the war on drugs. And I think for the sake of our young men and women in the military, for the commitment this country has made financially, this last National Defense Authorization Act is pushing $700 billion—$700 billion today after a conflict that started 16 years ago.

So I think there needs to be strong and clear decisive directions and authorization and maybe move this war on terror into another vehicle and then reel back the AUMF and use it for nation-on-nation kinetic energy or kinetic contact.

It is just something that, hopefully, with this hearing today a lot of good ideas and we can bring this to an end and move on to the next. I don't want to say the next conflict but focus our country's energy where we need to be for national security.

Any closing thoughts?

Judge MUKASEY. I think even if we were to say that the AUMF went out of existence, at the end of the day we would still experience attacks——

Mr. YOHO. We will.

Judge MUKASEY [continuing]. Because they are focused on us as the principal and the most powerful country in the world and the principal exponent of Western ideas.

Mr. YOHO. Sure.

Judge MUKASEY. And that is really the way it starts and I think that we blink reality by disregarding that.

Mr. YOHO. General.

General GROSS. I was just going to say thank you. I very much appreciate and I know all members of the armed forces appreciate how serious Congress takes these issues. No matter where you come out, it matters—that knowing that you all care enough to take the time means a great deal to the members of the armed forces. So I would just say thank you again.

Mr. YOHO. Well, again, I appreciate all your service. I, personally, have known five young men and women that have lost their lives in this conflict and here we are 16 years later.

So it is something we do take seriously. It is something that we want to make sure that we get it right so we don't commit our young men and women and put them in harm's way.

And I appreciate your time. That is the end of the questioning. This meeting is adjourned. Thank you.

[Whereupon, at 12:54 p.m., the committee was adjourned.]

APPENDIX

Material Submitted for the Record

FULL COMMITTEE HEARING NOTICE
COMMITTEE ON FOREIGN AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515-6128

Edward R. Royce (R-CA), Chairman

July 25, 2017

TO: MEMBERS OF THE COMMITTEE ON FOREIGN AFFAIRS

You are respectfully requested to attend an OPEN hearing of the Committee on Foreign Affairs, to be held in Room 2172 of the Rayburn House Office Building (and available live on the Committee website at http://www.ForeignAffairs.house.gov):

DATE: Tuesday, July 25, 2017

TIME: 10:00 a.m.

SUBJECT: Authorization for the Use of Military Force and Current Terrorist Threats

WITNESSES: The Honorable Michael B. Mukasey
(Former Attorney General of the United States)

Brigadier General Richard C. Gross, USA, Retired
Partner
Fluet Huber + Hoang, PLLC
(Former Legal Counsel to the Chairman of the Joint Chiefs of Staff)

The Honorable Matthew G. Olsen
Lecturer on Law
Harvard Law School
(Former Director of the National Counterterrorism Center)

By Direction of the Chairman

The Committee on Foreign Affairs seeks to make its facilities accessible to persons with disabilities. If you are in need of special accommodations, please call 202/225-5021 at least four business days in advance of the event, whenever practicable. Questions with regard to special accommodations in general (including availability of Committee materials in alternative formats and assistive listening devices) may be directed to the Committee.

COMMITTEE ON FOREIGN AFFAIRS

MINUTES OF FULL COMMITTEE HEARING

Day *Tuesday* Date *7/25/2017* Room *2172*

Starting Time *10:20* Ending Time *12:55*

Recesses *0* (____to____) (____to____) (____to____) (____to____) (____to____) (____to____)

Presiding Member(s)

Chairman Edward R. Royce, Rep. Chris Smith, Rep. Jeff Duncan, Rep. Ted Yoho

Check all of the following that apply:

Open Session ☑
Executive (closed) Session ☐
Televised ☑

Electronically Recorded (taped) ☑
Stenographic Record ☑

TITLE OF HEARING:

Authorization for the Use of Military Force and Current Terrorist Threats

COMMITTEE MEMBERS PRESENT:

See attached.

NON-COMMITTEE MEMBERS PRESENT:

Rep. Barbara Lee

HEARING WITNESSES: Same as meeting notice attached? Yes ☑ **No** ☐
(If "no", please list below and include title, agency, department, or organization.)

STATEMENTS FOR THE RECORD: *(List any statements submitted for the record.)*

IFR - Rep. Eliot Engel
IFR - Rep. David Cicilline
SFR - Rep. Gerald Connolly
QFR - Rep. Brad Sherman

TIME SCHEDULED TO RECONVENE _____
or
TIME ADJOURNED *12:55*

Full Committee Hearing Coordinator

HOUSE COMMITTEE ON FOREIGN AFFAIRS

FULL COMMITTEE HEARING

PRESENT	*MEMBER*
X	Edward R. Royce, CA
X	Christopher H. Smith, NJ
	Ileana Ros-Lehtinen, FL
X	Dana Rohrabacher, CA
X	Steve Chabot, OH
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	Michael T. McCaul, TX
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	Mo Brooks, AL
	Paul Cook, CA
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	Brendan Boyle, PA
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X	Tom Suozzi, NY
X	Adriano Espaillat, NY
X	Ted Lieu, CA
X	Barbara Lee, CA

MATERIAL SUBMITTED FOR THE RECORD BY THE HONORABLE ELIOT L. ENGEL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

THE CONSTITUTION PROJECT

Safeguarding Liberty, Justice & the Rule of Law

July 24, 2017

Rep. Ed Royce
U.S. House of Representatives
2310 Rayburn House Office Building
Washington, DC 20515

Rep. Eliot Engel
U.S. House of Representatives
2462 Rayburn House Office Building
Washington, DC 20515

Re: Constitution Project Statement for the Record, House Foreign Affairs Committee Hearing on "Authorization for the Use of Military Force and Current Terrorist Threats"

Dear Chairman Royce, Ranking Member Engel, and Members of the Foreign Affairs Committee:

Thank you for holding this hearing. The Constitution Project does not take a position on whether or when the United States should use military force, but we are deeply committed to restoring the division of war powers set out in the Constitution, which makes clear that Congress is the branch of government vested with the power and responsibility to decide on war. Your hearing is a welcome step toward that end.

As a threshold matter, if Congress disagrees that U.S. service men and woman should be engaged in battle, those men and women should come home. If, however, Congress believes that there are specific entities against which the use of force is necessary and appropriate, it is Members' constitutional duty to say so. Of course, *how* Congress says so matters tremendously.

We write now to underscore some war powers first principles, and to suggest what fidelity to those principles demands in any effort to revise the 2001 Authorization for Use of Military Force (AUMF), or to craft a new one.

We are concerned that many recent AUMF proposals seem to be written on the assumption that Congress needs to figure out how best to provide the executive branch with greater flexibility to use force, particularly for counterterrorism purposes. But given the context in which Members would be legislating (described below), the problem is not that Congress has tied the president's hands too tightly in this area. The problem is that Congress has failed to tie the President's hands tightly enough.

Why the Framers assigned Congress the war power

The Constitution could have given the President primacy in deciding whether to take the country to war. Save for a narrow set of defensive circumstances (i.e., to repel a sudden or actually imminent attack), it does not. Congress was assigned that power. The reasons why are important.

First, human nature compels our constitutional separation of war powers. As James Madison cautioned, if those powers were accumulated in the executive branch, "the temptation would be too great for any one man." Second, it is central to our democracy that Members be politically accountable when the government sends young Americans into harm's way. Third, collective judgment about whether and when the United States should use force—fashioned through a full, serious and transparent debate among our elected representatives—is superior to that of any one person.

All of these reasons share the same animating principle: constraint. Our system of checks and balances was designed to guard against war; to ensure it is the carefully limited exception, peace the rule.

Important context for the current AUMF debate

If Congress decides to weigh in—to address pre-existing war authorities, pass a new one, or both—it will not be doing so in a vacuum. In order to meaningfully fulfill their constitutional obligation, Members must be clear-eyed about the backdrop against which they would be legislating. The following three factors, in particular, should weigh heavily in Members' decision-making:

Both Presidents Obama and Trump have stretched the 2001 AUMF far beyond its breaking point

There is a growing acknowledgment that the United States cannot, or at least should not, rest the legal authority for so many military engagements—the ISIS war in particular—on a 15-year-old statute that was intended specifically to target those responsible for the September 11, 2001 terrorist attacks. We agree. Through the concepts of "associated forces" and "successor entities," first President Obama and now President Trump have stretched the 2001 AUMF—which nowhere mentions "associated forces" or "successor entities"—beyond its breaking point. Indeed, the 60-word statute is the purported legal basis for current military operations against some groups that had no role in 9/11, and against others that did not even exist on 9/11. Had the 2001 AUMF been drafted more clearly, specifically, and narrowly, it might very well have precluded the interpretive gymnastics necessary to grounding those operations in that law.

The executive branch has become increasingly hostile towards congressional oversight, and Congress has largely failed to push back

This is neither a partisan phenomenon, nor one confined to a particular subject area. In the aftermath of 9/11, President George W. Bush's administration argued that Congress could not regulate the President's actions *at all* when he was acting pursuant to the Commander-in-Chief power. President Obama took the United States to war in Libya in 2011, without prior congressional approval, and in the process claimed unilateral authority to send up to 20,000 troops into battle on the theory that doing so would not constitute "war" in the constitutional sense. President Obama also presided over the expansion of the 2001 AUMF beyond any plausible reading of its text, a legal and policy decision that President Trump has continued.

In the oversight context more generally, the executive branch has over time come to treat Congress less and less as a co-equal branch of government. For example, the Justice Department has taken the position that neither the House nor the Senate has the constitutional authority to enforce a subpoena against an executive branch official through criminal or inherent contempt proceedings, even if there is no claim of executive privilege. The practical result of that stance is to deny Congress timely access to the information it needs to do its job, and to incentive agency obstructionism when responding to congressional requests for information.

For its part, the Trump administration has explicitly told federal agencies not to respond to oversight requests from Members of the minority. That instruction was accompanied by a May 1, 2017 Office of Legal Counsel opinion concluding that "such requests do not trigger any obligation to accommodate congressional needs and are not legally enforceable through a subpoena or contempt proceedings."

The Trump administration has delegated significant war making authority to national security agencies

Shortly after taking office, President Trump reportedly restored CIA authority to conduct lethal drone strikes. In March, the press reported that the administration is considering weakening current policy standards for the use of force in counterterrorism operations. In April, the President delegated to Secretary of Defense James Mattis the authority to set troop levels in Iraq and Syria. In June, he gave Mattis the same authority for Afghanistan.

Entrusting these kinds of decisions solely to the warfighters—and intelligence personnel who have come to perceive themselves as such—carries serious risk of unchecked escalation. The absence of clear, congressionally-imposed limits on where and when force can be used heightens the risk.

How Members should approach revising the 2001 AUMF or crafting a new one

There is no shortage of current proposals—most of them drafted by Members of Congress—for a new statute that would authorize force against (at least) ISIS, and in some cases also address one or both of the 2001 AUMF and the 2002 Iraq AUMF. Unfortunately, as noted at the outset, many of the proposals accommodate a degree of executive unilateralism that the Constitution was designed explicitly to reject. This is especially troubling given the context described above, coupled with technological advances that have drastically reduced the barriers to the United States waging global war.

On July 24, a coalition of human rights, civil liberties, and faith groups sent a letter to Committee Members "urging you to ensure ... that any new AUMF is clear, specific, tailored to the particular situation for which force is being authorized, and comports with the international law obligations of the United States." The signatories then set out a list of provisions we all believe would help Congress achieve clarity, specificity, and narrow tailoring if and when it next authorizes force.

Congress should view this list as a floor, not a ceiling. Members legislating in today's environment need to prioritize strict limits and robust oversight for executive branch uses of force. In other words, they need to rein the executive branch back in. By doing so, Members can meaningfully fulfill the role that Article I, Section 8, of the Constitution envisions for them.

Sincerely,

/S/ Scott Roehm

Vice President for Programs and Policy

July 24, 2017

Rep. Ed Royce
U.S. House of Representatives
2310 Rayburn House Office Building
Washington, DC 20515

Rep. Eliot Engel
U.S. House of Representatives
2462 Rayburn House Office Building
Washington, DC 20515

Re: Authorizing the Use of Military Force

Dear Chairman Royce and Ranking Member Engel:

We, the undersigned, represent a wide swath of the human rights, civil liberties, and faith communities. While we do not have a coalition position on whether or when a nation should use military force, we share a common view on the appropriate procedures for considering a new authorization for use of military force (AUMF) and on the critical elements that any new AUMF that is passed should meet.

We commend you for addressing the issue of a new use-of-force authorization in the Foreign Affairs Committee. Deciding to send the nation into war is Congress' gravest responsibility. To fully perform its constitutional role in authorizing military force and providing oversight over ongoing military operations, Congress should evaluate the administration's plans to identify and address where current or proposed missions lack adequate authorization. The Foreign Affairs Committee is the appropriate forum to begin that evaluation, followed by a full and transparent debate in the full House if the Committee moves forward with an AUMF.

We urge you to ensure as well that any new AUMF is clear, specific, tailored to the particular situation for which force is being authorized, and comports with the international law obligations of the United States. We all agree that vague and overbroad war authorizations undermine accountability, frustrate effective oversight, invite mission creep, and risk embroiling the nation in unauthorized or perpetual wars that threaten human rights and the rule of law.

The following types of provisions would help Congress achieve clarity, specificity, and narrow tailoring if and when it next authorizes force:

Repeal or Supersede Other AUMFs: Any new AUMF should repeal old AUMFs or include "supersession" language. Such language would prevent old AUMFs from being interpreted beyond their original purpose, and prevent them from being used to circumvent the limitations and requirements of any new authorization. If, for instance, Congress fails to address both the 2001 AUMF and the 2002 Iraq AUMF in any new ISIS-focused AUMF it risks adding to what has become a tangled and ambiguous web of war authorities, and claims of war authorities, from

which a president might pick and choose without explanation, and invoke to engage in unlawful wars.[1] AUMFs that are no longer necessary should be repealed.

Clearly Specify the Mission Objectives and the Enemy: To prevent current or future administrations from overstepping Congress' intent, engaging in mission creep, and using the authorization to justify unlawful or perpetual armed conflict, a new AUMF should clearly specify the mission objectives, the entity against which force is being authorized, and geographic limits. Clear mission objectives will make it clear when the mission against the specified enemy is achieved and authorization has thus expired. Delegating Congress' authority to authorize war to the executive branch by authorizing force against unknown future threats or enemies is both unconstitutional and unnecessary for national security. Congress can specifically authorize force against threats that arise in the future and the president has authority under the Constitution to defend the nation from sudden attacks.

Increase Transparency and Reporting: Regular and thorough reporting sufficient to keep both Congress and the public informed is important for democratic accountability, ensuring compliance with domestic and international law, and enabling Congress to fulfill its critical oversight functions. For instance, requiring the president to provide regular reports on the specific organized armed groups considered covered under the new AUMF (including the factual and legal basis for this finding), the number of civilian and military personnel killed, relevant legal justifications for new actions, and other similar information, is critical for keeping the public informed and enabling Congress to exercise its war powers duties as the conflict unfolds.

Require Compliance with International Law: The Supreme Court has long held that domestic statutes must not be interpreted in a way that conflicts with the United States' international legal obligations if any other plausible interpretation exists. Nevertheless, explicitly stating that the force being authorized by Congress must comply with U.S. obligations under international law (including the U.N. Charter, international human rights law, and the law of armed conflict where applicable) will underscore that when Congress authorizes the use of force, the president is required to abide by the terms of the authorization as well as the international legal obligations of the United States.

Require Reauthorization: Setting a sunset or review date for use of force authorizations ensures continued congressional oversight and approval as the conflict evolves. A sunset is also an important safeguard against perpetual armed conflict or executive branch overreach. Sunsets act as forcing mechanisms, requiring Congress and the administration to reexamine the AUMF at a future date in light of more current conditions, and if necessary, reauthorize and/or refine the legislation to suit those new conditions. Sunset provisions have been included in

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[1] Several of the undersigned organizations have previously written to Congress regarding the importance of any new war authorizations either repealing existing authorizations or containing explicit supersession language. *See, e.g.*, http://www.constitutionproject.org/wp-content/uploads/2014/11/141119-ISIL-AUMF-Coalition-Letter.pdf; http://www.constitutionproject.org/wp-content/uploads/2015/02/150224_ISIL_AUMF_Coalition_Letter.pdf.

nearly a third of prior AUMFs. The 2001 AUMF, which was passed to authorize the use of force against those responsible for the 9/11 attacks, did not contain a sunset clause. That law has since been claimed to authorize the use of force for nearly 16 years, including against groups against which Congress did not intend to authorize force.

***

Provisions aimed at ensuring that use of force authorizations are sufficiently clear, specific, and tailored to particular conflicts are critical for the fulfillment of Congress' constitutional role. Congress is the branch that this country's founders entrusted with the solemn decision to send the country and its men and women to war. Broad, vague, or open-ended authorizations fail to fulfill Congress's role. While there are different ways to ensure that use of force authorizations are clear, specific, and narrowly tailored, any new authorization should meet this standard by including the above critical elements.

Sincerely,

American Civil Liberties Union
Appeal for Justice
The Constitution Project
Council on American-Islamic Relations
Defending Rights & Dissent
Government Information Watch
Human Rights First
National Religious Campaign Against Torture
OpenTheGovernment
Win Without War

Note: The above material is not reprinted here in its entirety but may be accessed in full at: http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=106315

MATERIAL SUBMITTED FOR THE RECORD BY THE HONORABLE DAVID CICILLINE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF RHODE ISLAND

Congress of the United States
Washington, DC 20515

President Donald J. Trump
The White House
Washington, DC 20500

July 26, 2017

Dear Mr. President:

We have serious concerns about the escalation of American military action in Syria. The U.S. military reportedly engaged in strikes against pro-Assad forces on the ground on May 18, June 6, and June 8, and shot down armed Iranian-made drones in Southern Syria on June 8 and June 20.

Additionally, on June 18 a U.S. fighter aircraft shot down a Syrian SU-22 bomber south of the Syrian city of Tabqah in Raqqah province. This was the first time the U.S. has downed a manned Syrian aircraft in the course of the Syrian conflict.

As the War Powers Resolution states, "The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." Furthermore, the Constitution and U.S. law under the War Powers Resolution (50 U.S.C. §§ 1541-48) require you to obtain authorization from Congress for the ongoing use of military force.

You must report to Congress within 48 hours of any unauthorized use of force, as you did on April 8, 2017 following the U.S. strikes against the Shayrat airfield in Syria. If you do not receive congressional authorization, you must stop using military force within 60 days of the initial report. This time limit may be extended for 30 additional days if necessary, only to safely remove forces.

Administration officials have offered differing explanations to legally justify your strikes against the Syrian regime and its associated forces. Therefore, we urgently request that you submit to Congress within seven calendar days a report that includes (1) circumstances necessitating the introduction of United States Armed Forces, (2) the constitutional and legislative authority under which such introduction took place, and (3) the estimated scope and duration of the hostilities or involvement. Failing those requirements under the War Powers Resolution, we expect a full brief of the ongoing Operation Inherent Resolve and any successor operations to accompany a request for a new Authorization for Use of Military Force.

According to longstanding executive branch interpretations, the 2001 Authorization for Use of Military Force (P.L. 107-40) does not provide authority for attacking the Syrian government or

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any of its associated forces. Despite the lack of congressional authorization, Congress has not received any reports pursuant to the War Powers Resolution for the strikes that took place between May 18 and June 20. If you intend to continue military action against the government of Syria or its associated forces, you must present a strategy to Congress and request specific authorization.

The Constitution gives the power to declare war to the United States Congress. It is our responsibility as the elected representatives of the American people to ensure that any military engagement involving our men and women in uniform is done with the support of Congress, and has a clearly articulated strategy, against a defined target, with a clear purpose that prioritizes the security of the United States.

Our efforts to defeat ISIS and al Qaeda are of the utmost importance to American national security. We are concerned that increasing escalation in Syria without the consent of the American public through their elected representatives, will embroil the United States military in a protracted and unauthorized war without any strategy for victory. It is our responsibility to ensure that any decision to engage U.S. troops in military conflict is made with Congress's constitutionally mandated consent and urge you to act accordingly.

Sincerely,

David N. Cicilline

Ami Bera

Earl Blumenauer

Anthony G. Brown

Michael E. Capuano

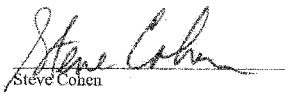
Salud Carbajal

Judy Chu

Karen Bass

Katherine M. Clark

Yvette Clarke

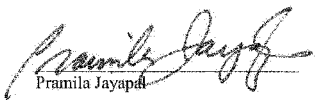

Steve Cohen

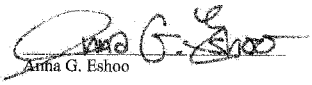

John Conyers Jr.


Peter A. DeFazio

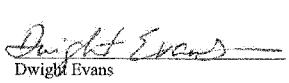

Mark DeSaulnier

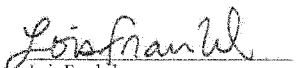

Lloyd Doggett


Pramila Jayapal

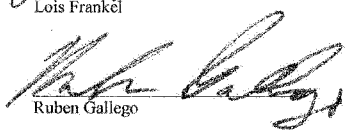

Anna G. Eshoo


Adriano Espaillat

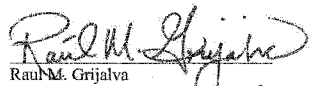

Dwight Evans


Lois Frankel

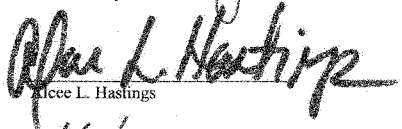

Tulsi Gabbard

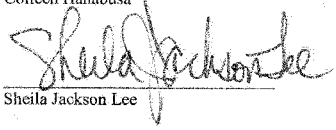

Ruben Gallego


John Garamendi

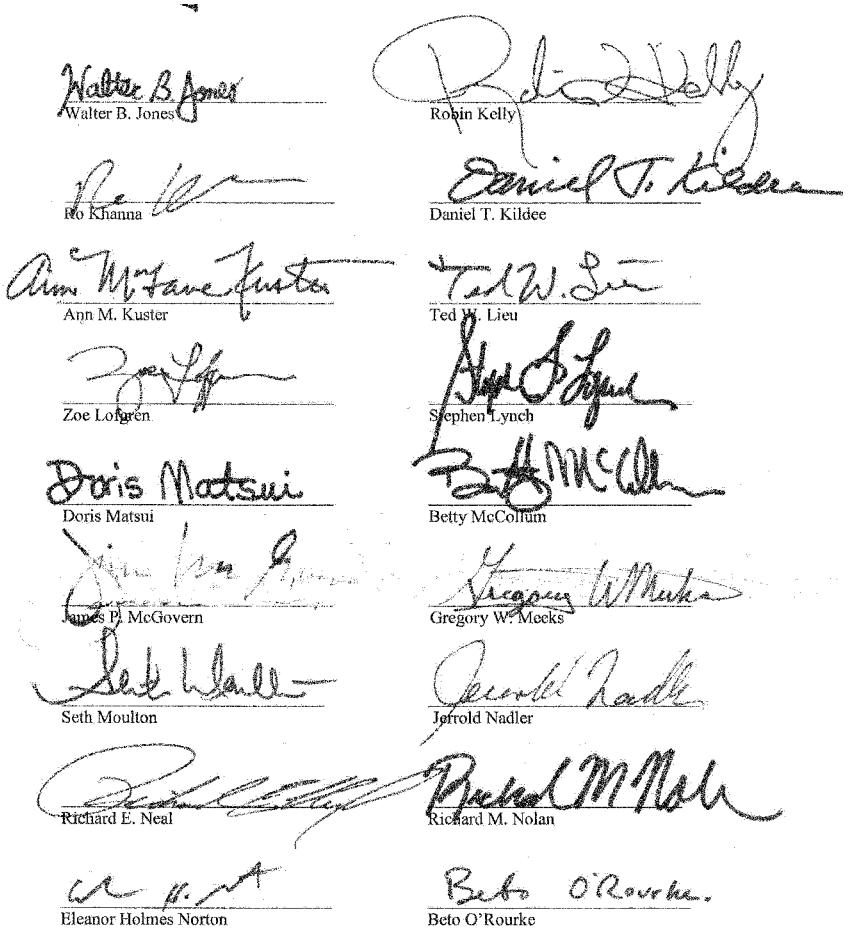

Raul M. Grijalva


Colleen Hanabusa


Alcee L. Hastings


Sheila Jackson Lee


Keith Ellison



Walter B. Jones

Robin Kelly

Ro Khanna

Daniel T. Kildee

Ann M. Kuster

Ted W. Lieu

Zoe Lofgren

Stephen Lynch

Doris Matsui

Betty McCollum

James P. McGovern

Gregory W. Meeks

Seth Moulton

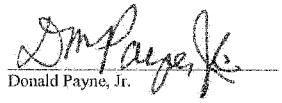
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Richard E. Neal

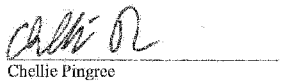
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Eleanor Holmes Norton

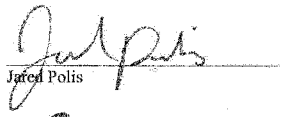
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Donald Payne, Jr.


Collin C. Peterson

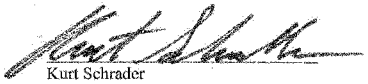

Chellie Pingree

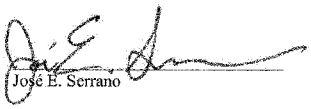

Mark Pocan


Jared Polis


Jamie Raskin


Bobby L. Rush


Kurt Schrader

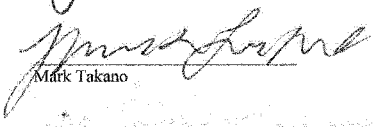

José E. Serrano


Carol Shea-Porter


Louise M. Slaughter

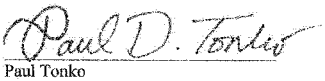

Jackie Speier


Thomas R. Suozzi


Mark Takano


Mike Thompson

Dina Titus


Paul Tonko


Norma J. Torres

Juan Vargas

Bonnie Watson Coleman

Peter Welch

John A. Yarmuth

Statement for the Record
Submitted by Mr. Connolly of Virginia

From Afghanistan and Iraq to Syria and Yemen, United States Armed Forces have been engaged in military action on several fronts in the first six months of the Trump Administration. In the Middle East and around the globe, the proliferation of terrorism undermines U.S. national security interests, threatens vulnerable populations, destabilizes partner and allied countries, and contributes to an increasingly volatile world. Ongoing military actions against foreign terrorist organizations such as ISIS are carried out based on congressional authorizations for the use of military force (AUMF) passed in 2001 and 2002 to respond to the 9/11 attacks and carry out the Iraq War, respectively. These AUMFs have grown stale, and it is past time Congress make crystal clear to the Administration, our allies, our constituents, and our military families the circumstances and limitations under which we would authorize engagement by our men and women in uniform in hostilities overseas.

Article I, Section 8 of the United States Constitution states that "Congress shall have power…to declare war…and to raise and support armies" and other armed forces. While Article II, Section 2 designates "the President shall be Commander in Chief" of the nation's armed forces. These constitutional duties have been in competition ever since the ratification of the Constitution. While Congress has officially declared war only 5 times (1812, Mexico, Spain, WWI, and WWII), American presidents have initiated military operations without Congressional approval more than one hundred times.

In the aftermath of the Vietnam War and the exploitation of the open-ended authorization contained in the Gulf of Tonkin Resolution, Congress sought to clearly define the procedures by which Congress and the President would participate in decisions to send U.S. Armed Forces into hostilities by passing the War Powers Resolution (P.L. 93-148). Every president since the enactment of the War Powers Resolution has taken the position that it is an unconstitutional infringement on the president's authority as Commander in Chief. The War Powers Act never resolved this constitutional question, and, frankly, both Congress and the executive branch have been complicit in keeping it unresolved. In most instances the president, Congress, and the courts have refused to invoke the authorities of the War Powers Act. And Congress, for its part, has found it convenient to cede its constitutional duty to the president in order to avoid a tough vote.

Both the Obama and Trump Administrations have cited congressional authorizations for the use of force from the early 2000s to justify ongoing military actions against the Islamic State. On September 18, 2001, just days after the 9/11 terrorist attacks orchestrated by Osama Bin Laden and al-Qaeda, Congress passed a joint resolution authorizing the use of U.S. forces against those responsible for the attacks (P.L.107-40). On October 16, 2002, Congress passed another joint resolution authorizing the use of U.S. forces against the continuing threat posed by Iraq (P.L. 107-243). While the 2001 and 2002 AUMFs were sufficient to authorize the wars in Afghanistan and Iraq, it stretches credulity to claim that these same resolutions extend authorization to the present-day fight against the Islamic State, which was only established in 2013.

If the President determines that the United States needs to use military force, then he should seek and gain such authorization from Congress. Instead, the Trump Administration has so far refused

to seek Congressional authorization for military action against the Islamic State, or in response to Assad's chemical weapons attacks on civilians. A fifty-nine cruise missile strike cannot be a substitute for a policy going forward, and the United States has continued to engage the Syrian regime militarily on a number of occasions since then without consulting Congress to obtain the necessary authorities. Kneejerk kinetic responses without an overarching strategy endanger American lives and diminish U.S. global leadership. The Trump Administration must begin a dialogue with Congress about our Syria policy.

I was pleased to see the House Appropriations Committee's passage of an amendment to the Department of Defense Appropriations Act, 2018 (H.R. 3219) that would repeal the 2001 AUMF. Unfortunately, the Speaker of the House removed the amendment from the bill. Since President Trump has declined to seek the requisite authorization from the legislature, such an amendment would have prompted Congress to undertake a long overdue debate about whether, and under which parameters, our troops should be engaging in military action.

As informal discussions regarding an AUMF against the Islamic State have simmered, they have raised fundamental questions about the future of fighting terror and how we accommodate necessary military action in an AUMF that would allow the U.S. to effectively prosecute terrorism without committing to war in perpetuity. An effective AUMF would need to address the purpose, scope of authorized force, targeted entities, geographic limitations, timeline, and reporting requirements.

Congressional malfeasance notwithstanding, it is necessary for the President to receive authorization for a sustained military operation against the Islamic State, and the full assertion of Congressional duty is long overdue. I look forward to hearing from our witnesses how Congress and the Trump Administration can reassert our constitutional roles to protect U.S. national security from current terrorist threats.

HEARING ON "AUTHORIZATION FOR THE USE OF MILITARY FORCE AND CURRENT TERRORIST THREATS"

HOUSE FOREIGN AFFAIRS COMMITTEE – JULY 25, 2017

RESPONSE OF MICHAEL B. MUKASEY TO QUESTIONS FOR THE RECORD FROM REP. BRAD SHERMAN

Question for Judge Michael B. Mukasey: What are the various mechanisms Congress can use to enforce the War Powers Act?

Answer: As I testified during the hearing I believe – as every Attorney General since Griffin Bell has believed -- that the War Powers Act is unconstitutional as an improper limitation on the President's Article II powers. The only "mechanism" I can think of involves engaging the power of Congress over appropriation of public funds, and relates to the second question below. That "mechanism," as I think my answer to the next question makes clear, is more apparent than real.

Question for Judge Michael B. Mukasey: Can Congress legally provide that the monies provided by the Defense Appropriations bill not be spent in contravention of the War Powers Act? And if so, is this a way for Congress to enforce the War Powers Act?

Answer: At the hearing, I was asked the first of the above questions, and responded "sure," as I would now. Congress can legally attach conditions to appropriations, and has done so in the past. However, when Rep. Sherman said at the hearing that that is "the way" to enforce the War Powers Act, and I responded that it is "a way," that response should not be over-read. Although it is lawful for Congress to attach a condition to an appropriations bill, there is no condition that enforces itself, any more than there is a rule that enforces itself. Congress could insert such a condition, but it seems highly unlikely that there would be any way of forcing a President to comply with such a condition other than withdrawing funding completely, because the condition refers to a legal determination and not to a particular specific action. For example, Congress has conditioned its appropriation of funds to specify that no funds be spent to bring prisoners from Guantanamo to the mainland United States. That is a particular act, and a determination as to whether that condition had been violated would be relatively easy to make. Whether funds are being spent in contravention of a statute may involve determinations that a court could deem political, especially when that statute itself is of doubtful constitutionality. As I testified, the constitutionality of the War Powers Act has never been tested, and I hope it never is. The two branches have to work it out between them through the political process, as they have until now.

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