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CONGRESSIONAL TESTIMONY

The Law of Armed Conflict, The Use of Military Force, and the 2001 Authorization for Use of Military Force

Testimony Before
Armed Services Committee
United States Senate

May 16, 2013

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Chairman Levin, Ranking Member Inhofe, and Members of the Committee, thank you for inviting me to testify on the law of armed conflict, the use of military force, and the 2001 Authorization for Use of Military Force (AUMF). My name is Charles Stimson, and I am a Senior Legal Fellow and Manager of the National Security Law Program at in the Kathryn and Shelby Cullom Davis Institute for International Studies at The Heritage Foundation. Before joining the Davis Institute in May 2013, I served as Heritage's Chief of Staff, and as a Senior Legal Fellow in Heritage's Center for Legal and Judicial Studies. I have written, lectured, testified, and debated widely on subjects including the law of armed conflict, military commissions, detention and interrogation policy, and other pressing national security policies. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

Prior to joining Heritage in 2007, I served as the Deputy Assistant Secretary of Defense for Detainee Affairs, where I advised both Secretary Rumsfeld and Secretary Gates on global detention policy and matters regarding the detainees within the custody or effective control of the Department of Defense, including those in Iraq, Afghanistan, and Guantanamo Bay. During my tenure at the Pentagon, we finalized and eventually published the overarching Department of Defense instruction related to detainees,[1] drafted the Military Commissions Act of 2006, re-published the Army Field Manual on interrogations,[2] accepted transfer of the 14 High Value Detainees from the Central Intelligence Agency to Guantanamo Bay, presented the United State's Second Periodic Report to the United Nations Committee Against Torture, and undertook many other crucial actions dealing with detainee policy.

I have also served as a local, state, federal, and military prosecutor and defense counsel, most recently having served as an Assistant United States Attorney for the District of Columbia, where I was a homicide/violent crimes prosecutor. I currently serve as the Deputy Chief Trial Judge and Executive Officer for the Navy-Marine Corps Trial Judiciary, Reserve Component, where I hold the rank of Commander. In my twenty years in the Navy Judge Advocate General's Corps (JAG), I have served three tours on active duty, including one assignment overseas. Additionally, in the spring of 2000, I deployed as Force Judge Advocate with Commander of Amphibious Group Two to East Africa as part of Operation Natural Fire, a joint military training exercise. In the spring of 2001, I deployed with the Navy SEALS as part of Naval Special Warfare Group Two as their Joint Special Operations Task Force JAG (JSOTF) to take part in joint task force exercise. The views I express here are mine, and do not necessarily reflect those of the Departments of Defense or Navy, or the United States Navy JAG Corps.

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[1] Department of Defense Instructions 2310.01E, found here: http://www.defense.gov/pubs/pdfs/Detainee_Prgm_Dir_2310_9-5-06.pdf

[2] Formally known as FM 2-22.3 (FM 34-52), Human Intelligence Collector Operations, published September 2006. Electronic copy here: https://www.fas.org/irp/doddir/army/fm2-22-3.pdf

Today's topics are particularly timely given the fact that over a decade has passed since the September 11, 2001, attacks and the September 18, 2001, AUMF joint resolution came into force. I commend this Committee for holding this hearing and for putting together a thoughtful set of questions for today's witnesses. It is an honor to appear before you with my co-panelists, all of whom are experts in this field. It is vitally important that this Committee and the Congress as a whole take stock of the current terrorist threats to our security and provide those tools necessary and lawful to those charged with its defense, consistent with the principles of oversight and accountability.

The Committee's invitation included 15 interrelated questions that cover a broad range of topics, from the scope and duration of AUMF to its current efficacy and the principles underlying the use of remotely piloted aircraft. Providing thorough answers to these important questions could easily take up several law review articles. Given the Committee's focus and the limited time to prepare for this hearing, I have focused my testimony on several themes that run throughout the Committee's questions.

A Primer on the Law of Armed Conflict

Both the Obama and Bush administrations have concluded that our country is at war—in particular, that it is engaged in an "armed conflict" with al Qaeda and associated forces. President Obama reiterated the point during his first inaugural speech, and his administration has since repeatedly re-stated that position. The Supreme Court has affirmed our engagement in an armed conflict in, among other decisions, that of *Hamdi v. Rumsfeld* in 2004. A country in a state of armed conflict may resort to that body of law called the law of armed conflict.

Those who study the law of armed conflict come to know and understand the basic principles and purposes of that rich body of law. It is worth reviewing those basic principles for purposes of setting the stage for the questions posed by the Committee. I studied the law of war as a JAG, and refer the Committee to the Army's Operational Law Handbook,[3] wherein it states:

> The law of war is defined as that part of international law that regulates the conduct of armed hostilities. It is often termed the law of armed conflict. The fundamental purposes of the law of war are humanitarian and functional in nature. The humanitarian purposes include:
>
> (1) Protecting both combatants and noncombatants from unnecessary suffering;

[3] Operational Law Handbook, International and Operational Law Department, The Judge Advocate General's Legal Center & School, U.S. Army. 2007. Pages 12-16. Link found here: http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA469294

(2) Safeguarding persons who fall into the hands of the enemy; and
(3) Facilitating the restoration of peace.

The functional purposes include:

(1) Ensuring good order and discipline;
(2) Fighting in a disciplined manner consistent with national values; and
(3) Maintaining domestic and international public support.

The law of war rests on four basic principles:

(1) The principle of necessity---which authorizes that use of force required to accomplish the mission;
(2) The principles of distinction or discrimination---the requirement that combatants be distinguished from non-combatants, and that military objectives be distinguished from protected property or protected places;
(3) The principle of proportionality---the concept that the anticipated loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained; and
(4) The principle of humanity or unnecessary suffering---a military force must minimize unnecessary suffering and is forbidden from employing arms or materials calculated to cause unnecessary suffering.

These principles are particularly important to keep in mind when, for example, discussing the Committee's questions concern the use of remotely piloted aircraft, or "drones." Although the technology may be new, drones are simply tools subject to the same principles for deployment as any other weapons system employed under the law of armed conflict. As my colleague Steven Groves has explained in an exhaustively detailed report on the legal basis for drone warfare, the Obama Administration's framework for carrying out targeted strikes with drones appears to adhere to recognized principles of the law of war described above.[4] Indeed, drones may allow a greater degree of distinction than previous generations of weapons technology, reducing expected collateral damage and injuries. In this way, the United States may carry out the necessities of warfare in a highly efficient and targeted fashion.

I also agree with the point raised by the Brookings Institution's Benjamin Wittes that any thoughtful discussion of drone warfare must distinguish between policy and means. Much criticism of drone warfare is actually criticism of broader policies, such as the application of the law of armed conflict to the present conflict, geographical

[4] *See* Steven Groves, Drone Strikes: The Legality of U.S. Targeting Terrorists Abroad, Heritage Foundation Backgrounder No. 2788, April 10, 2013, at http://www.heritage.org/research/reports/2013/04/drone-strikes-the-legality-of-us-targeting-terrorists-abroad.

limitations on such conflict, and targeting decisions. Whether a strike is carried out by a drone or an airplane (with the pilot in the vehicle itself) has little or no bearing on these broader policy issues.[5] As Wittes explains, drone use is appropriate in the context of an armed conflict:

> The ability to target the enemy in an armed conflict with lethal force is a simple, and lawful, operational necessity in a world in which enemy organizations in countries and locations impossible to reach by law enforcement continue to threaten the United States. The fact of armed conflict—and the consequent availability of targeting—does not mean automatic recourse to hostilities, of course. There are many places in the world where the United States can and does pursue terrorists through law enforcement, interdiction of terrorist financing, and other non-hostilities-based tools of counterterrorism. But there are other places in the world that are weakly governed, ungoverned, or simply hostile to the United States, where terrorist groups responsible for September 11 have fled, or in which associated terrorist groups or cells have arisen and joined the conflict against the United States. The armed conflict framework, and the inherently-tied authority to target the enemy with lethal force, is essential to reaching these actors and denying them sanctuary from which to attack this country.[6]

I agree, as well, with Wittes's conclusion that this point should engender no particular controversy.

The law of armed conflict, in addition to authorizing a country to use force against its enemies—which, by the way, may consist of both state and non-state actors—also authorizes the country to detain such enemies for the duration of the hostilities, without criminally charging them. The fact that we do not know when the hostilities against al Qaeda will end does not change the fact that the United States has the legal authority to hold captured al Qaeda members during ongoing hostilities. As a practical matter, however, the United States has transferred or released the vast majority of captured al Qaeda and Taliban combatants, even as we kill or capture others.

The September 18, 2001, Authorization for Use of Military Force

In response to the devastating attacks against our homeland, Congress passed a joint resolution a week after the attack, on September 18, 2001. The preamble to the AUMF directs the President "to protect United States citizens both at home and abroad."

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[5] *See generally* Benjamin Wittes, Drones and the War on Terror: When Can the U.S. Target Alleged American Terrorists Overseas? Testimony Before the House Committee on the Judiciary, February 27, 2013, at http://www.brookings.edu/~/media/Research/Files/Testimony/2013/02/27%20drones%20wittes/Feb%2027%20Drones%20Wittes%20Testimony.pdf.

[6] Ibid. at 6.

The operative text authorizes the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or 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."

This authorization for the use of force has acted, and still acts, as the legal framework for, among other things, targeting and detention operations. Two administrations have relied on the AUMF to engage those actors who were responsible for, aided, or harbored those responsible for 9/11.

Ninety-eight Senators voted for the joint resolution along with 420 members of the House of Representatives. The AUMF has served the country well. It has enabled our warfighters, intelligence professionals, and other stakeholders to carry out their work, knowing that Congress has given express authorization for the use of appropriate and proportional force to confront an enemy that was responsible for the worst attack against our country since Pearl Harbor.

It is important to note the ways in which the AUMF is self-limiting. First, it is limited to al Qaeda, the Taliban, and persons and forces associated with those "organizations." It is not a mandate to use force against any terrorist organization or other entity that may threaten U.S. national security.[7] Second, it is limited by the principle that force should be deployed only "in order to prevent any future acts of international terrorism against the United States." Third, as described above, it incorporates and is limited by the law of armed conflict. In these respects, the AUMF is consistent with prior force authorizations that have targeted non-state actors.[8]

The AUMF, by its own language, does not have an expiration date, nor should it. While it is true that over the decade we have made hard-fought gains against the al Qaeda leadership, and key members of the Taliban and associated forces, other elements of those organizations still pose a continuing threat to the United States. I base this opinion not on current intelligence briefings—to which I no longer have access—but my reading of open source materials. That said, Congress does have access to classified intelligence briefings, and I encourage a thorough and dispassionate evaluation of the current threats by the Congress.

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[7] Note that Congress considered and rejected the Bush Administration's initial request for authority to "deter and pre-empt any future acts of terrorism or aggression against the United States," without regard to the entities involved. *See generally* Curtis Bradley & Jack Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L. Rev. 2047, 2079 (2005).

[8] *See, e.g.*, Pub. L. 15-101, 3 Stat 532, 532-33 (1819) (authorizing force against slavers); Pub. L. 15-77, 3 Stat. 510, 510-11 (1819) (authorizing force against pirates); Pub. L. 17-7, 3 Stat. 721 (1823) (same); 33 U.S.C. §§ 381-82 (same).

As to the Committee's question regarding the geographic scope of the AUMF, both administrations have taken the unremarkable position that by its terms, and in practice, there is no geographic limit or scope to the AUMF. Rather, the AUMF gives the President the authority to confront the enemy wherever he deems the enemy resides. Just last year, in a major address at Northwestern University, Attorney General Eric Holder stated, "Our legal authority is not limited to the battlefields in Afghanistan. Indeed, neither Congress nor our federal courts have limited the geographic scope of our ability to use force to the current conflict in Afghanistan."[9]

The notion that we are at war, and that the war (and by implication the AUMF) has no geographical boundaries is anathema to some, but is nevertheless lawful and consistent with the law of armed conflict and our national and international obligations. It is also not the boundless source of tyranny and infringement upon other nations' sovereignty that detractors profess; rather, the national security power of the politically accountable branches are subject to all of the checks and balances within our constitutional form of government, as well as the more modern checks detailed by fellow witness Jack Goldsmith in his book *Power and Constraint*. And it is commensurate, in this case, with the enemy, an international terrorist movement that does not respect political or any other boundaries and that considers the people and assets of the United States and its allies, wherever they may be, to be its targets.

As to the Committee's question regarding whether the AUMF should be modified, or by implication repealed, I would suggest that repealing the AUMF prematurely would be unwise. Repealing the AUMF would signal, legally, that the war against al Qaeda is over, at a time when al Qaeda and associated forces continue in fact to wage war against the United States. And it may have more specific consequences, for example, involving the continued detention of those terrorists currently in captivity and not subject to military commission or federal court proceedings.

Repealing or substantially narrowing the existing AUMF could also have substantial repercussions on other sensitive operations, including but not limited to the targeted killing program.

In short, the current AUMF should remain in place unless and until the narrow class of persons under its scope no longer poses a substantial threat to our national security. Keeping the current AUMF does not authorize a permanent state of war, as some critics have alleged. It merely retains the legal framework that has worked and served us well, to date, and acknowledges that those subject to the AUMF, although greatly diminished in number and efficacy, should not be allowed to regain their footing.

In the context of the AUMF, keeping the AUMF as is does not necessarily mean that the Executive Branch, this one or the next, will want to or need to employ the full

[9] Address at Northwestern School of Law of March 5, 2012. Text found here: http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html

extent of its authority. We cannot foresee with precision when or if the threats posed by those subject to the narrow jurisdiction of the AUMF will be defeated or become so insignificant as to not warrant this particular AUMF.

The AUMF and Detention Authority

Despite the fact that the express language of the AUMF does not include the words "detention," each of the three branches of the federal government, including the Executive Branch across two administrations, has recognized that the AUMF necessarily includes the power to detain those subject to the boundaries of the AUMF.

In June 2002, the Bush administration argued in its brief before the Fourth Circuit in the case of *United States v. Hamdi*, that the authority to detain Yasser Hamdi flowed from the Commander in Chief's Article II powers and from the "statutory authorization from Congress…Furthermore, the President here is acting with the added measure of the express statutory backing of Congress." It cited the AUMF.

Similarly, in its brief before the Supreme Court in *Hamdi* in 2004, the Bush administration argued that its detention authority stemmed, in part, from the AUMF as that authority "comes from the express statutory backing of Congress."

And, as is well known by now, the Supreme Court held in *Hamdi* that "Congress has in fact authorized Hamdi's detention, through the AUMF." As the Court explained, citing longstanding, consistent executive practice and the law of war, "detention of individuals [who fought against the United States as part of the Taliban], for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."[10] The Bush administration relied on the AUMF's detention authority in subsequent cases, including those regarding Jose Padilla and Ali Saleh Kahlah al-Marri.

The Obama administration has continued to rely on the AUMF for detention authority. In its first brief before a court on the matter—here, in the context of habeas litigation from three Guantanamo detainees—the administration argued that "The United States bases its detention authority as to such persons on the Authorization for the Use of Military Force."[11] Their brief went on to say that "detention authority conferred by the AUMF is necessarily informed by principles of the laws of war,"[12] which is a position also taken by the Bush administration and the courts in numerous instances. In particular, it arrived at the following "definitional framework," premised on the application of the law of armed conflict to the AUMF, that has subsequently been upheld by the United States Court of Appeals for the D.C. Circuit:

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[10] *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004).

[11] See http://www.justice.gov/opa/documents/memo-re-det-auth.pdf

[12] Ibid.

> The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.[13]

Congress, in turn, ratified that framework in Section 1021 of the 2012 National Defense Authorization Act ("NDAA"). That provision "affirms" the authority of the President under the AUMF to detain certain "covered persons":

> (1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.
>
> (2) A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.

And although there have been differences between the two administrations in terms of their reliance on Article II powers and detention authority, the fact remains that both administrations have consistently relied on the AUMF to justify detention of members of al Qaeda, the Taliban, and associated forces.

Furthermore, both administrations have relied on the AUMF as a lawful basis for its targeted killing programs. Such a program, under proper supervision within the executive branch and appropriate oversight from the Congress, is a necessary and invaluable tool.

Assessing the Threat

Al Qaeda today remains a threat. The organization has evolved substantially from the relatively insular group that planned and carried out the September 11 attacks. Over the past decade, al Qaeda has "franchised" its name, its techniques, and its terrorist mission to any number of associated groups, including al Qaeda in the Arabian Peninsula and al Qaeda in the Islamic Maghreb. That period has also seen the rise of a number of terrorist groups with similar goals and varying relationships to the "core" al Qaeda

[13] Ibid.

organization. They include al Shabaab, Boko Haram, Jabhat al-Nusra, and Lebanese Hizballah.

Robert Chesney's 2012 law review article entitled "Beyond the Battlefield, Beyond al Qaeda: The Destabilizing Legal Architecture of Counterterrorism" describes the strategic and legal complexity of the terrorist battlefield today. At the same time that al Qaeda itself has splintered, a number of groups have allied themselves with its mission, its techniques, and only sometimes al Qaeda itself. A few examples are illustrative of this trend:

> Al Qaeda has been linked in relatively unspecified ways to a group of Islamist extremists in northern Nigeria known as Boko Haram. The Algerian extremist group formerly known as the Salafist Group for Call and Combat has embraced the al Qaeda brand more formally, becoming "al Qaeda in the Islamic Maghreb" or "AQIM," and has recently seized territory in Northern Mali working in close concert with a local armed group of extremists known as Ansar Dine ("Defenders of the Faith").Multiple al Qaeda-linked groups have emerged in the area of the Sinai Peninsula in Egypt, including a group calling itself the Mujahideen Shura Council and another called Ansar al Jihad. Iraq famously became the home of al Qaeda in Iraq in the years following the U.S. invasion, and was famously (and foolishly) reluctant to conform its operations to the dictates of al Qaeda's senior leadership in Pakistan in its first iteration; after nearly being eliminated a few years ago, it is now enjoying a substantial resurgence. And as the civil war in Syria unfolds, there are claims in the media regarding the presence of "al Qaeda" fighters appearing, though whether this represents an influx of al Qaeda in Iraq members, of homegrown extremists appropriating al Qaeda's brand, something else, or mere propaganda is far from clear at this time. The point being, each of these groups may differ markedly from one another in terms of their actual degree of connection to al Qaeda itself, their interest in conducting operations targeting American or other western targets outside the confines of the state in which they usually operate, and in terms of their own organizational coherence.[14]

As Chesney concludes, al Qaeda has embraced an increasingly decentralized model, while seeking ties to already existing regional terrorist actors. The trend makes ever more tenuous the assumption underlying the AUMF that al Qaeda-style terrorism necessarily bears any direct or substantial relationship to al Qaeda itself, as is necessary to fall under the terms of the AUMF. As this trend continues, the day will come when substantial threats to the United States are no longer encompassed within the existing force authorization. For the present, however, al Qaeda's enormous organizational flexibility—perhaps its chief strength—has allowed us to defer addressing that issue.

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[14] Robert Chesney, Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism, at 29-30 (footnotes omitted).

Additional Authorities to Confront the Evolving Threat

Still, it is not too early to begin thinking about what comes after the AUMF, because the day when it will no longer be sufficient to meet the terrorist threat is approaching. At this stage, the most important thing may be to frame how we approach this problem. In general, I commend to your attention a recent white paper by the Hoover Institution's Task Force on National Security and Law entitled "A Statutory Framework for Next-Generation Terrorist Threats"[15] co-authored by fellow panelist Jack Goldsmith. And in particular, a few key points are worth discussing here:

First, the central consideration on whether to enact additional authorizations for the use of military force must be our national security needs. As al Qaeda continues to splinter, and new groups unassociated with al Qaeda proliferate, threats beyond the scope of the AUMF will become increasingly prevalent. At the outset, these may be addressed by greater attenuation of AUMF authority—a phenomenon that has already begun—and by non-military means. But as these threats grow, those methods will become infeasible. Congress and the President, working together, have a duty to ensure that appropriate legal authority exists to address these threats. That will require cooperation between the branches and a relationship of trust, particularly if the nature of this emerging threat requires greater flexibility in targeting than allowed by the AUMF.

Second, the substance of the AUMF's force authorization should be followed. The AUMF's allowance that the President may bring to bear "all necessary and appropriate force" against the entities encompassed by it is consistent with our constitutional architecture, with centuries of precedent, and with the need for flexibility in fighting a diverse and always evolving threat. Congress has never attempted to regulate the specific means by which the President has exercised his power as Commander in Chief. Beyond raising serious constitutional questions, limits on that authority would be folly because they would constrain the President's ability to wage war successfully on non-state actors whom Congress has already identified as the nation's enemies. The better course is to separate the substance of a force authorization from its breadth.

Third, narrowly tailored, flexible legislation by Congress, prepared in an open and transparent manner, best serves the interests of the American people. As Justice Jackson observed in his famous opinion in *Youngstown Sheet & Tube*, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[16] Consistent with that principle, when the President acts with the support of Congress, his actions bear greater legitimacy both domestically and internationally, in the courts and in these chambers. When the President acts on his own, as sometimes he

[15] http://media.hoover.org/sites/default/files/documents/Statutory-Framework-for-Next-Generation-Terrorist-Threats.pdf

[16] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636 (1952) (Jackson, J., concurring).

must, his powers are more constrained and therefore may be less effective, while at the same time subject to less oversight and fewer checks by the Congress and the courts. But make no mistake: the President has a duty to protect the nation's security, and any President will, if and as necessary, rely on his Article II powers to carry out that duty in the face of imminent threats, even where Congress has not provided additional authority. Congress therefore weakens not only the President but also itself when and if it declines to face up to the threats against our nation.

Fourth, Congress must build on the AUMF, not replace it. To replace the AUMF would be risky and unwise at this time, because doing so would cast uncertainty on the legal basis for so many aspects of our campaign against al Qaeda. Any modification to the core AUMF grant of authority is risky for that reason. Over time, the AUMF will obsolete itself, as al Qaeda and the Taliban fade into oblivion, and when that process is finally complete, the AUMF will no longer have any purpose or meaning. We are not yet at that day, however. Therefore Congress may need to build on the AUMF, expanding its authority to reach new threats, rather than altering it at this time.

Finally, Congress must always strive to balance the need for expediency in addressing threats with appropriate congressional control and oversight. No one suggests handing the President a blank check to carry out the power to declare war. The Constitution reserves that power to Congress. It also reserves to Congress the power of the purse and the power to regulate the armed services. These powers are essential to ensuring accountability for results and for the protection of Americans' rights, consistent with our values, as we fight enemies that reject those rights and those values.

Conclusion

In summary, the United States remains in a legal state of armed conflict with those responsible for the 9/11 attacks. The current AUMF authorizes the use of force against this enemy and also allows this enemy to be detained under the law of war. The mere existence of the AUMF does not, in and of itself, authorize an endless war, as some critics contend. Rather, it merely authorizes the Commander in Chief to use those lawful authorities to confront and ultimately to defeat this enemy. And although those subject to the AUMF's narrow jurisdiction are now on the run and arguably degraded in their capabilities, the fact remains that they still pose a national security threat to the United States. As such, the current AUMF is in the process of becoming obsolete; but unless and until this enemy no longer poses a substantial national security threat to our country, the current AUMF should not be repealed or replaced.

That said, other transnational terrorist groups may pose a substantial national security threat to the United States. The looser the affiliation they have with al Qaeda and those responsible for 9/11, the more difficult it is to shoehorn them into the existing AUMF. As such, Congress has the opportunity to assess what threat, if any, they pose to our national security, and if substantial, the obligation to craft appropriate legislation to confront the threat.

I commend the Committee for their work in this area.

Thank you for inviting me to testify and for this Committee's leadership on these tough issues. The nation's security is a sacred duty, and we can and must balance security with personal liberties and the utmost respect for the rule of law.

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