

[H.A.S.C. No. 114-13]

**OUTSIDE PERSPECTIVES ON THE  
PRESIDENT'S PROPOSED AUTHORIZATION  
FOR THE USE OF MILITARY FORCE  
AGAINST THE ISLAMIC STATE OF  
IRAQ AND THE LEVANT**

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**COMMITTEE ON ARMED SERVICES  
HOUSE OF REPRESENTATIVES**

**ONE HUNDRED FOURTEENTH CONGRESS**

**FIRST SESSION**

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**OUTSIDE PERSPECTIVES ON THE PRESIDENT'S PROPOSED AUTHORIZATION FOR THE USE OF MILITARY FORCE AGAINST THE ISLAMIC STATE OF IRAQ AND THE LEVANT**

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HOUSE OF REPRESENTATIVES,  
COMMITTEE ON ARMED SERVICES,  
*Washington, DC, Thursday, February 26, 2015.*

The committee met, pursuant to call, at 10:07 a.m., in room 2118, Rayburn House Office Building, Hon. William M. “Mac” Thornberry (chairman of the committee) presiding.

**OPENING STATEMENT OF HON. WILLIAM M. “MAC” THORNBERRY, A REPRESENTATIVE FROM TEXAS, CHAIRMAN, COMMITTEE ON ARMED SERVICES**

The CHAIRMAN. Committee will come to order.

Committee meets today to hear testimony on the President’s proposed authorization for the use of military force [AUMF] against ISIS [Islamic State of Iraq and Syria].<sup>†</sup> This hearing is just the first committee event on this issue, but given the expertise of the witnesses today, I think it will raise many of the issues and considerations that we will need to follow up on in the future.

Previously we have heard testimony that the threat posed by Islamic jihadists is growing. Last September President Obama said, and I want to quote here, “Our objective is clear. We will degrade and ultimately destroy ISIL through a comprehensive and sustained counterterrorism strategy.”

Many people, including me, are concerned, however, that we do not really have a clear strategy that will accomplish that goal.

An AUMF is not a strategy. It is only an authorization to use military force against a particular enemy.

In spite of the fact that the President ordered military action against ISIS to begin several months ago and only now has submitted a request to Congress to authorize such action, I believe it is still important for the United States Congress to do its constitutional duty. But I have a number of questions and concerns about the President’s language.

First, as we have experienced with the 2001 AUMF, defining the enemy is difficult, especially as they adapt and form new allegiances and seek to manipulate our system.

Second, we already put too many encumbrances on our troops in carrying out the missions they are assigned, in my opinion, so going into battle with a lawyer nearby to decide whether a par-

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<sup>†</sup> Also referred to as ISIL, Islamic State of Iraq and the Levant.

ticular action is enduring or offensive or a ground combat operation seems problematic.

Third, I know that some are concerned about the time limitation included in this draft. I think a forcing action that requires Congress to consider and possibly update an AUMF may be useful, but I want to hear from our witnesses their views because I recognize the drawbacks of unintentionally telegraphing a timeline to the enemy.

A vote to authorize a President to send American men and women into battle is as serious and sobering a vote as any vote cast by a Member of Congress. Our country has always been incredibly fortunate to have had individuals of outstanding bravery and dedication defending our Nation and the American way of life.

We are facing a cruel and savage opponent. Our service members must know that their mission carries the full weight of approval under our constitutional system and that the administration, this Congress, and the American people will stand with them and support them as long as it takes to accomplish the missions which they have been assigned.

That will be my goal as we go through this process.

Mr. Smith.

**STATEMENT OF HON. ADAM SMITH, A REPRESENTATIVE FROM WASHINGTON, RANKING MEMBER, COMMITTEE ON ARMED SERVICES**

Mr. SMITH. Thank you, Mr. Chairman. I think it was really two topics for this morning's hearing. One is the basic details of the AUMF with regards to Syria and Iraq and ISIL, and it is a very, very difficult thing to do because Congress wants to strike the balance.

We do not want to give the President a blank check and take away any of our authority. On the other hand, we don't want to restrict the executive branch in a way that hampers his ability to carry out the mission. That, from a language standpoint, can be virtually impossible.

And I think the chairman mentioned some of the areas of tension there—the timeline. I think the timeline is fine, because, as the chairman mentioned, Congress can come back and reauthorize. It sort of makes sure that we stay as part of the process, that we don't let our constitutional authority slip.

The tougher questions are, you know, how do we define military engagement without simply giving the President the right to do whatever whenever. And I will get more into this in the strategy session, but I, for one, think that it would be a mistake strategically to excessively rely on U.S. military force to try and solve this problem.

So I am looking for ways to limit that, to make sure that we don't have an executive that thinks that the military is the solution to this problem, because we should all keep in mind, whatever President Obama's personal position on this is, this AUMF would carry over to another President, which we can't be sure of. So I think those limitations are important, but difficult to articulate, which brings me to the real issue here today, which I think is the broader strategy.

What is the broader strategy? I think it can be fairly simply defined in the sense that we need to get to the point where the Muslim world rejects this type of violent extremism.

And I think one of the things that makes the strategy so difficult is it is a moving target. Back in, you know, 9/11 it was all about Al Qaeda and Al Qaeda senior leadership in Afghanistan, but the ideology is so much broader than that, as everybody here knows. It crops up in all manner of different places, from al-Shabaab to Boko Haram to Ansar al-Sharia.

It is an ideology that is becoming far too deeply rooted in that part of the world. How do we stop it?

Well, the short answer is we don't stop it, because the most dependable part of the message that Al Qaeda has is to basically say that they are defending the Muslim world against Western aggression. The last thing in the world we want is either, you know, a whole bunch of U.S. troops to show up to try to fix the problem, or just as bad, you know, a whole bunch of U.S. policymakers going over there and telling Muslim countries and Muslim governments how they should conduct themselves. They are not going to be responsive to that.

This is a problem that has to be solved internally by these countries. And the real strategic challenge for us here is, how can we help without making the problem worse?

It is a very delicate balance, and I would be very interested in hearing from the three of you on how we can engage in that, because this is an ideological struggle. This isn't about defeating AQAP [Al Qaeda in the Arabian Peninsula] or defeating Al Qaeda senior leadership, or even primarily about defeating ISIL. It is about stopping this just horrific ideology that has spread to too many parts of the Muslim world.

How do we stop it? How do we get that to be turned around? Because the truth is the overwhelming majority of the Muslim world rejects this ideology and rejects this strategy.

And yet, it marches on. How do we work with that to change that?

And then the final key piece of this is—that makes it very difficult to develop a strategy, is we keep tripping over another aspect of conflict in that world, and that is the Shia-Sunni divide.

You know, we may well be in there fighting ISIL, but if ISIL is fighting Shia, as they were in Iraq, and the main reason they were so successful in Iraq is because the Sunni Iraqis looked at Baghdad and said, "That is not my government. That is a government that is sectarian, that is protecting Shia, that is doing nothing for us." So they basically sided with ISIL not so much because they loved ISIL's ideology, but because they found it preferable to Shia rule.

If somehow, some way, Saudi Arabia and Iran could find a way to peacefully coexist tomorrow, a huge chunk of this problem would go away. Now, that is obviously easier said than done, but it is part of the equation is figuring out this—the Shia-Sunni split.

So I think part of the reason people are confounded sometimes on the strategy level is because this is a moving target with lots of complicated pieces. It defies a two-sentence strategy.

And in fact, I don't think we would be well served by coming up with that two-sentence strategy. It is a dynamic problem. We have to be flexible in terms of how we respond to it.

But one piece of it is, with the U.S. engaged militarily against ISIL, as I think it should be, Congress should play its role. We should authorize that use of military force within whatever parameters we as a body decide.

With that, I yield back, and I look forward to the testimony and the questions.

The CHAIRMAN. Thank the gentleman.

I ask unanimous consent that a letter that Mr. Smith and I received from retired General James Mattis, former CENTCOM [Central Command] commander, on the AUMF be made part of the record.

[The information referred to can be found in the Appendix on page 99.]

The CHAIRMAN. Without objection, so ordered.

And without objection, each of your written statements will be made part of our record, as well.

Let me welcome our witnesses. We are very fortunate today to have retired General Jack Keane, former Vice Chief of staff for the U.S. Army; Robert M. Chesney, Associate Dean for academic affairs and Charles I. Francis professor of law at the University of Texas School of Law, an outstanding institution, I would add; Benjamin Wittes, senior fellow of government studies at Brookings Institution.

And, as many of you all know, Mr. Chesney and Mr. Wittes are both associated also with the Lawfare Blog, which is widely read on these constitutional national security issues.

So thank you all for being here.

General Keane, the floor is yours.

**STATEMENT OF GEN JACK KEANE, USA (RET.), FORMER VICE CHIEF OF STAFF, U.S. ARMY**

General KEANE. Chairman Thornberry, Ranking Minority Smith, members of the committee, thank you for inviting me to testify today on the President's request for authorization of the use of military force. I am honored to be here again and to share the panel with my distinguished colleagues.

I have been testifying here for 15 years before this committee, and I just want to tell you once again how much I appreciate the support that you provide to our Armed Forces through all these years and what you are doing currently. I have always appreciated your serious and thoughtful approach to the Nation's business regardless of who has been the majority in this committee.

Please reference the map that I provided at the end of my testimony when I discuss the enemy and its geography. It was prepared by the Institute for the Study of War where I am the chairman. This was a part of a recent intelligence summary and is useful to understand how ISIS looks at the world.

My remarks will be brief, highlighting the essential observations only, permitting the focus to be your questions.

In principle I agree with a President who desires to use military force beyond a short-term contingency, requests an AUMF from the



Congress. The current AUMFs, 2001 and 2002, which are obviously still in use, are, in their design, good documents in that it is clear why military force is being authorized and provides latitude for the President to determine how to use that force.

Indeed, an argument can be made that the President's current AUMF request is unnecessary in that the previous AUMF provides sufficient authorization for the use of force against ISIS. Nonetheless, I do believe it is better public policy for a new AUMF based on the reality that ISIS is a different threat in terms of its scale, mode of operation, location, and near-term intent.

As to the President's current AUMF request, I would like to make a few observations.

The strategy: Strategy is how the military force is used. This is the President's lane, along with his senior military commanders.

As much as I and some Members of Congress are critical of the administration for not having a comprehensive strategy to defeat radical Islam nor an adequate strategy to defeat ISIS, the AUMF is not the appropriate document for that expression. A President needs maximum flexibility to adapt to the enemy and the battlefield environment, which at times may demand a change in strategy.

The enemy: The enemy is ISIS, and the proposed AUMF describes it as "ISIS and associates."

ISIS has claimed contractual agreements and a written plan approved by ISIS leader Abu Bakr al-Baghdadi to form satellites in Libya, Egyptian Sinai, Afghanistan, and also Algeria, Saudi Arabia, and Yemen. Some of these affiliations are likely aspirational, to be sure, but ISIS is exporting military capability to make affiliates in Sinai and Libya stronger. All that said, defeating ISIS does not mean that U.S. forces are needed to defeat ISIS satellites.

The geography: Core ISIS is principally located in Iraq and Syria, but it covets territory in a broader region, including Lebanon, Saudi Arabia, Jordan, Israel, and lands that are part of historic caliphates, like the Caucasus. As such, there should be no geographical limitation in the AUMF.

The time constraint: It makes no sense to me to tell our allies and the enemy that we are uncertain of this commitment of force by our unwillingness to extend it beyond 3 years. Congress has the authority to provide continuous assessments through its oversight committees, which is far more appropriate than a 3-year sunset.

The ground force constraint: ISIS cannot be defeated in Iraq and Syria without a decisive ground force victory. There is no ground force in Syria, and no one knows if the Iraq ground force can defeat ISIS.

Why put limits on the use of a ground force when it is widely recognized as the only means to defeat ISIS? Indeed, it may be necessary for a coalition ground force, with the United States likely in the lead, to ultimately defeat ISIS. The ground force constraint should be removed from the AUMF if the true goal is to defeat ISIS.

In conclusion, the proposed AUMF is not an acceptable document. The time and ground force constraint must be removed. This President as well as our next President deserves latitude in the use of military force.

Additionally, how to use the military force, or strategy, is not an appropriate topic for this document, as I previously stated. But it is essential for the Congress to provide oversight and, in so doing, understand the feasibility of the strategy actually working.

I believe it is a matter of conscience to only support an AUMF if there is confidence that the strategy our troops execute will indeed succeed in defeating ISIS.

Thank you, and I look forward to your questions.

[The prepared statement of General Keane can be found in the Appendix on page 55.]

The CHAIRMAN. Thank you.

Professor Chesney.

**STATEMENT OF ROBERT M. CHESNEY, ASSOCIATE DEAN FOR ACADEMIC AFFAIRS, CHARLES I. FRANCIS PROFESSOR IN LAW, UNIVERSITY OF TEXAS**

Mr. CHESNEY. Chairman Thornberry, Ranking Member Smith, and members of the committee, thank you very much for the opportunity to be here today. And I associate myself with General Keane's remarks about the tremendous history of this committee and the way it conducts its business.

I would like to make six points this morning.

First, the draft AUMF lacks a stated purpose in its operative sections. This is in contrast, for example, to the 2001 AUMF, and it is potentially significant.

To be sure, the question of purpose is for policymakers to decide ultimately, not lawyers. But the lawyers, in drafting an AUMF, need to know what the purpose is in order to make sure their work product is suited to accomplishing the mission.

And the public needs to know the purpose, as well. And so, as you improve upon the draft, I hope you will insist upon a clear statement of purpose in it.

Second, the draft's attempt to forbid "enduring offensive ground combat operations" is a grossly indeterminate phrase on its face and it should be dropped. Notwithstanding examples given by the White House in its transmittal letter accompanying the draft, the language inevitably will cast a shadow of uncertainty over commanders' operational decisions.

The statement by Secretary Kerry this past Tuesday explaining a bit about what it means in his understanding, referring to overnight embedding being okay but weeks upon weeks of some form of ground presence not being okay, I think underscores rather than assuages this concern. Simply put, commanders should not be left to guess where the boundaries lie.

Third, at no point in American history has Congress ever simultaneously authorized the use of force to destroy an enemy militarily while at the same time purporting to forbid the Commander in Chief from using ground forces towards that end.

In fairness, there have been several authorizations in our history that have been narrow in various ways. But in all such cases, the objective was much narrower than the military destruction of the enemy. Instead, these were cases in which the objective involved important but limited things, such as ending piracy against our shipping or participation in a peacekeeping operation.

Of course, if the actual objective with respect to ISIL is not its military destruction, but instead something relatively more narrow yet still important, then the analogy to past narrow authorizations may work much better. But this simply underscores my earlier point about the need for clarity regarding the purpose of the AUMF and our mission.

All that said, I can't say that Congress would lack the authority to enact such a limitation if it truly wishes to do so. I am simply pointing out that it would be unprecedented in a particular way, and it is certainly closer to the constitutional border line than things we have seen in the past.

Fourth, I want to share my thoughts on what we usually call sunsets, although I am beginning to think that we should get away from the sunset language because of the connotation it has for many people that it suggests that it is predetermined that there won't actually be a renewal. Perhaps it is better to talk about them as renewal or forcing function provisions.

The idea, of course, is to create an occasion after a certain period of time when the authorization, if appropriate, will receive the fresh imprimatur of a Congress and a President acting on the most recent conditions. And in this respect I would just point out where we are with the 2001 AUMF, which, of course, is still a critical instrument; it supports our anti-Al Qaeda operations around the world, from Yemen, to Somalia, Pakistan, Afghanistan, and Iraq, as well.

It has been 13 years-plus since it was enacted, and the passage of time has led many to criticize it on the grounds that it has somehow become stale, that it has become attenuated as Al Qaeda has evolved. And it is a shame, I think, that we haven't had a past occasion where it has been clearly refreshed by a more recent Congress in order to avoid these kinds of problems, which create friction in the reliance upon the AUMF.

Now, it is true that it did partially get refreshed in the National Defense Authorization Act for Fiscal Year 2012, but that refreshment, unfortunately, was limited to reference to the detention authority and—rather than being a full refreshment. But the point is, the experience with the 2001 AUMF illustrates how there is something to be said in favor of being able to continue to operate under an AUMF if you ensure that Congress will, in fact, come back to it after a certain number of years.

I recognize, however, that you cannot create a sunset or renewal provision that signals to the enemy that we are starting off with one foot already out the door. And so, in thinking about how you strike the balance here, my conclusion is that the better way to go is not a 3-year but a 5-year sunset, which also has the virtue of not landing this particular renewal provision on the doorstep of a newly elected President who may still be getting fully acclimated into the office and getting personnel into place.

My next point is about the silence of the draft AUMF on matters of detention, which is rather striking, if you ask me. Another lesson of the past 13 years is that the silence of an AUMF on detention is itself a cause for great legal friction if and when the United States may decide that in addition to using lethal force against

ISIL targets, heaven forbid we actually detain some in military custody for the duration of our conflict.

If and when we come to that point, we will regret, I think, not having said something in the AUMF clarifying detention authority. So at a minimum, I hope Congress will consider that issue.

Last, there is the question of whether all this is moot because the administration, though asking for this ISIL-specific AUMF, it does continue to assert that it has the authority to do what it is doing already under color of the 2001 AUMF, and possibly as well under Article 2 of the Constitution. I don't think it is entirely moot.

As a municipal matter, the 2001 AUMF argument and the constitutional argument that have been the backdrop up to this point, up to this very moment, are not without their detractors. They are far from obviously correct arguments, and that, in itself, creates a lot of legal friction. In so far as we are putting our Armed Forces into harm's way, they deserve a clear legal endorsement for what they are doing from this body.

As to the particular constraints in the draft AUMF being moot, again, at one level, yes, as a lawyer I can explain to someone if they have the time and patience to listen to me as to why the constraints in the new AUMF, since they aren't present in the old one, don't really matter. But I think that, while true as a legal matter, it is different as a political and rhetorical matter, and the existence of these constraints in the new AUMF will cast a shadow back over the old one and create more legal friction. So for that reason alone I think this proposal really does have to be taken quite seriously.

So let me stop there. I thank you for your time and I look forward to your questions.

[The prepared statement of Mr. Chesney can be found in the Appendix on page 66.]

The CHAIRMAN. Thank you.

Mr. Wittes.

**STATEMENT OF BENJAMIN WITTES, SENIOR FELLOW,  
GOVERNANCE STUDIES, THE BROOKINGS INSTITUTION**

Mr. WITTES. Thank you, Chairman Thornberry, Ranking Member Smith, and members of the committee, for inviting me to present my views on the President's proposed authorization for the use of military force against the Islamic State.

I want to advance, I am more modest than Bobby on this, I want to advance only two basic arguments today, and the first is that the administration's draft ISIL AUMF, while it is a significantly flawed document, is flawed in ways that are somewhat different from many of the criticisms being advanced against it. So I want to start by separating what, from my vantage point anyway, is the wheat from the chaff, and sort of dispensing with a number of the criticisms of the draft that are, to my judgment at least, meritless or having significantly less merit than their presence in the conversation.

So, many critics have worried that the draft AUMF would limit the President and his successor in prosecuting the war, and some in this regard, some have worried about the limitation on the use of ground forces; others have argued that the problem is chiefly the 3-year proposed sunset. I think both concerns are actually mis-

placed, at least as a legal matter, though Professor Chesney's point that they may have political—operate as political constraints is certainly a valid one.

I think it is misplaced as a legal matter for largely the same reason, which Professor Chesney just alluded to, which is that this authorization, at least as the administration proposes it, is not the President's only source of authority to use force. And so limitations in the authorization don't limit Presidential power to the extent that some other authority exists for the contemplated action.

The proposed authorization leaves in place untouched the 2001 AUMF, which the administration has construed quite broadly, which does—including to cover all of its operations today, and which doesn't contain a sunset provision. So the result is that you actually have these optical restraints that don't, in fact, do what they seem to say they are doing.

So, moreover, I think it is implausible, and both of my co-panelists have mentioned this, that the ground force limitation in the AUMF is, you know, quite what it seems to be even if it were the only source of authority, and the reason is the elasticity of the word "enduring" and "offensive." And I think all—the resolution does not define either word.

And there is just a lot of room for elastic interpretation there, and I can't imagine that an administration that wanted to use ground forces in any significant way would not be able to either define them as not offensive or define them as something less than enduring.

A number of commentators have also complained that the draft resolution contains no hard geographic limitations that would contain it to Iraq and Syria. I think this is a—this criticism actually denigrates what is one of the virtues of the administration's AUMF.

ISIL is a fluid enemy. It is by no means likely to restrict its activities to Iraq and Syria. And, as General Keane points out, it is already developing relationships with countries elsewhere, with groups elsewhere that, you know, would be off limits if a hard geographical limit were—limitation were in the document and the document were legally operative.

I ask you to consider that if a similar geographic limitation had been inside the original 2001 AUMF we would never have been able to undertake, under that authorization, operations against AQAP, which have been so vital to American counterterrorism.

All that said, I do think the administration's draft has serious problems, which mostly have their roots in the proposal's breadth and failure to grapple with the relationship with the underlying 2001 AUMF. Now, as a lot of people have noted, the document, on its face, does not appear broad. It seems to have all these limitations.

But it is actually written very carefully to make the—create the impression of significant limitations without the reality. And the administration's lawyers have succeeded in this to a degree that they are being denounced for the breadth, for the restrictions in the proposal rather than developing anxiety about its actual breadth.

In fact, the real problem is that, despite the appearance of accepting restraint, the document contains virtually no meaningful

restraints at all. And the reason for that is the failure to grapple with the underlying 2001 AUMF, which it leaves in place without any—I also have developed anxieties about the word “sunset,” but without any forcing mechanism for reconsideration.

So under the administration’s proposal, at least as a legal matter, the President would have all the authority he has today, including all the authority to fight ISIL under the 2001 AUMF. And in addition to that, he would also be granted 3 years of even broader authority to target ISIL and its associated forces. And by the way, the draft defines “associated forces” quite broadly.

Thus, the limitations on ground forces is entirely meaningless, since the 2001 AUMF remains in place. This doesn’t concern me particularly because I don’t actually favor a ground force limitation, but for those who do favor a ground force limitation, I think you should be particularly concerned by one that is there in appearance but not in reality.

The 3-year sunset is also largely meaningless because the 2001 AUMF doesn’t sunset. And the reporting requirements, which are quite anemic on their own terms, are similarly empty, and I think that should be a particular concern to this committee.

Second point I want to advance is that there is an alternative to this approach. In November of last year my co-panelist Robert Chesney, Jack Goldsmith, Matt Waxman, and I jointly drafted a possible AUMF, which we sort of imagined as a way of sort of kick-starting a discussion on the subject.

It did, and actually a lot of consensus developed between our author group and a group over at the Just Security website about the components of a new AUMF. Unlike the President’s recent proposal, our proposal aimed to integrate authorization for the fight against ISIL into authorization for the larger conflict, and we tried to supplant the existing AUMF with a more modern document to respond to exactly the concerns that Professor Chesney just laid out.

So I want to identify a few aspects of this proposal that are relevant, in light of the criticisms that the President’s AUMF has received both from the right, left, and center.

So first, unlike the President’s draft, our proposal would subsume the current AUMF, which covers, as the administration and the courts interpreted, Al Qaeda, the Taliban, and associated forces, and it would then repeal the underlying document. The result is that there would be a single authorization for fighting Al Qaeda, the Taliban, ISIL, and all of their associates.

Second, because there would be no duplication in the authorization, the proposal’s sunset provision would actually means something. It would actually serve the forcing function that the chairman was referring to.

Third, while the draft does not contain specific geographic limitations, as the President’s does, like the President’s, it does not contain that, but it does authorize force only where it could be used consist with applicable international law concerning sovereignty and the use of force, thus giving some territorial guidance. It would allow the sort of things we did with Al Qaeda in the Arabian Peninsula; it would not allow, say, the use of force or authorize the use of force, you know, in France.

And fourth, the proposal contains significantly more robust reporting requirements than does the administration's draft, and I would urge you, even if you are proceeding off of the administration's draft, to look at the disparity between what we would have asked them to report and what they want to have reported. I think that difference alone is very substantial.

So look, I have no doubt that our proposal could stand significant improvement in any number of areas, and there are aspects of it, actually looking back at it 5 months after we wrote it, that I would change. But our—I think our draft offers an approach that is far less susceptible than the administration's draft to the concerns that many scholars across the political spectrum have raised.

And as this body considers how to authorize the conflict against ISIL and how—and really importantly, how that authorization should interact with the existing AUMF, our proposal may offer an alternative way forward that might attract a broader swath of support.

So thank you very much. Look forward to taking any questions.

[The prepared statement of Mr. Wittes can be found in the Appendix on page 84.]

The CHAIRMAN. Thank you.

And I appreciate, again, testimony from each of you.

I guess I would like to have each of you comment on kind of a basic question, which is how important do you think it is for Congress to authorize a use of military force? I am not really talking about whether the 2001 covers ISIL, that is—although that is an interesting question I would hope we get to today.

What I am talking about is some people argue that Article 2 means the President can do whatever he needs to do to protect the country, and terrorism is a threat so he can take action whenever and however he wants to. On a more practical level, some folks say, "He has been bombing for 6 months. Why do you need to act now? You know, just don't worry about it. Let it go on."

So, Mr. Wittes, starting with you, I would like to hear your views about the constitutional and legal importance of Congress acting to authorize a President's use of military force.

And then, General Keane, by the time we get back to you I would like to hear how that affects our troops, how they see Congress acting or not acting to authorize the missions on which the Commander in Chief sends them.

So if we can just go backwards up the line.

Mr. Wittes.

Mr. WITTES. Sure. I mean, look, at a practical level—at a basic, brass tacks, practical level, the military is going to do what the Commander in Chief orders it to do, assuming, you know, it is lawful order, irrespective of whether this body passes a document or not. And so at that level it is probably true that in some very tangible, immediate way it doesn't matter all that much.

I would say, however, that it matters very much for three reasons. One is, I just have a moral problem with the idea of asking U.S. troops in a—to engage in a long-term set of military operations without them knowing that the political branches of their government are behind them, and I think it is just not an appro-

priate thing for—it is not an appropriate message to send to our own people.

Number two, at the level of—I don't know if it is constitutional law, but it is certainly constitutional hygiene. Relying on a more than 13-year-old document that is about a different organization in a different part of the world to conduct military operations now for a different reason, you know, is I think that is a very bad way for Congress and the administration to behave.

It is not good to have legal authorities that you have to stretch and torture to have them reach the problems that you face. We should go through the exercise, as a democratic polity, of describing the war that we actually want to fight and doing so.

And then the third reason, which I think is a defense of this body's prerogatives with war powers you know, if you all believe that, in fact, the definition of the parameters of a war is not something that this body has, that is not something you have a stake in, it is not, you know, part of why you got elected to office, then fair enough. You know, maybe you shouldn't be involved in the conversation.

But if that sounds like a sort of insulting thing to say, and of course this body has a role in defining the parameters of—scope of military action overseas, and of course it has an oversight function, then this is a critical aspect of this body's engagement with its own constitutional responsibilities in this area.

Mr. CHESNEY. Mr. Chairman, passage of an AUMF specific to ISIL will signal resolve and commitment of this country both to our allies, which is a critical matter, and to the enemy itself, which is an even more critical matter. It will also signal to our troops and our commanders this institution's investment of its own political capital—all of you and all your colleagues, all of your political capital being put on the table in support of what they are being asked to do.

And I think all that matters as a practical matter very much in terms of that critical function, the legitimacy of the effort and the perception that it is going to be sustained over time to accomplish the mission.

Turning to the particular angle the chairman mentioned, how does this interact or what does it say if we don't do it and Article 2 authorities are being relied upon in the background separate from the 2001 AUMF? Article 2 national self-defense authorities of the President to use military force in defense of the country are broad and important, but they are far less capable of marshalling the credibility of this government and crystalizing public support than the ability that this body has, that Congress has, to pass an AUMF.

And it is also clear, as been alluded to, with the passage of time strict reliance on Article 2 alone, if there is no authorization that plausibly supports what is happening, begins to become more and more problematic with time's passage and generates legal friction, as I mentioned in my opening remarks.

I think that at this stage, now that the issue has been put to Congress, a failure to act, a failure to authorize would put us in an even worse spot than we were—in terms of the degree of signals of unity by this government supporting this mission—than where



we were a month ago when we were carrying on these operations strictly on the President's combination of Article 2 authorities and the 2001 AUMF.

At this stage I do think Congress needs to step up with some appropriate endorsement if, indeed, it believes in the mission.

General KEANE. Yes. Mr. Chairman, it is indisputable the President has the authorities to do what he needs to do in terms of military force. And look, and our troops, they are always going to respond to the orders of their officers, take on the most difficult tasks.

Something has really happened in the use of military force and our troops' reaction to it, in my judgment, because I transcended from the pre-9/11 military to the post-9/11 military; I have been very close to both of it. And, you know, pre-9/11 we were, to include much of World War II, this was always about helping somebody else. And incredible expenditure of national treasure by the American people to make the world a better place and achieve security and stability for others, even though maybe we may not have been directly involved.

And morale was always high. When the troops were off doing something they have a sense of purpose about it, they have a sense of accomplishment, they have an incredibly intense shared comradery with each other, and being associated with people that are drawn—that not only have the motivation to do what we are asking them to do, but actually have the wherewithal to do it. And that is very different.

Post-9/11, quite different, because this has been and is today all about the American people. And our troops get it. We have a 9/11 generation in the United States military as a result of it. The Central Intelligence Agency has a 9/11 generation in it as a result of this.

They have a dogged determination to succeed and make this right for the American people. So that aspect of our troops and their commitment to do what is asked of them is quite extraordinary. And I know you know that; I am just reinforcing what I think you know and trying to find my own words to explain it.

But this is a pluralistic, democratic society, more democratic than any other society on Earth. This government is not just about the executive branch.

You are the representatives of the people of this great country. It would never be lost on our troops that you are part of the authorization for the use of military force when we are conducting a campaign that will be protracted, and that is what this is.

So I absolutely believe this is the right thing to do, to come together, to show the determination and resolve, and to back the orders of the President of the United States, and certainly back the execution of those orders by our troops.

The CHAIRMAN. Thank you.

Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

I want to focus on the broader strategy question, because I think that is really, I mean, that bleeds into the controversy over the AUMF is the disagreement over strategy, you know, how limited

should it be, how open should it be? This is a moving enemy, as has been noted by many.

The 2001 AUMF morphed in a variety of different directions, primarily because the enemy morphed. And the enemy here is the broader ideology.

And I am wondering if any of you could shed some light on the sort of damned-if-we-do, damned-if-we-don't situation of—this is a military issue. You know, I have heard people say, you know, “There is going to be no military solution to this problem.”

And I know what they mean. I also know that they are wrong.

What they mean is that the broader, you are not going to win the ideology, you are not going to kill your way to victory. I mean, many generals have said it, General McChrystal most notably.

But there is a clear military element to it. We have got to stop the various groups from gaining ground, from launching terrorist attacks, and killing people. And the military is going to be part of it. But at the same time, the more we engage, the more that helps recruitment.

What can we do to begin to help turn around this ideological problem? Now, I know that the answer to that is to have strong, moderate Muslim voices that reject this ideology and offer a reasonable alternative, but I am not exactly holding my breath waiting for that to happen because they have struggled.

So what can we do in the U.S. to help the broader ideological struggle? Because otherwise we are just going to be—you know, it started in Afghanistan and Pakistan and Yemen, it is Libya, it is Somalia, it is Nigeria, it is, you know, Mali. I mean, it is going to be everywhere and it is going to pop up.

You know, people have been criticized, the whole whack-a-mole strategy. Sometimes there are moles that need to be whacked, and I have got no problem with that, particularly if they are getting ready to whack you first.

But that doesn't get to that broader ideological struggle of how we get the Muslim world to comprehensively reject this ideology, or more to the point, what we can do to help with that. Even the own—my own phrasing of that question was wrong—how we can force them to change their mind.

They are not going to like that, because historically the Muslim world is not fond of the West. They have got some decent reasons for that and some not-so-decent reasons for that. But the bottom line is, they are not going to listen to us coming in and telling them what to do.

But what role can we play in winning that broader ideological struggle? Otherwise, you know, 20 years from now, you know, a new Armed Services Committee is going to be talking about some other country, I won't name one because I don't want to, you know, predict the future in that way, but it is going to just keep evolving and moving and moving and moving as long as this ideology is not defeated and it is broadly acceptable.

So what can we do to nudge it towards, well, if not disappearing, at least reducing?

General KEANE. Well, I will take a run at it.

You know, I have felt since 9/11 we have never had a comprehensive strategy to defeat radical Islam. I always felt the Bush admin-

istration made a strategic error in wanting us all to go back and watch the New York Yankees. I am a hometown New Yorker, I apologize, not for the New York Yankees.

But the fact is we have never, ever dealt with the broader issue. And the reality is, yes, you are absolutely right, we have ISIS in front of us just like we had core Al Qaeda in Pakistan initially and Afghanistan, and there will be somebody else after that if we don't come to grips with the larger issue itself, and that, I mean, I think is a comprehensive strategy to deal with radical Islam and——

Mr. SMITH. Got that. What I am asking for is that comprehensive strategy——

General KEANE. Yes, and I am talking about it. So if you look at a map and you see that radical Islam has morphed into a global jihad, it goes from Western Africa to Northeastern Africa all through the Middle East into the——into Afghanistan, Pakistan, Southern Asia, and Southeast Asia in varying different degrees of depth and violence.

But the one thing that they all have in common is a commitment to an ideology, the central point that you are making. Most of these movements are about overthrowing the host country government because of the grievances that they have, but they use jihad to achieve those ends.

So when I look at it—and this is Fordham University Jesuit training, which you are familiar with, sir, and just take a logical approach here. If you have got a global problem on your hands, what I think this is, we should have a global response to that problem.

This isn't about just the United States. There is no way that we can deal with this problem without enlisting a global response to it.

I think what we can do here is, what we have historically done, is provide leadership. Not telling people how, but setting the framework and the stage to move forward in global—in a global alliance to deal with this.

And that is understanding the ideology. That is working against it.

You know, I believe strongly that we are making a serious strategic mistake in not dealing with radical Islam and letting the moderate; when you understand what is the struggle, the struggle is inside Islam, dealing with these—with the radicals who take a very literal interpretation of the Quran and the Prophet's writings, some of it going back to medieval times, as we know, and they are battling against the moderates and the traditionalists, which is the overwhelming majority.

When we refuse to deal with this, the name of it, which I have less problem with, but more problem with explaining it, and really laying out what this is, we permit the moderates and traditionalists not to have to explain it themselves. They are the theologians here.

We are actually dealing with people whose ideology is steeped in theology. We need those clerics who are opposed to that radical theology to explain why this is wrong, and it doesn't get done.

And that is a serious mistake, and we are tolerating that mistake. We should not let them off the hook in dealing this. I think

that is what al-Sisi was trying to do as a national leader is to reach into them and to get their attention and say, "This is our problem, but it is more your problem."

Mr. SMITH. I am sorry. That is a great answer. We have got a lot of other people to get into—to have the opportunity to ask questions.

I am sorry, gentlemen. If you have an answer to that, if you could submit it for the record that would be great. I want to let some other folks ask some questions.

Thank you, General Keane.

[No answers were available at the time of printing.]

The CHAIRMAN. And I just have to reflect that at least as far back as 2007 and 2008, when Mr. Smith chaired the what we now have Emerging Threats and Capabilities Subcommittee and I was a ranking member, he was on this issue, how do we battle this ideology, which I share the frustration of both of you. We really haven't been able to do that yet.

Mr. Jones.

Mr. JONES. Mr. Chairman, thank you very much.

And I thank the panelists for being here today to talk about the President's AUMF.

And I would like to make a couple points, and then probably, Dean Chesney, I am going to come back to you.

You know, the fact is it is so vague, and y'all have already commented on that, and whether it should be expanded beyond ISIL, as to what groups could be a threat, what groups need to be fought and defeated. Let me make that point.

Also, the issue of sunset, whether it should be sunset or not. I was in the Congress—I have been here 20 years—I was here at 9/11. I was part of this committee at that time. I remember the anxiety of the American people—and also those of us in Congress, by the way, that we had to do something, we had to give President Bush the authority to fight this enemy that had done so much damage to America. So we passed the AUMF for 2001 and then a year or two later we passed another AUMF for Iraq.

Well, I bring that up because we are still there. If there had been a sunset with either of the two, do you think, Dean, that President Obama would have thought he had the authority to bomb Libya?

Bob Gates, the Secretary of Defense, was sitting exactly where you are when my good friend Randy Forbes, who has now left the committee for another meeting, asked Secretary Gates, "If Libya had dropped a bomb on New York City, would that be an act of war?" He never answered. He never answered.

So the point is that Mr. Obama did not come to Congress in any way to say to the Congress, this committee or any other committee, that we have got a problem with Gaddafi and Libya and we are going to attack. That is what has got the American people concerned not just about Mr. Obama, but any President that has any type of authority that he or she can turn their nose up to the Constitution.

And we are complicit, as a Congress, if we give them such authority that there are no limits to that authority, and actually, there are no end points to the strategy that an administration—forget whether it is Obama administration or another administra-

tion—that we become complicit, as Members of Congress who uphold our hands and say, “We will support the Constitution of the United States,” and we know the requirement of the Constitution as it—excuse me—as it reflects to war powers.

So my question to you is that if these 2001 and 2002 had had a sunset, do you think that Mr. Obama would have felt that he could bypass Congress and bomb a foreign country? Because my belief is, as a non-attorney, that if he had done that then we get into international law, that I don’t think any nation, as great as America is, should have the power to just decide to go in and bomb another country because we don’t like their leadership.

And so, therefore, I think the AUMF needs to be vetted very carefully as we move forward. But I want to ask you—if you got a minute, give it to you, I want to ask you that if we had sunsetted those two AUMFs, do you think Mr. Obama would have felt he had the justification to bomb Libya?

Mr. CHESNEY. Sir, you are raising a number of great questions. If there had been sunsets for the 2001 and 2002 AUMFs, and if those moments came and for whatever reason those authorizations were not renewed so that they had gone away, and we reached 2011, when, as we did, the administration deployed our military to use force in Libya, I actually don’t think it would be any different than what actually happened, because at that time there was no claim by the administration that what it was doing in Libya was under color of either of the existing AUMFs.

Instead, it was a pretty broad claim of Article 2 authority inherent in the President. So I think we would have seen that same claim being made, for better or worse.

That claim does illustrate the breadth with which this administration understands its Article 2 authority to act without your participation to be. That was not a situation where there had been an attack on the United States, or at least that that was being claimed as the basis for it.

Instead, it was about the enforcement of the U.N. Security Council resolution, foreign policy interests that were very important, humanitarian interests that were important, but none of which are traditional bases for Article 2 claims of authority to deploy the military.

The CHAIRMAN. Thank the gentlemen.

And just to alert members and witnesses, because we are the largest committee in Congress I have to be pretty strict about the time limit, so I appreciate your understanding on that.

Mrs. Davis.

Mrs. DAVIS. Thank you, Mr. Chairman.

And thank you all very much for being here, for your service, particularly General Keane, and for your insights.

I want to actually turn to something that maybe we have a little more control over, and that is the reporting mechanism.

And, Mr. Wittes, you talked about that.

General Keane, you yourself mentioned in your remarks or in the article that we were 3 years into a failing strategy with the war in Iraq, and you talked about the adaptiveness, and I appreciate that, in terms of our military.

But I guess I am looking for what language you think is appropriate in terms of the reporting mechanism to the Congress? Because there are a few of us who were here at that time and, I don't know, how do you think we did?

How did we do in terms of that oversight role? Because if we were 3 years into a failing strategy, had difficulty asking the questions, and, frankly, a great deal of difficulty getting answers, what is it that we need to do now?

Mr. WITTES. I am very glad you asked that question, because I actually think the reporting requirements that the administration wrote into its draft AUMF should reasonably be regarded as insulting to—probably less to the committees of jurisdiction than to the larger Congress, and certainly to the public.

For the last number of years there has been a quiet but occasionally erupting tension between—I see—sometimes see it—I don't know if it has arisen on this committee, but it has certainly come up on—with your Senate counterparts, where people have wanted to get a list of groups that are covered by the AUMF, and the administration has actually not produced a list of groups that the AUMF authorizes force against. And I think this is kind of a mind-boggling thing that you have a 13-, 14-year-old war in which the position of the executive branch is that there is no—you know, there is no public list of the group of people that we are at war with.

And so I think, at a minimum, the reporting requirements should require public reporting of the list of organizations that the administration considers affiliates, associates, co-belligerents of the organizations that it is authorizing force against.

One of the reasons to integrate the existing AUMF into the old AUMF is so that you can apply those reporting requirements to Al Qaeda, the Taliban, and their associated forces—

Mrs. DAVIS. And in a way, I mean, we are saying associated forces, but not including persons, as in the 2001, as well.

Mr. WITTES. Well, there is a—there is some pretty broad language here about who counts as an associated forces, but I am saying, you know, that is a separate fight. The question, once you have decided somebody is an associated force, who gets to know that, right? And I think this—the Congress should be advised of who is an associated force, and unless there is some compelling national security reason to keep it secret from the public, that should be provided in public forum, as well.

Secondly, the administration's draft talks about—I don't have the language of it in front of me, but it talks about a semiannual report or a twice-annual report on specific actions taken under the authorization. Now, again, there is no clarity about what "specific actions" mean, and there is some question if you have duplicative authorizations whether you are taking it under this authorization or under the other one that doesn't have the reporting requirements.

So I think that, you know, in the draft that Professor Chesney and our co-authors and I wrote, we laid out what we thought were a sort of robust and reasonable set of reporting obligations. The text of that is in my prepared statement, and I still think those make sense, honestly.

Mrs. DAVIS. Yes.

Time is running out. Mr. Chesney, I appreciate that you would agree with that.

General Keane, can you comment on the reporting and the role of the Congress, and again, these 3 years into a failing—

General KEANE. I don't have any problem with reporting requirements. I do believe the mechanism for oversight of military force being applied is already here, and your committee is central—central to that. I think it really has much to do with the rigor of that.

The 3-year failed strategy we had in Iraq, I don't suggest that the committee probably would have uncovered initially that the strategy was not going to work, but I think when the evidence was there that it was not working I think the committee does bear some responsibility to do thorough assessments. If these are the goals and objectives we are trying to achieve, how are we doing against these goals and objectives? And then that kind of analysis was there and there was evidence that the strategy was failing.

So I think the mechanism is really already here. I think it has to do with rolling up the sleeves and doing rigorous assessment and analysis.

Mrs. DAVIS. Thank you.

The CHAIRMAN. Thank you.

Mr. Wilson.

Mr. WILSON. Thank you, Mr. Chairman.

And thank each of you for being here today.

And, General Keane, I want to thank you for your service on cable news. It is always really so solid, the information you provide; it is so meaningful, and so important to the American people.

It is particularly meaningful to me. I have four sons currently serving in the military of the United States, and every time I see you on the air it is a reminder to me of how capable and competent the American military is. And so I want to thank you for that.

I also would like your input on what suggestions do you have for the AUMF, and what language should there be for the flexibility for our President to be able to lead us to victory?

General KEANE. Well, I think the language in the—that we found in the other two AMFs—AUMFs, excuse me, where we are talking about using the appropriate and necessary force, a very short statement to that effect, really is appropriate.

As I stated in oral statement, I don't believe we need, nor should we have, a time constraint in it. Why cast any doubt about our resolve? Why do that?

This administration has a pattern of doing that in the past, as we recognized when the President I think rightfully made the commitment to escalate our forces in Afghanistan. In the same public policy statement he announced the termination of that force, as well. I think that is an unnecessary flag to our enemy about our lack of commitment, and I also think it does much the same with our allies.

So I would avoid that for those reasons. And I do believe that, given the authorities the Congress has and the oversight responsibilities, you can get at this another way.

I would agree with Mr. Chesney that if you kick this thing down the road a little bit, a few more years, then some of that does go

away, in terms of the lack of resolve and commitment. But 3 years I think is unacceptable.

The ground force constraint I think has to be absolutely removed because of what we are dealing with. We are facing an enemy that, in the front of us, we have to deal with largely militarily. At the same time we are trying to counter their finances, undermine their ideology, but this right now it is a central military problem.

And we already know that the only way that we can defeat this force is with effective ground operations. So anything in this document that would cast doubt on our ability to conduct decisive and effective ground force operations seems to me to be misguided and it should not be in the document.

I would bow to my—Mr. Wittes on my left knows far more about the intricacies of the legality of this than I do, but I—and the fact that the President would still have the authority even though the appearance of it would be that he does not. I would not want that confusion. I don't want our troops to have that kind of confusion. It doesn't make any sense to me.

And those are the essential issues for me. I am for a President having the latitude to conduct military operations without these constraints on it.

Mr. WILSON. And it does appear to be a limitation on ground troops, but with loopholes, that certainly has to be of concern to the American people.

And, Dean Chesney and Mr. Wittes, it has been indicated that y'all have provided the language for AUMF. Has that been provided to the American people and can you give a summary?

Mr. WITTES. So this was written back in November in a post on Lawfare by the four of us. We had written a draft AUMF, a much more complicated draft, about a year and a half earlier than that, and so this was a response to some of the criticisms that we had received, and also a response to ISIL, which had emerged in the meantime.

And what we tried to do was to authorize force against the Taliban, Al Qaeda, ISIL, and their associated forces. We did not have a ground force restriction, in which I don't think any of us particularly believed, and we did have a sunset provision that was also 3 years.

But I think there is a very simple solution to the problem of triggering, flagging for the enemy a lack of resolve: Make the thing longer and don't call it a sunset.

Mr. WILSON. Thank you.

The CHAIRMAN. Mr. Garamendi.

Mr. GARAMENDI. Thank you very much, Mr. Chairman. And a big thank you to you for conducting this hearing and, I understand, another hearing coming up next week or thereafter on the military side of this, what might be necessary.

We are doing exactly what we should be doing as Members of Congress. In my view it is absolutely essential for Congress to act. To use the 2001 or the 2002 AUMF as a reason for a new war, actually, a war that was declared over in Iraq is, in my estimation, just dead wrong.

And we have a responsibility. We represent the American people, 535 of us plus one, the President, and we have the obligation to



deal with this. Not easy. Easier to duck. But it is our responsibility.

With regard to the 2001 AUMF still being in place and the sunset, the 2001 AUMF proves the reason for a sunset; an unending war can't continue it. We have got to deal with this, and the sunset seems to me to be absolutely appropriate in that.

And 3 years requires that the next Presidential election be about war. And that is a really good thing for the United States to debate and to discuss.

With regard to the issue of, and this is coming to a question, the issue of limitations of the use of boots on the ground, which the President says he wants to limit but then writes in such a way as probably not limiting, is there any debate between our two esteemed lawyers and general about the ability of Congress to use the purse to limit the use of ground troops, for example, no money for infantry brigades, Army brigades, artillery, and et cetera, but perhaps money for special forces and the like? Is there any doubt about the ability of Congress to limit using the purse?

Mr. CHESNEY. I don't think there is any serious doubt about that. I think amongst those who debate these war powers issues, one common touchstone is that the power of the purse, there is very little Congress can't accomplish with it.

We can imagine a bizarre hypothetical where somehow that power is leveraged to say that the President is not the Commander in Chief but instead fill-in-the-blank will have command. But obviously nothing like that sort is being contemplated or talked about here. So as long as you are away from that core superintendent's function, I think the power of the purse gives you a lot of leverage if it can be used in a particular way.

Mr. GARAMENDI. Any debate about that amongst the——

General KEANE. No debate from me. I mean, you have done it before. The Congress stopped a war in Vietnam. It unauthorized, no longer authorized our advisors, no longer authorized the use of air power, and that war ended.

I think it is the most powerful mechanism that you actually have.

Mr. WITTES. I have nothing to add to that.

Mr. GARAMENDI. Well, given that, and given the debate which will go on forever about how you define "boots on the ground" or limitations on what can actually be done, it just seems to me that we could very simply say, "You have the power to bomb; you have the money to bomb; you have the money to do special operations or all of the other things, but there is no money for the brigades, infantry, artillery, et cetera." And I think that is a good, clear way to limit it.

It also gives this committee and the Congress the opportunity at any moment to change its mind and appropriate the money for those purposes. So we would be constantly and appropriately, therefore, engaged in the ongoing issue of the war and its outcome.

The other issue that is, I think, one that we are going to have to deal with is this issue of limitation. As I said before, I think it is absolutely essential. Three years is perfect, in my view.

I know you disagree, that maybe the next President ought not have to deal with it immediately. I strongly disagree, that the next

President must deal with this up front in the campaign, tell the American people whether they want war or not and how they would conduct it.

The other issue is the geography here. We are going to go round and round on geography, and I again, my personal view of this is it must be limited, and probably doing that by clearly stating who we are at war with.

And a final point, and I guess this won't be a question but rather a comment, and that is, General, you are absolutely correct about the ideological war that we must be engaged in also. It is not just going to be a military war; this is a question about ideology and our necessity of dealing with that reality.

Thank you, gentlemen, for the clarity on the power of the purse.

The CHAIRMAN. Mr. Franks.

Dr. Fleming.

Dr. FLEMING. Thank you, Mr. Chairman.

Thank you, gentlemen, for being here today.

General Keane, one of my primary concerns above what is contained within the AUMF is the fact that I still don't know a clear and coherent strategy upon which we will use the AUMF. The President has not outlined—in fact, at one point he even said we didn't have a strategy, so I have a deep concern about whatever the AUMF ends up being, what is going to be the strategy that goes along with that.

I would love to hear what you have to say about that.

General KEANE. Well, you know, I agree with you. And it is pretty frustrating about what is being said and also what is not being said.

I think, clearly, just dealing with ISIS and dealing with Iraq and Syria, what is the strategy to degrade and destroy, defeat is a much better word than destroy, ISIS? We are saying to ourselves that we have an Iraq strategy first, which is to reclaim the territory that is lost.

To do that, we know we need ground forces to do it. The air power has largely stalled, effective air power has largely stalled ISIS offensive campaigns, no longer really taking territory in any large way in Iraq.

It has taken territory in Syria since the bombing campaign began. That is another story.

We are depending on local indigenous forces to be that ground force, but then we also know that we have problems with this force, that it is not a homogeneous force. It is Peshmerga, it is Shia militia, it is Iraqi Security Forces, it is Sunni tribes.

And we also know that we want air power to be effective, but we are not going to put any boots on the ground to help that force be more effective. My simple way of dealing with this: If you think you have a weak hand, do what you can to strengthen that hand.

What we want to avoid doing is what the Congressman from California would like to constrain the President from doing. We all want to avoid using combat brigades to go deal with this. We want these people, the Iraqis, to bear the burden of this, not us, on the ground. You won't get anybody in the military signing up for sending large combat brigades in there.

But that strategy, I think, is flawed because we are not providing enough assistance to this local indigenous force that is weak, and by that I mean is special forces who can go with them on the ground, forward air controllers to help them, significant amounts of Apache helicopters, AC-130 gunships, JSOC [Joint Special Operations Command] direct action forces to go kill leaders like we do in Iraq and Afghanistan very successfully, on the ground, I may say. And these are questions I think that you can ask the military leaders when they come forward.

In Syria, sir, there is no ground force.

Dr. FLEMING. Okay. And I appreciate that and——

General KEANE. There is no strategy in Syria to defeat ISIS. We do not have a strategy to defeat ISIS in Syria.

Dr. FLEMING. So it really is kind of based on a fantasy ground force. I get that, yes, we want to stand up or re-stand up the Iraqi forces, and that might work. But in Syria, and now I believe ISIS has moved into Libya, you know, we voted last year for the Free Syrian Army. We still don't know who the Free Syrian Army that we are arming and training, which could take years and it is small in number—even the President himself said they were pharmacists and doctors.

So the question here is, without leadership from the United States and without boots on the ground that we can trust from an army that is well-trained and well-equipped, how in the world does this vague strategy work?

General KEANE. Well, it is not going to work. We have a plan to reclaim the territory that was lost in Iraq and hopefully return the sovereignty of Iraq to its borders. There is a plan for that.

But what you are not being told is that the strategy in Syria is really only to degrade ISIS and only—and to contain it, because that is really what is on the table. The Free Syrian Army, we lost the opportunity to help them when they were—when they had the momentum in Syria and when they needed our help.

They are down to several brigades. We are going to train 3,000 to 5,000 a year of new recruits. Heck, ISIL gets that in a few months. It doesn't even match.

There is no reality to that strategy if you accept the President at his word that he intends to destroy ISIS. What he intends to do is degrade it in Syria, contain it, and defer that problem to his successor. That is the strategy in Syria.

Dr. FLEMING. Thank you. I yield back.

The CHAIRMAN. Ms. Duckworth.

Ms. DUCKWORTH. Thank you, Mr. Chairman.

Gentlemen, I thank you for being here today.

And, of course, thank you, Mr. Chairman, for bringing this hearing—this issue to our hearing.

I am encouraged by the fact that we are finally having this debate because I think Congress failed last fall to not only have an honest discussion about our overall strategy to defeat ISIS, but we also failed to discuss the underpinning authorities for that strategy. I think regardless of where you come down on this issue, it is important that we have the discussion, so I am glad that we are here.

I want to first off just say that the paramount importance is to make sure that our troops who are sent into harm's way know that all of America is behind them. When they go to battle and they go to fight and they go to potentially lay down their lives for this Nation, they need to know that we are behind them and that they—that we will be there to help provide them with the resources that they need to do the job that we ask them to do.

That said, I think the AUMF is critically important. I actually voted against the repeal of both the 2001 and 2002 AUMFs in the past when they came up on the floor as amendments to NDAA [National Defense Authorization Act] and defense appropriations not because I fully support them, but because there was no alternative at the time.

Now that we are looking at this new alternative, I like the fact—the proposal that this new AUMF should subsume and we should get rid of the 2001, and I agree with that.

What I do want to do is to drill down on the geographic boundaries portion of it, and specifically the Brookings Institution's proposal to, instead of having a geographic boundary, a legal boundary, one that is in conjunction with international laws for the use of force and sovereignty.

So could you—is it Wittes or Wittes?

Mr. WITTES. Wittes.

Ms. DUCKWORTH. I apologize.

Mr. WITTES. No worries.

Ms. DUCKWORTH. Mr. Wittes, could you sort of drill down on that for me a little bit? Let me just give you a specific example and see if I understand this correctly.

This legal boundary would basically say to American commanders on the ground, whom we should trust, by the way, because we put them in charge and they know what they are doing when it comes to military, the use of military force, so we are telling them that in Iraq and Afghanistan, because we have the cooperation of those nations' governments, "You can be in there, you can do your job," but you can't go and invade Pakistan without coming to Congress and Congress authorizing that first because there is—we don't have the invitation of the government of Pakistan to come conduct operations within their territory.

What does this do for countries or failed states; places like Yemen, places like Somalia back in 2001? You know, if these guys run into—or in Yemen, does this then put constraints on our military commanders and on our troops to not be able to go after ISIS forces in Yemen, for example?

Mr. WITTES. So I have got 2 minutes to answer this question—

Ms. DUCKWORTH. Go ahead.

Mr. WITTES [continuing]. And I am going to do my best.

Ms. DUCKWORTH. You have the full 2 minutes.

Mr. WITTES. So, look, the—what we said in the proposal was that Congress authorizes action in any location that it—that action—military action would be appropriate and lawful under international law of sovereignty and the use of force. Now, in circumstances, for example, where you would implicate the President's Article 2 self-defense authorities, of course he wouldn't have to rely on this authorization. So in the exigent, imminent defense

situation, he can operate under his own authority to the extent that he needs to.

There are two ways to satisfy the sovereignty barrier under international law. One is if you have the consent of the country in question. Yemen tolerates our conducting drone strikes against AQAP; Pakistan has sometimes permitted our, you know, our use of drones to strike targets in Pakistan. That alleviates—ends the sovereignty problem.

The other way is that the U.S. position is that it has the authority to use force against a—on the—against—on the territory of a non-consenting state when that state is either unwilling or unable to contain and deal with the threat that is emanating from its soil against us.

And so what this would say is if one of those two, that is if that is your position as the administration on your international authority to use force, if you are within it then you are within Congress' blessing and authorization. But we are not giving you authorization to do stuff that would otherwise violate international law as you understand it.

Ms. DUCKWORTH. Very good. Thank you very much.

The CHAIRMAN. That was impressive.

Mr. Turner.

Mr. TURNER. Thank you, Mr. Chairman.

Gentlemen, one of the things that we are being asked to do is to repeal the 2002 authorization for the use of military force. As you know, the 2002 AUMF with—concerning Iraq found that Iraq poses a continuing threat to the national security of the United States and international peace and security in the Persian Gulf region, and because members of Al Qaeda are known to be in Iraq.

I would like your opinion, because it would seem to me that even though the Saddam Hussein regime has been removed from power, that the objectives in the 2002 resolution remain: protecting both United States and Iraqi minority groups as well as ending terrorism in Iraq. All of those objectives are still in doubt, and therefore it does seem that there may be a compelling legal rationale for keeping the 2002 AUMF in force since the President obviously is finding that he has very broad authority under it currently.

So do you believe that leaving the 2002 AUMF concerning Iraq in place would be a conflict, and would you recommend removing the text that repeals the 2002 AUMF? Any thoughts?

Mr. CHESNEY. So when the administration revealed that it was relying on the 2002 Iraq AUMF as part of its basis for its operations in Iraq, this precipitated a lot of debate amongst folks about whether this is a persuasive claim under that authority. The objectives, as you say, the objectives of the 2002 authorization are still present.

The question is, the authorization was specific to the threat posed by Iraq. What do we mean by that? What is the best reading of that authorization?

If it means threats to the United States that are emanating from within, or that involve something happening within the borders of the state of Iraq, that is an argument for saying that it fits, and I guess that is the argument that the administration adopted. If it is read, instead, to mean that Iraq in 2002—that is referring to

Saddam Hussein's regime and the government of Iraq as the threat—then it doesn't fit well. And that was a view that was a little bit more plausible to me, but reasonable lawyers, including some of my colleagues on Lawfare, we disagreed on this point.

The interesting question today is, is there anything you get only with the 2002 authorization that isn't separately covered either by the 2001 authorization against Al Qaeda or a new authorization that this body may produce against ISIL? And I am hard-pressed to think of what that might be.

We would have to imagine a situation in which force needed to be used against some entity that was not plausibly an associated force of ISIL nor an associated force of Al Qaeda. We might imagine falling into that category Shiite militia, Hezbollah, the groups that are on the Shiite Iran-sponsored side of things.

We are not, to the best of my knowledge, at least in the public record, we are not currently using force or contemplating the use of force against them. Indeed, in some respects we are fighting in the same direction against ISIS with those entities.

You can imagine, though, a situation where it does seem appropriate, a new fact pattern. In that circumstance, the President's Article 2 authorities would be ample to at least initially respond, and I think the wiser course would be to come back to this body at that point if something more than Article 2 were needed.

Mr. TURNER. Other thoughts? Any other thoughts on the panel?

Mr. WITES. I mean, I very much agree with that.

Mr. TURNER. Excellent. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Mr. O'Rourke.

Mr. O'ROURKE. Thank you, Mr. Chairman. I wanted to start by thanking you and the ranking member for holding this hearing.

I can think of no more important decision that we will make as Members of Congress than whether or not to send our Armed Forces into harm's way, and I appreciate the fact that we have got the subject matter experts before us to help us make a more informed decision. I hope that we will have more hearings on this subject. It certainly warrants it.

And I also want to agree with the fundamental questions asked by the chairman, you know, what is our strategy? And the ranking member, how do we help out without making the problem worse? I think those are the questions of the day, and I realize very difficult to answer.

General Keane, I couldn't help but agree with you when you said that we shouldn't put limitations on our military if we are asking them to go in and do a very difficult job, if we want to acknowledge that there are no ground forces today in Syria that we can rely on. It is very questionable whether there are ground forces in Iraq that we can rely on that are not our own.

And so if we are going to go in, and if we want to win, then we need to do whatever is necessary to do that.

But I also think about the service members at Fort Bliss, whom I have the honor of representing, the veterans who have come back from wars throughout our history, including the most recent engagements in the Middle East. And while I agree with Ms. Duck-

worth that they want to know that we have their back and that we support them, I think what they want to know even more than that is that we have a plan and we have a strategy before we send them into harm's way.

So I would like to ask you to do this, I don't know that in the 3 minutes remaining we can define what that strategy should look like. If you can, go for it.

But how about this: Can you define what winning looks like? Can you define the conditions that would be necessary in Iraq and Syria or vis-a-vis ISIS for us to conclude military operations?

And I will start with General Keane and then we can move to your left across the panel.

General KEANE. Well, ISIL is a little different organization than Al Qaeda because owning territory, it provides them a legitimacy and it is part of their belief system. So you fundamentally, to defeat them, have to begin by taking their territory away from them.

They will largely stay and fight. We found that when we went into Afghanistan, where Al Qaeda was initially at post-9/11, when they were met with some sizeable force—not necessarily a decisive force—they ran into the mountains and hills of Pakistan. They fled to fight another day. This organization will not do that.

So what we must do is take the territory away from them which provides them their legitimacy. And by returning Iraq to its sovereignty, to its borders, that is a good thing and that is what winning looks like.

The same thing in taking the territory away from them in Syria.

That would not stop ISIS from conducting terrorist activities in those same countries from outside the country or from a small safe haven in it, or using terrorist activities in cyber terrorism, which they are also doing, in other satellite countries. But where core ISIS is, we must take the territory away that they own, and that begins to look like we are winning.

That doesn't mean ISIS goes away, because as the map I showed you, they have affiliates out there in satellites that they are trying to establish governance with and relationships with. But this is central to ISIS.

And let's face it: ISIS has quite an appeal in the world today, and why is that? Because they have the appearances of winning. They are standing up to the United States and powerful nations; they are humiliating these nations by how—the barbarism and butchery that they do on the Internet. And they have had some impact with citizens in other countries killing their fellow citizens, as well.

When you start to take this territory away from them, and you start to kill and capture them, and you find them in shackles, and they are moving into detention centers by the scores, this image, this attractiveness of ISIS begins to fade because now it is a losing organization. And it starts to impact on its ability to recruit people. Nobody wants to be a part of a losing, failing organization.

Mr. O'ROURKE. Yes.

I am not going to have time to hear from the other witnesses, but I would love to get your responses for the record: What does winning look like? What conditions will have to prevail for us to withdraw military forces from that region?

Thank you, Mr. Chair.

The CHAIRMAN. Thank you.

Mr. Wittman.

Mr. WITTMAN. Thank you, Mr. Chairman.

General Keane, Mr. Chesney, Mr. Wittes, thanks so much for joining us today.

General Keane, I wanted to ask you, from your perspective, and examining all the issues around an authorization of the use of military force, what would be some of the questions that you would suggest that we ask of our military leaders, with all the conditions that have to be considered here: the controversy of timeframes, the extent of which—how we identify the adversary, how we go after them, what should the scope and breadth of that be? Give me your perspective on some of the aspects that we should get the military leaders' perspective on?

General KEANE. Certainly. Well, first of all, I think you are bringing General Austin in here, CENTCOM commander. I have known him for years, worked with him, a very fine officer, and certainly with his depth of experience I think you are going to get all the answers you want, but here are a couple of suggestions.

Number one, we are so dependent on this indigenous force in Iraq, I mean, it is appropriate to find out—get an assessment of the quality of that force and its reliability. After all, we did see this Iraqi army, despite all the years of investment in it, painfully watched it collapse in the face of ISIS, which wasn't that much of an overwhelming force. The Iraqi army outnumbered ISIS somewhere in the neighborhood of eight-to-one, but yet it collapsed in the face of it.

So what has happened in the last year or so that changed that? This is crucial to our success. And what could we do, as the coalition, not just the United States, to help that force be better; not just in training, but advising it and also giving it military capability to assist in that force?

What kind of timeframe are we really talking about here? Is this sometime this year, as the media seems to be reporting, and also CENTCOM gave us an awful lot of information on that themselves, which I was a little surprised with, in terms of the qualitative approach and quantitative approach to the force itself. But that is an important issue.

In dealing with Syria itself; let me come back to Iraq.

One of the key dimensions in Iraq is clearly the Sunni tribes, and where are we in the growth and development of the Sunni tribes' willingness to participate under arms? And I know we are doing—we are conducting some assistance of them.

Most of them are reconcilable, and we know these leaders very well from our association with them. There are a few irreconcilables from the previous Saddam Hussein regime, and they are supporting ISIS; they always will. Where are we with that in—and the Abadi government's willingness to be politically inclusive with them?

Another issue deals with Shia militia itself. The Shia militia is a very strong force. The cleric Sistani asked for popular support for it.



It goes well close to 100,000-plus, maybe close to 200,000 volunteers who have thickened the Iraqi Security Forces. The best of the Shia militia forces are those that are backed by Iranians and have had a role in training them. What does this mean to us as we go forward in terms of the Shia militia's role in helping to reclaim territory?

Also, are we finally equipping the Peshmerga with what they need? They have been complaining to every one of you and to anybody that visits them that they still haven't got the equipment they need.

In Syria the real issue, as I have tried to point out, is the ground force itself. What will be the ground force that will eventually defeat ISIS in Syria? And I think if the answer is the Free Syrian Army, I think you need to push pretty hard on that, because it doesn't seem to be viable to me.

I believe it is an Arab coalition that will have to be put together. They will probably ask us to lead it, and I think it is likely we probably should. I don't think we could do that unless we shut down Assad's air power.

And I also believe that the administration doesn't want to do any of that. And even though Turkey, the UAE [United Arab Emirates], Saudi Arabia, and Jordan want the administration to do that, in other words, shut Assad's air power down so that finally we can start to do something against ISIS and you are not bombing the Free Syrian Army force every day. That is what he is doing.

I think the elephant in the room there, quite frankly, is the nuclear deal with Iran, that the administration does not want to push on Assad because of the relationship with Iran. Iran propped that regime up; it rescued that regime from failure.

And if we pushed on it I think it would jeopardize the pending potential deal on nuclear weapons, which I think the administration believes is its number one priority. Probably wouldn't say that, but I believe it is.

I don't think General Austin will get much involved in that because that is a policy question above his head, but certainly these other things he would be prepared to answer, and I think you will get some very straight answers from him.

Mr. WITTMAN. Very good.

Thank you, Mr. Chairman. I yield back.

The CHAIRMAN. Thank you.

Mr. Norcross.

Mr. NORCROSS. Thank you, Chairman. Certainly appreciate it.

And, you know, one of the duties that we have is to make decisions on these very difficult items, and it weighs heavily certainly on my mind and those of the people that I represent.

Certainly I have to agree with the witnesses when they talk about three reasons that we are even considering this: obviously the moral reason, which I agree with; the age and scope of the old AUMF; and certainly, it is our job, which actually brings me to the point of the question.

King Abdullah was here 2, 3 weeks ago, and it was the day that the video was released of his pilot being burned to death in a cage; that barbaric video. He stated, "This is our war," indicating that

he and his partners in the Gulf. It can't be America against them. "We need your help, but it is our war."

And the other item which really resonates with me: I have been fighting this for 1,400 years, and brings me back to what Mr. Smith had said is beating down the mole. So we heard the question earlier talking about what is a win, and certainly the nuts and bolts of a win can be debated. But I think those who we are targeting, it is not a team sport that they win and lose; it is a way of life.

And I think we have heard ample evidence of that, that they are willing to give everything up because they believe in this at a core level. Whether we think it is insane or not is immaterial.

But you had talked rather, General, directly against a timeframe. Couldn't the same argument be spoken about the timeframe is, each year we authorize a budget, and in many ways that is a timeframe.

I think it is the responsibility of the next President and next Congress to review what we are doing. And I don't think anybody in this room or in America doubts the resolve of the American people to back up our troops.

So I want to get your opinion on where we are going with the timeframe again, given that at any point they could point to the fact that we wouldn't fund this or the budget and appropriations. How is that different than the resolve of a 2- or a 3-year AUMF?

General KEANE. Well, in my mind, I mean, the budget is an annual process, and that is quite different even though there are plenty of authorities in a budget, obviously, to fund military operations. But that is quite different from the AUMF, where you are authorizing military force for a specific purpose and then tying a timeframe to that authorization.

I am suggesting that why do that when you have plenty of authority yourselves in your normal oversight of the Department of Defense and the executive branch to make certain that you understand what is taking place and the progress that is taking place and you have the power of the purse in any event, which is your ultimate authority? I think it sends a message of a lack of resolve.

You know as well as I do that our friends in the region, and if you are speaking to them you know what I am about to say, that they have been questioning America's resolve in this region for some time now.

Mr. NORCROSS. Exactly why we are here today.

General KEANE. And why add to that? Why add to that doubt about our resolve? After all, we are going to be largely depending on them dealing with this problem for years to come.

And secondly, I think it sends a message to the enemy that, well, America is not that serious. We are going to take a look at this in 3 years and see if we should be doing this. When anybody who is looking at this, I mean the reason why we have an authorization for military force is because I think it is an unstated, it is an unstated understanding that this—it will be protracted, that this is going to go on for years.

Mr. NORCROSS [continuing]. Like a budgetary issue that we would be discussing each year. Couldn't they look at that from the very same perspective as you are suggesting?

General KEANE. The normal oversight that takes place and the tough questions that are asked of, you know, the Department of Defense leadership, both civilian and military, that kind of rigorous analysis is never going to get communicated in the same way that the authorization for military force and the time constraint that is associated with it would be. I mean, that is a headline, and rigorous analysis in terms of the progress we are making is not. I think those are two very different things and quite separate, frankly.

Mr. NORCROSS. Thank you.

The CHAIRMAN. Mr. Franks.

Mr. FRANKS. Well, thank you, Mr. Chairman.

And thank all of you for being here.

General Keane, I don't ever want to let a general stand before this committee without expressing gratitude for your service and for just your commitment to protect human freedom, especially my little babies. I appreciate it.

I was especially moved by your comments related to the resolve that I think the enemy tries to consider as much as anything else. And the administration's AUMF mentions using American forces, "in support of partners on the ground and local forces to combat ISIS."

One of my concerns is that there is an ancillary effect that it might end up where we are even indirectly funding Shia militia proxies of Iran, and it might actually increase their standing in the world to the extent that it might actually increase their opportunity to one day gain a nuclear weapons capability. And do you think that the AUMF, as it stands now, opens us up to the potential of the ancillary effect of fighting alongside Iran?

General KEANE. Well, clearly we cannot disguise the fact that there are Shia militia that is largely protecting Baghdad and also the shrines, the Shia shrines, north and south, that are present there, and some of them have been trained by the Iranians. And they also have been effective, and they will continue to be effective. So that reality is on the ground and it is not going to change.

That does not mean that when Iraq gets its total territory back and its sovereignty is returned to its borders that Iran is going to have a grip on Iraq that is totally dysfunctional. The Iraqis don't want that. Certainly Abadi wants no part of that.

He also did not turn down, his predecessor didn't turn down, when he asked for help, airplanes started arriving day one. And we put off help for a few months, if you will recall that. And he was not about to turn that help down from a practical matter.

When you look at it geopolitically, Iraq wants to stand on its own two feet. Iran will always have an influence there, given its neighbor and also given the fact that they have helped them here.

But I do think that the coalition that is coming together to help Iraq and to return its sovereignty, we will have a long-term strategic relationship with Iraq on a path that we had intended to do back in 2009, when we had driven this Al Qaeda in Iraq into their rat holes. So I think those opportunities are still there.

I don't think that the Shia militia backed by the Iranians forecloses on a strategic relationship with Iraq over the long term that makes sense to us in terms of a country that has wealth, an edu-

cated class of people, and is a force for stability in the region. Those opportunities are still there.

Mr. FRANKS. Well, thank you. It occurs to me that emphasizing our relationship to the Kurds and helping them as much as possible might be a safer alternative there, but one of the great concerns that I think all of us have is that we—you know, one of the gentlemen mentioned here, we have been fighting this radical Islamist ideology for 1,400 years. And so without defining our enemy or essentially by that ideology, it is difficult for me to know how that we engage them strategically.

I mean, we have fought terrorism tactically very successfully. We have had unprecedented success. But I think that we have failed to engage them strategically.

And so I guess I would ask what would your thoughts be to some language in an AUMF that might sort of—I know it is deep water, but to holistically identify this ideology so that we are able to confront it where it emerges instead of just kind of coming up with some fuzzy associational definitions?

General KEANE. You know, I sympathize, you know, with your desire to do that because you are frustrated, like I am, that we don't have a comprehensive strategy to deal with this and it has gone on far too long. And when you watch the growth of—the continued growth of Al Qaeda, and now watching the growth of ISIS, it is particularly difficult to recognize that we still haven't come to grips with it.

But this is not the document to put those means in there, even though you are frustrated and you are tempted to want to do that. It is just inappropriate to do it.

I think it would set a terrible precedent for authorizing military force. I think you would get significant pushback from the—and justifiably so—from the President and his team.

I think bringing the national leadership in here and putting them in front of you and asking them to explain what is the strategy to deal with radical Islam, and evaluating that and assessing that, and pushing on them, I think that is much more appropriate to deal with than to try to put some expression of it in this document—in the authorization for military force. I think it is inappropriate.

Mr. FRANKS. Thank you, sir.

The CHAIRMAN. Mr. Takai.

Mr. TAKAI. Thank you, Mr. Chairman, and really thank you very much for having this hearing. As many have mentioned, this is a very important issue for all of us here and definitely for our constituents back at home.

I looked at the request from the President in the form of this joint resolution, and under section (c) limitations it says the authority of the grant does not authorize the use of the United States Armed Forces in, “enduring offensive ground combat operations.”

So my question to you on the panel is, what does that mean? Does it actually refer to the length of time during which the operations will be ongoing for 3 years? What is the scope of the operation, from your perspective? And is it, in fact, some undefined relationship between time and scope?

Mr. CHESNEY. It is not well defined. It is a severe problem with the language in section 2(c). And it is not just one problem of lack of clarity; it is multiple problems.

"Enduring" has no particular legal meaning. That, in some people's minds, could reasonably refer to years; in other people's minds, the Secretary of State the other day, on Tuesday, referred to a couple of weeks or a few weeks. You know, reasonable people can disagree about what "enduring" means.

"Offensive" is difficult to describe. So, for example, the upcoming operation to liberate the city of Mosul, is that an offensive operation? You can see where someone would view it that way.

But on the other hand, it is not like ISIL was in that city all along. ISIL came in and took it. Is it defensive to drive them back out?

"Ground combat." If you have forward air controllers who are on the ground and they are directing air strikes or assisting with the direction of air strikes, is that a ground combat operation?

There are ways to try to handle this by offering statements, like the President's transmittal letter, referring to, well, here is a list or an enumeration of particular types of activities that we mean to be okay. But at the end of the day, none of that gets enacted in the AUMF. The AUMF's text will say, "No enduring offensive ground combat operations," and that language should be dropped.

Mr. TAKAI. Okay. I have another question, and maybe you can help me with this.

So there have been many mentions, I mean, if you take a look at the language it also repeals the 2002 AUMF, but my reservations are in regards to the still-in-effect 2001 AUMF. So my question is, and in fact, many people have already said it, the conflict that we are in right now, what is happening right now is based on the 2001 and 2002 AUMFs, so what is your perspective with the fact that the 2001 AUMF will still be in effect based on this draft? What does that mean?

I mean, we are currently operating with those two AUMFs. Is, in fact, this particular draft necessary to continue operation?

Mr. WITTES. So what it means very simply is that the additional authorization here is purely additive, not there is no, you know, the interaction between this and the underlying document is that this merely adds authority. It does not tailor authority. It doesn't really, despite the optics, at least as a legal matter it doesn't limit authority.

And I think if I have one message for this committee it is, think about the new authorization in interaction with the prior authorization, because otherwise you end up talking about restrictions that aren't real restrictions, and you also end up imposing, you end up doing all kinds of things that you don't know you are doing or you don't mean to be doing because there are these other documents out there.

And so think, think about it as though you had to today answer the question, what force do we want to be authorizing overseas in general against the groups that we might want to use force against. And some of that involves rewriting the old AUMF, and some of it involves the discrete expansion of it into the ISIL and associated forces department.

But think about that question holistically. Don't try to think about it as, you know, hey, what can we add that is on ISIL in particular, because then you end up with restrictions that don't seem to mean what they say.

Mr. TAKAI. Okay. And then one more question, and I guess we will have to wait for your response in writing, but I am just questioning why you think there was no geographical limitations put in this current draft. So if you can think about that and maybe send us the information, I—

Mr. WITTES. I can give you a 2-second answer to that: because the administration wanted to maintain flexibility.

Mr. TAKAI. All right. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Gentlemen, thank you for being here.

And the authorization that the President submitted to Congress lists one terrorist group in two countries. I have got a Defense Intelligence Agency report right here that is unclassified that says that we are chasing 41 terrorist groups in 24 countries. And I think that one of my concerns, or I know one of my concerns, and I think other people's concerns, with the way the authorization is drafted is, what if they simply change their name or what if they simply cross borders into another country?

The other thing that I would point out is that the President had the authority several months ago, when we first saw the ISIL convoys, to take action at that stage and he chose not to, and I think that one of the reasons that we are in the situation we are today is because they were indecisive at that point, and quite honestly, it is almost like they let them kill enough people that now all of a sudden they have to do something about it.

I want to go back to 2011 for a second. The decision was made to take Gaddafi out, yet the United States did not secure the weapons in Libya. I would like to know what do you think happened to the weapons in Libya when Gaddafi was removed, since we did not go into the country and secure them?

The other thing I would suggest is that the U.S., through the State Department, for years has been undermining Assad and the central government of Syria. That, to me, seems to have been one of the things that has allowed these terrorist groups to grow.

And then finally, I would like—and, General, this may be more of a question for you because of your military experience, what does the hold force look like? I have no idea that we can move these terrorists out of any territory that we choose to move them out of, but what does the hold force look like to hold that territory? Because if we can't hold it this time, we are simply going to be right back in there again.

General KEANE. Okay. Well, that is a mouthful. Let me try to get to you with some of it and hopefully leave some time for others. But, you know, in terms of the enemy itself, I think saying "ISIS" and also putting the word "associates" in there clearly sends a message that this is—ISIS, as I tried to show you on ISW's map, clearly has intent and is moving outside of ISIS, the Islamic State of Iraq and al-Sham, which is essentially the Levant. And you would

not want to restrict the President geographically or in terms of what this enemy calls itself and who it is affiliated with.

It doesn't mean that on that map that is in front of you that we would obviously be dealing with ISIS in all of those countries. I think we would have to give the President a lot more credit than that. But the fact of the matter is, if we wanted to conduct a counterterrorism operation against ISIS in Libya because al-Sisi asked us to do that, and we want to do it together, and we have got good reason to do it, that may be something the President would want to consider and we would want him to have the flexibility to do that.

Mr. SCOTT. Do you agree that he has the authorization to do that today?

General KEANE. He could do it today.

Mr. SCOTT. Absolutely. I agree with you—

General KEANE. I agree with that, but I also think that this document, because this is a protracted war and because of who this enemy is and the scale of it, I do believe the AUMF is appropriate.

And weapons in Libya, look at three times we have made the same mistake. We went into Afghanistan, Iraq, and Libya, deposed a government, and never had very good plans—

Mr. SCOTT. Yes, sir.

General KEANE [continuing]. To deal with the aftermath of that in terms of establishing security and stability. We have made the same mistake three times.

In Libya the only thing that—and we had a moderate government that took over, much to our surprise. The only thing that moderate government asked of us is, “Help me put together an effective security force so I can tamp down the militant organizations that are in my country.”

Our answer to that was, “No.” And look where we are now. Our embassy is gone, they have killed our Ambassador, they burned our consulate down, and we have got chaos in that country.

The weapons in Libya we did take control, I mean, some—I can't get into the classified aspect of it, but the Central Intelligence Agency did have an operation that they conducted in Libya to take control of a lot of sensitive weapons. I am not talking about AK-47s and RPGs [rocket-propelled grenades]; talking about WMD [weapons of mass destruction] and other weapons.

Mr. SCOTT. I am out of time. I would suggest that a better word for what happened to our Ambassador in Libya was an assassination. The idea that that just kind of happened is absolutely ridiculous, and the facts show that that was an absolute assassination of a United States Ambassador.

General KEANE. Quickly, on the hold force: If all we do is clear out ISIS from Mosul, Tikrit, and Fallujah, and don't have a force that stays there to protect it and that is effective, this is the number one lesson we learned prior to putting in play the counterinsurgency operations in Baghdad and the environs around it. We would routinely clear forces out and then they would come back in because we did not hold control of the territory and maintain influence and control over the people.

If we don't do that, they for certain are going to come back. This is a determined, resolute force. They are not going to go someplace else. They are going to come back.

And we have to have that capability there, and that is—I think that is something you can explore with General Austin. I am sure he has got a plan for it.

The CHAIRMAN. Ms. Gabbard.

Ms. GABBARD. Thank you, Mr. Chairman.

Thank you, gentlemen, for being here today.

There are so many different points and angles, and difficult to address them quickly in less than 5 minutes, but I want to touch on the point that many have made about the need to address and come up with an effective strategy to defeat this threat not only militarily but simultaneously ideologically; that, as you said, General Keane, as we saw with Al Qaeda, because this was never addressed up front we find ourselves in the situation that we are in today.

So my question is about how we deal with this issue within the construct. Each of you believe that there should be an AUMF passed to deal with this, and how that issue of ideology is addressed within this document.

And secondly, as we talk about what is coming in Mosul but also generally, as we look at the military strategy to defeat this enemy, why it is so important to address the ideology is, for example, if we had a primarily U.S.-led ground force it would play directly into the ideology and major recruiting propaganda that groups like ISIS are using, that this is a war between the West and Muslims, as opposed to supporting what President al-Sisi is calling for, this Arab regional ground force.

So specifically with the AUMF, I am wondering if you can address that question with regards to the fact that this must have a military and ideology component to the strategy.

We can start with General Keane.

General KEANE. Well, you know I have very strong feelings about the fact that we have to recognize it for what it is. What we have failed to do is name the movement properly, then we don't define it, and we certainly have done a terrible job in explaining its ideology.

And by putting a magnifying glass on that ideology and then having the moderate and the traditionalist Muslims explain why the Islam that they are following is powerful and why 95, 97 percent of the Muslims in the world are following it, and why that should shape and define people's lives and why this other following is absolutely antithetical to it, that has to take place. And I would suggest that we are not the best to do that. This is about Muslims doing this, educating not only Muslims about it, but educating the rest of us about this.

And I do think the United States can play a leadership role here in terms of encouraging this and getting the majority of the Muslims, and there are many of them that speak out, but getting their clerical leaders to really speak out in a theological way to deal with this issue.



Certainly the military component here is what is right in front of us. We have a marauding enemy that is killing people every single day; most of it is not being exposed on the Internet.

And this kind of brutality and barbarism has to be stopped. The only way you can stop that killing is you have to kill the people who are doing it and—or you have to capture them.

All that said, we don't want to fight another movement like this 5 years from now or 8 years from now, and that is what brings in your comment about the ideology and countering that entire narrative. We need a longer-term issue to get at that.

And yes, there are conditions in this region that helped to grow some of this movement. Political reform, social justice, and some of the economic repression in the region are conditions that contribute to it. They are not necessarily central to it, but they are there contributing it and we have to have those kind of sensible dialogues with our friends in the region who, in fact, contribute to some of these problems.

Ms. GABBARD. Right. Sorry, I have got 1 minute.

I wanted to just ask Mr. Chesney both to address this but also the first point that you made about this AUMF lacking a purpose, a directly stated purpose, and how you could see that an effective winning strategy can be achieved and outlined, really, in this.

Mr. CHESNEY. So, taking these in reverse order, it certainly makes sense to talk about the strategy on the ground most likely being best effectuated by an Arab regional ground force, properly supported, and led and resourced and punched up by U.S. forces.

Trying to tweak the AUMF's language in a way that allows for that yet doesn't somehow allow for a larger ground force where it is just the U.S. I think is not going to be easily done and shouldn't be attempted. That should be left to the Commander in Chief to figure out how to do this without trying to tie his hands legislatively.

As to what you say about the purpose, very difficult to make a granular statement there, but there needs to be at least some guidance at a high level of generality.

Ms. GABBARD. Thank you.

The CHAIRMAN. Mr. Brooks.

Mr. BROOKS. Thank you, Mr. Chairman.

During my time I would like to emphasize the very broad nature and scope of the war resolution that we are being asked to support. In particular, and this has been mentioned by some of the other Congressmen and by the witnesses, there are no geographic limitations. And as I understand it from the information I have, you can make the case that the Islamic State is active of course in Iraq and Syria, but also Jordan, Libya, Egypt, Algeria, Tunisia, Yemen, Saudi Arabia, and other nations.

Under the war resolution that we are being asked to support, in section 2 it states, "The President is authorized to use the armed forces of the United States as the President determines to be necessary and appropriate against ISIL or associated persons or forces as defined in section 5."

You go down to section 5: The term "associated persons or forces" means individuals and organizations fighting for, on behalf of, or alongside ISIL, which is, as we know, covering virtually every con-

continent on Earth, with the possible exception of Antarctica, and many of the countries that are on each of those continents, because the Islamic State has done a fairly good job of recruiting its people from all corners of the globe.

In that vein, then, I want to emphasize a couple of questions but ask you to ask one of them.

First, how is America going to pay for it? This is an extraordinary cost, and we have had witnesses where you are sitting now who have already said that the greatest national security threat that the United States of America faces is our deficit and accumulated debt that ultimately has the potential of exposing us to a devastating insolvency and bankruptcy, which would eliminate our ability to have a national defense. Those words, in effect, came from Admiral Mike Mullen when he was Chairman of the Joint Chiefs of Staff.

Second, how does diversion of defense money to this effort to fight the Islamic State undermine our defense capabilities and the rest of the needs for America's national security?

The question I want you to answer, though, is, if Congress adopts this war resolution or a similar one, how does that action affect the willingness of the rest of the world, and Europe in particular—Germany, France, United Kingdom, Italy, and the like—to shoulder more of the burden, to spend their treasury, to risk the lives of their young men and women now that they know that the United States of America is once again willing to pay the price for the world's security? So if we pass this war resolution, how does that impact the willingness of other nations that are at risk to spend their money and risk their young men and women?

Mr. WITES. I mean, I think I am overwhelmingly unqualified to address any of those questions, frankly. I am not an expert on fiscal matters. I am actually not an expert on European-U.S. relations. And, you know, I—you guys asked me to address the merits of the President's proposal, and I have tried to give some technical guidance on that.

Mr. BROOKS. All right. Thanks. I appreciate your succinctness and candor in that regard, and maybe the other two witnesses—

General KEANE. Okay.

Mr. BROOKS [continuing]. Are not prepared either—

General KEANE. I am here.

Mr. BROOKS [continuing]. But if we are going to shoulder the whole burden, which is what this resolution seems to suggest we are willing to do, how does that affect the willingness of other nations to sacrifice as we would be sacrificing?

General Keane.

General KEANE. Well, I knew we were going to have this discussion, and I think it is very difficult to put a price tag on security of the American people. We know this is a threat to our interests and national security objectives in the region, and we know it portends to be a long-term threat to the American people.

This ideology is clearly having some impact. I am not suggesting for a minute that terrorism is going to break out across the United States. I don't wring my hands about things like that.

But I do take seriously when the director of the FBI said he has got homegrown terrorism investigations going on in every State in

the United States. I am not suggesting that there is going to be a terrorist attack in every State, that every one of those people who he is investigating have the means to do it or the will to do it. But just the fact that it is ongoing itself I think is alarming in and of itself that how many people have been attracted to this ideology.

So secondly, the security of the American people are involved here, and should we be prudent about the expenditure of funds to do this? Of course we would be. But one of the things we have to do, to be frank about it, Mr. Congressman, is we have to deal with sequestration.

While we are talking about the authorization of military force, the Budget Control Act is decapitating the capabilities of the United States military. And you know that as well as I do when these service chiefs come in front of you and lay out, you know, what their challenges are as they look down the road at the Budget Control Act or sequestration.

We are taking the Army down to something that is pre-World War II, and the Navy and the Air Force down to something that is 1950s. That doesn't make any sense to anybody, but that is the path that we are on. So I think the Congress can play a significant role here in dealing with sequestration.

The Europeans? Listen, the Europeans I don't think they have ever recovered from the fact we bailed them out of World—from post-World War II. Year after year after year they have pushed the burden of their security more on us, and this has been generational.

Many of these European nations are feckless in the face of real security challenges. You can see it in their budget and you can see it in their will. And look at how they are dealing with Putin and the redesign of Europe that he is imposing on them and the feckless response that we are getting from them.

It is predictable that we will, by comparison to our European friends, bear a greater burden. I think it goes with the leadership role the United States plays in the world, that the United States believes in stability and security, and helping to raise the prosperity level among people in the world, and dealing with the thugs and killers who are out there who would impose our will, and we—it is not that we have to be the answer to all of it, but where our national interests are involved, that we should be involved.

And we shouldn't judge that based on—look around and say, "Are our European friends going to be with us or not?" We should do everything to get them involved with us, but if they choose to be halfhearted about it, if our interests are at stake and the security of the American people is at stake then I think we have got to be there. And I don't think you put a price tag on it.

Mr. BROOKS. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Moulton.

Mr. MOULTON. Thank you, Mr. Chairman.

And, gentlemen, thank you very much for joining us here this morning.

General Keane, I want to specifically thank you, because I was an infantry officer in the surge, I am greatly appreciative of what you did to help turn that war around.

I respectfully disagree with an earlier statement one of my colleagues made that the most important thing for the troops on the ground is to know that all of America is behind them. I knew that all of America wasn't supportive of what I was doing in Iraq, but you, with the help of General Petraeus and others, gave us some hope, some faith that we had a plan, that our effort, our sacrifice, our loss would not be in vain.

And so I, among many others, come back to this fundamental issue that we don't seem to have a strategy here.

I just returned from a CODEL [congressional delegation] to Iraq and Afghanistan and received countless briefs on a three-phased plan. And we all know that phase four was what was missing back in 2003, and it seems like it is missing again here.

I have not seen a good plan to deal with the Sunni tribes, to deal with the Shiite militias, and that is just in Iraq. I agree with your assessment that we don't seem to have much of any plan at all for Syria.

So my question is, how do we, how do you try to influence this debate to actually get a strategy? Somehow you were able to take a failing war in Iraq and help turn it around by bringing a workable strategy into the discussion and then eventually getting it enacted. If you could comment on that, maybe we could see a path forward.

General KEANE. Well, thank you, and appreciate your service, as well. Semper Fi.

Mr. MOULTON. Semper Fi.

General KEANE. This is very difficult. To change the failing strategy in Iraq, to be frank about it, the leaders, the military leaders who were prosecuting that strategy did not want to change. The leaders of the Department of Defense also, civilian leadership, the senior military leaders in Washington did not want to change.

But I think what happened there is it appeared to me that the evidence was compelling that the strategy was not working, and I think we had one person that understood that that was willing to do something about it, and that was the President of the United States. I mean, he just instinctively saw it and said, "This is a real problem."

I don't think he knew necessarily what should be done about it, but he knew instinctively we had to do something about it and he threw politics aside, certainly, because his own party was almost as much against him as the opposition party was, and certainly most of his generals were. But he reached for something that turned out to be the right answer.

So this is very hard to do.

We have a different problem here, I think, is we have a strategy that we put together and it is in the beginning of its execution, and so it is very difficult to get someone to change it based on the fact that when you look down that at long term it is not going to work.

Mr. MOULTON. Mr. Chesney, do you have anything to add to this?

Mr. CHESNEY. No. I will simply say that it will be difficult to make any progress on this through the lens of the AUMF itself, but the right way to think about the AUMF's relationship to this question is to make sure that the Commander in Chief has the author-

ity that he may judge necessary and not to tie his hands. Even if he is asking for you to tie his hands, his hands shouldn't be tied.

Mr. MOULTON. I agree with that statement, and I think that what was most frustrating to me about returning to Iraq was seeing so much of the effort that we had carried out during the surge really gone to waste. And the operative question in my mind is not, how do we have a military strategy to defeat ISIS? I think we do.

The question is, how do we prevent what happened from 2010 to 2013, where all that effort went to waste?

Thank you, Mr. Chairman. I yield my time.

The CHAIRMAN. Thank you.

Mr. Gibson.

Mr. GIBSON. Thanks, Mr. Chairman.

I appreciate the panelists and want to begin just by associating myself with the remarks that General Keane made earlier today with regard to calling things for what they are: Islamic extremists. And I have been saying this for some time.

First of all, it is the reality. The second point is is that it really then lays bare what our enemy is trying to do. This extremist group, this Islamic extremist group, is trying to deceive the Muslim world that somehow they are advancing their cause. This is how they are trying to recruit and fundraise.

So when we label it as it is we lessen their ability, especially now, when you see Muslim nations and people standing up to this Islamic extremism in Iraq, Kurds, and then Jordan and Egypt, when we are supporting them we lessen our enemies' ability to recruit and fundraise, and that is the key point here. We can militarily engage at this moment, and, you know, for every one that we kill we end up, you know, dealing with issues of multipliers in terms of recruiting and fundraising; why it is so important to have clarity.

So I just want to associate myself with those remarks.

My question for the panel has to do with, and by the way, I want to thank General Keane. He has always been a source of inspiration and great mentorship to many of those in uniform.

My question is on Syria. Last fall I was not able to vote for arming the so-called Syrian—moderate Syrian army. I gave it a fair hearing. I looked at all briefings and looked at the briefing papers, and at the end of the day I believe that that force was militarily incompetent, politically untrustworthy, and it was going to fail.

So that put me in a—I mean, ethically, morally I felt in a tough spot because I knew that this is an enemy that can't be deterred; they have to be defeated. Question is, how? And we were proposing a strategy that was, in my view, going to fail. And now we are seeing the problems of it.

You know, how do we get anything done of significance in Syria without a political foundation? In Iraq you could argue about the efficacy of that foundation, but you have Iraq, the Kurds, you have a foundation from which to support taking certain action.

In Syria we have really no foundation, so what is the way forward there, from anyone in the panel? Very interested to hear.

General KEANE. Well, I will take a stab at it. I mean, Syria is really a tough problem, and there are very good arguments on both

sides, on many sides of this issue because it is so challenging. I just want to provide you a couple of data points.

Remember back when the—this was part of the Arab Spring, the people stood up against Assad and, because he was so violently—he used violence to push that—the people back, many of his officers and his troops that—underneath him joined the opposition forces because he was killing his own people in the streets, unlike what took place in Egypt. As a result of that, that opposition force gained momentum and they were—people in this town were predicting it was just a matter of time before Assad falls. Remember that?

And what happened is the Iranians came in, propped up the regime, so did the Russians, and then the Free Syrian Army asked for our help. And this goes back in the 2011 timeframe.

In 2012 ISIS moves into Syria, and would things have been different if we had helped the Free Syrian Army then to maintain that momentum against the regime? I think so; I don't know for sure. But I think we made a huge policy mistake.

And then in 2012 Clinton, Petraeus, Panetta, and Dempsey advocate the same thing as a matter of policy—not just the Free Syrian Army asking; now they are advocating it, and we say no again.

In 2012 the radical Islamists are in Syria, and they are growing in size and scale and adding to the complications of this problem. What they do—they didn't start the Arab Spring but they have always seen it as opportunity, when you have political and social upheaval like this and chaos, they want to take advantage of that because they want to have a seat at the table at the end of it.

That is what we are facing. So it adds to the complications that we have in Syria.

When I put my head on that and try to work out an answer to what needs to be done, I do believe we need to get a political solution in Syria. But how do you get it when Assad has the momentum? You are not going to get it, and the Iranians and the Russians are not going to permit it.

The only thing you can do is change that momentum, and that begins with military, to change the momentum he has. Shut down his air power by the use of no-fly zones and buffer zones. Would he contest that? Unlikely, because we would then destroy his air power.

That begins to change the political situation, because now he is no longer dominating. And it puts pressure on people around him to look for a solution that is beyond Assad.

That, I think, is the general thought process, that you have to get past Assad and you have to see a political solution there—not necessarily the removal of this entire regime, but the removal of Assad, and to some kind of accommodation with its own people—not the radicals, but with its own people that are fighting them. I don't think you can get there unless you took some kind of military action to balance the military situation.

Then you can put together—then I think our friends in the region—I can't say and guarantee you this would happen, but they are all urging us to do what I just said. Then I think you get the makings of an Arab-Turkish coalition, which the United States would participate in, to drive and defeat ISIS in Syria.

Those are kind of the steps, I think, that should be undertaken. But we have no plan to do any of that.

Mr. GIBSON. Thank you, General. My time is expired. Thank you.

The CHAIRMAN. Mr. Aguilar.

Mr. AGUILAR. Thank you, Mr. Chairman.

Thank you, gentlemen, for joining us.

Mr. Chesney and Mr. Wittes—I am sorry, can you say it one more time?

Wittes. Okay. I was close.

Mr. Chesney and Mr. Wittes, you mentioned during your opening comments the silence that the AUMF has on detention protocols.

So, Mr. Wittes, if you could start, how would the alternative AUMF draft that you created treat detention protocols moving forward, in addition to the current detainees held under the 2001 AUMF?

Mr. WITTES. Right. So this is an excellent question.

Under the draft that we wrote you also have a notional silence about detention operations except that the language that we used to authorize force is the exact same language that the D.C. Circuit has used to describe the—in the current—under the current AUMF the detention authority that it embeds. And so what we were trying to do there was not change the status quo as to detention except to add ISIL to the list of groups that you—ISIL and its associated forces—that you could apply the AUMF's detention authority to.

I suppose we can be criticized along the same lines that Professor Chesney criticized the administration for sort of doing it elliptically rather than directly. As you know, as this committee knows, I have—I am all for being explicit about detention authorities, which, you know, has been a big theme of a lot of my work, and so if there were any inclination in the broader political community to make detention authority under this AUMF explicit, I think that would be a wonderful, wonderful thing and a very appropriate thing for the committee to do.

My concern about the way the administration has worded this draft is that because it is not piggybacking off of the existing AUMF, the moment you detain somebody under it you would have a habeas litigation in which you would have to, and I think the administration would win, by the way, but you would have to litigate the question, does this detention authority, does detention authority exist under this AUMF. I think under our draft it is a lot, lot clearer what the answer to that question would be.

Mr. AGUILAR. Mr. Chesney.

Mr. CHESNEY. I agree with everything Ben said.

Mr. AGUILAR. Thank you, gentlemen. And that doesn't take away anything from the broader strategic discussions that my colleagues—some incredible questions that have been asked, but I did want to delve into that piece because it was common between your testimonies, the written and the public, and I appreciate it.

But going back to Congressman O'Rourke's comments, you two gentlemen didn't get to answer that piece, and I know he mentioned possibly putting it in writing, but if you could discuss what

you feel winning looks like and what the conditions for us to achieve success would look like.

Mr. CHESNEY. I will just offer a few preliminary thoughts, and these are similar to what General Keane said earlier. I think a big part of success involves ensuring that ISIL does not have a safe haven within which it can conduct first of all its own external operations, and that doesn't necessarily mean operations against the United States, though obviously that would be our first and foremost concern, but it could be operations in Europe, it could be operations against Jordan, it could be operations in Turkey, in any number of other places.

Secondly, and slightly distinct from that, a safe territorial haven from within which they are able to attract and train foreign fighters who then go back and, even if not in any way subject to ISIL's direction and control, nonetheless going back and, as local home-grown terrorists, then carrying out attacks and destabilizing our allies in the area. These are things that we need to prevent ISIL from being able to do.

Mr. WITTES. I don't really have much to add to that. I mean, I think the focus on safe havens and ungoverned territories is critical. These lead to very bad outcomes, and the last 20 years is just one example of that after another. And I think the instinct to create, to remove, to allow sovereign power from reasonable governments—you know, non-exporting of violence governments—over what are now ungoverned territories is a pivotal objective both in this area and in other parts of the world where we are dealing with similar problems.

Mr. AGUILAR. Thank you, gentlemen.

Thank you, Mr. Chairman. I appreciate your patience and yield back.

The CHAIRMAN. I appreciate your patience in waiting to get in very good questions.

Mr. Langevin.

Mr. LANGEVIN. Thank you, Mr. Chairman.

And I too want to thank our witnesses for your testimony today. Your insights have been invaluable and I think this is a very important discussion. I think there is certainly no greater responsibility that any of us have here on this committee or in government when the decisions come up as to when or whether or not to send our men and women in uniform into harm's way and to get it right when we do.

You all have made clear very important points about why an AUMF is important, again, sending the signals to our allies and our enemies as well as our troops that the law-making branch of government, were going to stand behind their efforts to defeat ISIL.

I want to give each of you an opportunity, and this has been a pretty thorough discussion already, but give you an additional opportunity to talk about and point out the important points that should be left in an AUMF, which—in this as it is drafted, and which should be removed and within the time that we have, and if you can't get to everything, perhaps additional points in writing, if you would.



Some of the first points that we need to see in the theater right now to signal that there has been a turn. Clearly nature hates a vacuum, and there is a vacuum right now there that ISIL is filling, and there is also the saying that, you know, if they are strong they have to be with you, and I think that is why you are seeing this growing support of ISIL, because they are strong and getting stronger right now.

What would indicate an initial tactical success within the theater of conflict that would show that the tide has turned—is turning that would hopefully lead and then indicate that we are on the road to achieving strategic success?

And then finally, if you could, long term, how do we defeat this radical, violent ideology? Because in many ways this is an ideological war as well as a violent military one.

So I understand I have asked a lot there, and if you can't get to everything I understand, but perhaps some additional thoughts in writing would be helpful, too.

General, should we start with you?

General KEANE. Okay. Thank you.

Well, certainly in terms of some near-term tactical success that would indicate that we are beginning to turn the tide against ISIS is to capitalize on what we have already achieved in Iraq. We have stalled their offensive in Iraq largely through the use of air power. We have retaken some territory, some modest territory back in Baiji and also up in Sinjar in the north.

But what is coming next, and I think you are very much aware of is largely a counteroffensive military campaign to retake the major environs of Mosul, Tikrit, Fallujah, and part of Anbar Province, essentially fighting up the Tigris and Euphrates River Valleys is what we are really talking about here.

And that counteroffensive will be a major campaign and, if successful, clearly that will demonstrate that the tide has truly turned against ISIS. They will have to flee into Syria, which is their de facto capital now. It is where they maintain many of their—much of their resources. It is where their recruiting and training is taking place. And it will be a—continue to be something of a safe haven to them because there is—at least in the near term there is no ground force to act against them, although we will try to find—continue to find targets against them.

But that will send a huge message in terms of initial tactical success against ISIS. And I think it would have some impact, don't know for certain, but my judgment tells me it would begin to have some impact on whether people want to join this organization or not when they see it largely beginning to be destroyed right before their eyes.

So I think that is very important to us. And as we have said many times here, and I think everybody sitting at the table here is in agreement, that is an immediate military strategy, but we need a longer-term strategy that deals with the ideology or we will be dealing with ISIS-like enemies again. And that truly should be avoided.

We have an incredible lexicon of learning experience here after—you know, it will be 14 years this September of dealing with this

radical Islamic issue and we still, still, as we sit here now, do not have a comprehensive strategy to deal with it.

Undermining their ideology in a global alliance is what I suggested, and I think that is largely dealing with the people in the region who have to do this because the ideology is tied to the Islamic religion. But it also, from a practical sense, an alliance like that would share intelligence, it would share training, it would share technology so that people in it are all benefitting from it.

And I don't think we would craft that strategy. I think we would bring that alliance together and the alliance would craft it. And the input we would get from the participating nations who are dealing with this would be very significant, in my judgment, in terms of how to approach it and what practical means are there to do it.

And I will stop right there so others have an opportunity to talk.

Mr. LANGEVIN. My time is expired and I wish we had time, 5 minutes goes by too fast.

I would appreciate input from the other witnesses on the things that I raised, but I do thank you all for your input here today.

I also want to make a point that I am encouraged that this needs to be a multinational coalition and that we need to see the nations in the Arab world also step up, which I see that, I see that they are doing. We need to see more of that.

Thank you, Mr. Chairman. I yield back.

The CHAIRMAN. Thank you.

Mr. Ashford.

Mr. ASHFORD. Thank you. And I appreciate the opportunity to be the last questioner. But I thank you, Mr. Chairman.

I want to just make a few points. I also was in Afghanistan and Iraq with Congressman Moulton and Congresswoman Stefanik and Congressman Wilson. It was an extremely important trip. We went everywhere, pretty much, and these answers have been right in line with the thinking at least I come back with.

And it was very important to have Congressman Moulton there because of his work with General Petraeus. He was able to really zero in and—laser-like on the questions that—many of which have been asked today.

Let me just say, I absolutely agree with the panel, General Keane for sure, and that is that the number one goal here is to destroy ISIS and that we need to refresh, rewrite, do again, whatever it is, the resolution that is there.

We had several conversations—I did and I know Congressman Moulton did and others—with members of the military and leaders—King Abdullah and the prime minister in Iraq and so forth. And everyone said the same thing: We need to have a clear resolve.

I was on a C-130 and the navigator said, "Congressman, do you think you can get a resolution?" You know, and I said, "Well, we will see if we can," but, I mean, it is clearly the case.

I have been struggling with, and I also would just say this: I absolutely reject the idea that somehow these Muslim Arab countries cannot, with our help, be successful. I think that is just not correct.

I know you are saying the opposite, but I, you know, hear that, and that it—and that we are an exceptional nation and that we are going to have to maybe play a role that maybe somewhat outweigh those of others. And also that the ideological work, which clearly

every leader we talk to—King Abdullah was emphatic about the need to address, you know, sectarian education, to deal with economic development. And he did talk about a Syrian strategy, and it is a little more long-term.

Let me just ask this. I know in Nebraska, you know, what I get asked is, you know, “Are we going to need boots on the ground,” and I know you have answered this. My sense is that we haven’t defined that yet, we don’t know exactly what the assistance is going to be. We are in an assist role at the brigade level now and we have—intelligence support as well as our Air Force and Navy pilots, whatever.

I think you are right. I think we have to have a broader resolution, but boots on the ground does not necessarily mean a brigade, but if there is something going on in the field where Americans need to, I am sorry for the long question, need to get involved, that would—that is also boots on the ground, technically. They are on the ground.

So, General, could you—if you would?

General KEANE. Well, let me just—well, first of all, I appreciate your comments and you going to the region like that. It is insightful listening to you.

We do create a false narrative here, and it is this, and rightfully so. We don’t want to be involved in a protracted war like Iraq or Afghanistan, certainly. We all understand that. But also, nobody is talking about that here either.

So we get a choice between—we don’t want to have boots on the ground that will lead us to a protracted war where hundreds of thousands of U.S. troops are involved. I don’t know anybody that is making such a proposal or recommendation. Certainly nobody in the Pentagon, to be sure.

And I don’t know anyone who is opposed to the President’s strategy is suggesting such a thing either. But we are suggesting what is reasonable. And it is reasonable that the coalition lead and we help.

So we do need some boots on the ground to make them more effective, and I think that is reasonable. So what are we really arguing over here? We are arguing over scale.

The present policy is nothing below brigade level. I am saying you got to get down to battalion level where the fighting is going on. And maybe we will eventually get there because as we begin to do this General Austin and his team will want the same thing. And then we need Apache helicopters, and AC-130 gunships, and et cetera, et cetera.

This is modest improvement, in my judgment, that gets you an exponential better result.

Now, let me throw something out that maybe you would disagree with. If this offensive fails, we try it and it fails, do we wring our hands and say, “Okay, we are going to come back next year with the same force, with more boots on the ground, better-trained force and we will give it a try in 2016,” or, if this is truly in our national interest, maybe a reasonable alternative is to have an Arab coalition force that the United States is part of form in Kuwait and we put that force on the ground, which would mean some brigade combat teams to do that.

Is that something we should do now? Absolutely not. We want the burden to be borne by the Iraqis.

But if it is failure and we can't seem to get there, should that be an alternative that we should at least consider? I think it is.

Mr. ASHFORD. If I may, and I don't—my clock isn't working so I may be over—is—I agree with you, and I think that is the kind of definition, because Mosul is tough, and it may be—or these other operations.

And quite frankly, 2016, we were told, that is in play. It is going to take—it may take 2016, with other efforts, and it may take more American forces. So that is—as we draft this thing I think that advice has to be taken into consideration.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you.

Y'all have answered a wide range of questions and I think you can tell members are very serious and very concerned about this. I don't want to try your patience too long. I have got one other thing I want to get comments from our legal experts, if I may, because it continues to bother me in some ways.

And my question is, can the way an enemy define itself or affiliate itself matter when it comes to an AUMF? Because we have stretched the meaning of the 2001 AUMF so far that anyone who has a connection with the attacks of 9/11, it is just hard to even believe those words have much meaning.

And we have this situation where there have been incidents where al-Nusra and ISIS have disassociated themselves from each other and actually fought with each other, and yet the claim is once you are under the—affiliated with Al Qaeda you are always affiliated with Al Qaeda no matter what you do or say.

So we don't want people to be able to change their name and thus not be subject to attack. On the other hand, is there nothing that you do or say that ever changes your affiliation?

I mean, I don't know, do y'all have legal opinions about the way that works or doesn't work?

Mr. WITTES. So I think the—at the polar levels the answer to your question is, I think, pretty clear, which is to say—let's say, you know, I am a member of Al Qaeda and I openly and publicly renounce and break my affiliation with the group, I think there is a pretty good argument under those circumstances that, to the extent that the AUMF once covered me, it may no longer cover me.

And similarly, if you imagine a faction of Al Qaeda that breaks off and says, you know, "We want to start a peace process," right, I think you could make an argument that you might think about that group very differently under the AUMF.

Both of those are somewhat fantastical examples, but I think the other side of it is if Al Qaeda changes its name tomorrow to Greenpeace, no one would seriously argue that we then lack the authority to, you know, attack, you know, the Greenpeace front in Syria. Where the question gets very hard is where you have these ever splintering groups that are historically affiliated but may be no longer affiliated, or may be offshoots of groups that are themselves offshoots.

And here I think, you know, I go back to the point that, you know, we started with, which is that the underlying document is

aged. It is very appropriate, given that, to write a document that describes the war that we are fighting rather than, in fact, rather than the war that we thought 13 years ago we would be fighting.

By the way, that document will have a shelf life and a half-life too, and it will start degrading almost as soon as you pass it, which is another reason that the idea of whatever you call it—the renewal or the sunset or the reengagement, no pun intended—is a good one, and it forces you to come back and say, “Does this document still describe what we want to be doing?”

The core of the problem you identify is unsolvable because, unlike, you know, the Third Reich, which doesn’t morph, right? It asserts a sovereignty; it is what it is; it is—you know, this is not—this is more fluid than that.

The CHAIRMAN. Okay.

Mr. Chesney.

Mr. CHESNEY. So I think this underscores one reason why the oversight provision that our draft had emphasized, specifically including a requirement that when the administration, or when the Pentagon, whoever, identifies a group as an associated force or a successor force, that there be some, certainly at least to Congress and preferably to the American public, that that decision has been made. In other words, Ben is right, there is a level at which this is unsolvable with crafting of language, so you shine a spotlight on it and make sure that people are aware of how it is being interpreted. So that is one thing I would say.

And then the second thing I would say is this is both a problem for the removing—a group removing itself from the scope of the AUMF, but also coming into it. And so to give a concrete example of this, in the Sinai there is a group, ABM—I am going to mispronounce this but it is something along the lines of Ansar Bayt al-Maqdis. It had been an Al Qaeda-affiliated group but the Egyptians have done a tremendous job of taking out their leadership, and one consequence of all that is that the people now in charge apparently were open to tying in with ISIL instead, and they have made formal claims to affiliation with ISIL, so now you have this ISIL franchise in the Sinai.

Well, you know, would they count, if they have not taken any action or shown any inclination to take action against the United States, merely by virtue of that formality? These are the debates we have been having for 13 years under the 2001 AUMF. This is an occasion to think more systematically about how to define things, and if there is no better way to define it then you shine a spotlight on it.

The CHAIRMAN. Okay. Great point.

Thank you again, all. Y’all have really been helpful, I think, to the committee, and we appreciate your time and patience over these last 3 hours.

With that, the hearing stands adjourned.

[Whereupon, at 12:50 p.m., the committee was adjourned.]



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# **A P P E N D I X**

FEBRUARY 26, 2015

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**PREPARED STATEMENTS SUBMITTED FOR THE RECORD**

FEBRUARY 26, 2015

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**Testimony**

**United States House of Representatives  
House Armed Services Committee**

**By**

**General John M. Keane, USA (Ret)**

**on**

**Outside Perspectives on the President's Proposed  
Authorization for the Use of Military Force Against the Islamic  
State of Iraq and the Levant**

**1000 hours, 26 February 2015**

**Rayburn House Office Building**

**Room 2118**

Mr. Chairman, ranking minority, members of the committee, thank you for inviting me to testify today on the President's request for the authorization of the use of military force (AUMF). I am honored to be here again and to share the panel with my distinguished colleagues. Please reference the map provided at the end of my testimony, when I discuss the enemy and its geography, prepared by the Institute for the Study of War. This was a part of a recent intelligence summary and is useful to understand how ISIS looks at the world.

In principle I agree with a President who, desires to use military force beyond a short term contingency, requests an AUMF from the Congress. The current AUMF's, 2001 and 2002, which are obviously still in use are in their design, good documents, in that it is clear why military force is being authorized and provides latitude for the President to determine how to use that force. Indeed an argument could be made that the President's current AUMF request is unnecessary in that the previous AUMF's provide sufficient authorization for the use of force against ISIS. Nonetheless, I do believe it is better public policy for a new AUMF based on the reality that

ISIS is a different threat in terms of its scale, mode of operation, location and near term intent.

As to the President's current AUMF request I would like to make a few brief observations:

- The Strategy – Strategy is how the military force is used. This is the President's lane along with his senior military commanders. As much as I and some members of Congress are critical of the administration for not having a comprehensive strategy to defeat radical Islam nor an adequate strategy to defeat ISIS, the AUMF is not the appropriate document for that expression. A President needs maximum flexibility to adapt to the enemy and the battlefield environment which at times may demand a change in strategy. The truth is our military history reflects a rather consistent theme, that many times we started out with the wrong strategy and reflecting American adaptability and flexibility it was changed. President Bush changed a 3 year failing strategy in Iraq which ultimately succeeded. I do believe it is essential that the administration brief the Congress in detail on their strategy to defeat ISIS prior to voting on the proposal.

- The Enemy – The enemy is ISIS and the proposed AUMF describes it as “ISIS and associates.” ISIS has claimed contractual agreements and a written plan approved by ISIS leader Abu Bakr al-Baghdadi to form satellites in Libya, Egyptian Sinai, Afghanistan, and also Algeria, Saudi Arabia, and Yemen. Some of these affiliations are likely aspirational, but ISIS is exporting military capability to make affiliates in the Sinai and Libya stronger, and this is likely the list of places where ISIS means to expand activities next. All that said defeating ISIS does not mean that US forces are needed to defeat ISIS's satellites.

- The Geography – Core ISIS is principally located in Iraq and Syria but it covets territory in a broader region, including Lebanon, Saudi Arabia, Jordan, Israel, and lands that are part of historic caliphates, like the Caucasus. The extent of their aspirations is likely greater than that. As such there should be no geographical limitation in the AUMF.

- The Time Constraint – Makes no sense to tell our allies and the enemy that we are uncertain of this commitment of force by our unwillingness to extend it beyond 3 years. Congress has the authority to

provide continuous assessments through its oversight committees which is far more appropriate than a 3 year sunset.

- The Ground Force Constraint – ISIS cannot be defeated in Iraq and Syria without a decisive ground force victory. There is no ground force in Syria and no one knows if the Iraq ground force can defeat ISIS. Why put limits on the use of a ground force when it is widely recognized as the only means to defeat ISIS? Indeed it may be necessary for a coalition ground force with the US likely in the lead to ultimately defeat ISIS. The ground force constraint should be removed from the AUMF, if the true goal is to defeat ISIS.

In conclusion the proposed AUMF is not an acceptable document. The time and ground force constraint must be removed. This President as well as the next President deserve latitude in the use of military force. Additionally, how to use the military force, or strategy is not an appropriate topic for this document, as I previously stated, but it is essential for the Congress to provide oversight and in so doing understand the feasibility of the strategy actually working. I believe it is a matter of conscience to only support an

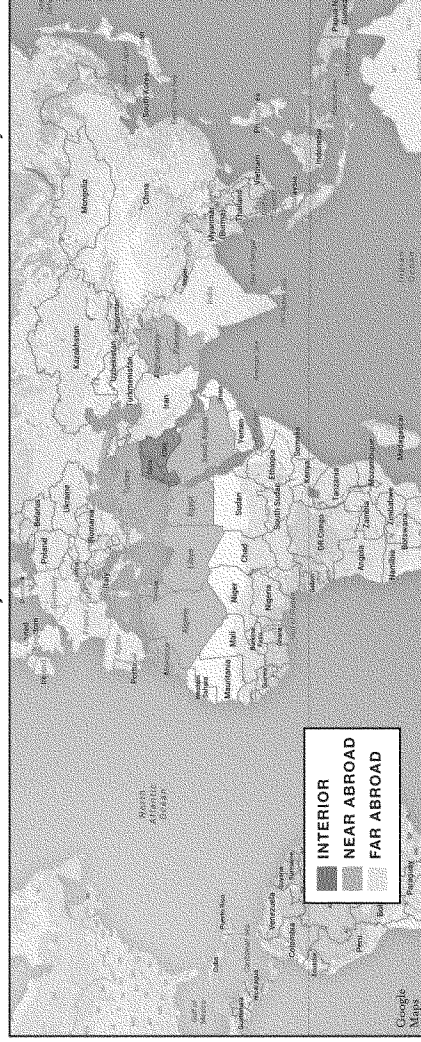
AUMF if there is confidence the strategy our troops execute will indeed succeed in defeating ISIS. Thank you and I look forward to your questions.



# ISIS GLOBAL INTSUM

The purpose of this intelligence summary is to document and assess the significance of open source reports regarding ISIS (The Islamic State of Iraq and al-Sham) activity *outside* of Iraq and Syria. This estimate will organize ISIS abroad activity into concentric rings, including the ISIS "Interior Ring" comprised of Jordan, Israel, Palestine, and Lebanon as well as Iraq and Syria; the "Near Abroad Ring" comprised of former Arab Caliphate lands; and the "Far Abroad Ring" comprised of Europe, the United States, Southeast Asia, and the Cyber domain.

ISIS GLOBAL ACTIVITY, JANUARY 7 - FEBRUARY 18, 2015



\* Read the full report online at [www.understandingwar.org/backgrounder/isis-global-intsum](http://www.understandingwar.org/backgrounder/isis-global-intsum) and follow us on Twitter @TheStudyofWar

## **General John M. Keane, United States Army, Retired**

General Jack Keane is president, GSI, LLC. He is a director of MetLife and General Dynamics, chairman of the Institute for the Study of War, chairman of the Knollwood Foundation, a former member for 9 years of the Secretary of Defense's Policy Board, the George C. Marshall Foundation, the Center for Strategy and Budget Assessment, the Council on Foreign Relations, the Smith Richardson Foundation, a trustee at Fordham University, and an advisor to two foundations assisting our veterans: Welcome Back Veterans and American Corporate Partners.

General Keane, a four-star general, completed 37 years in public service in December 2003, culminating as acting Chief of Staff and Vice Chief of Staff of the US Army. As the chief operating officer of the Army for 4½ years, he directed one million, five hundred thousand soldiers and civilians in 120 countries, with an annual operating budget of 110 billion dollars. General Keane was in the Pentagon on 9/11 and provided oversight and support for the wars in Afghanistan and Iraq. He serves as a national security analyst for Fox News and speaks throughout the nation on national security and leadership. Since 2004, General Keane conducted frequent trips to Iraq for senior defense officials having completed multiple visits during the surge period. He played a key role in recommending the surge strategy in Iraq and is featured in many articles and a number of books to include Bob Woodward's The War Within and Tom Rick's The Gamble. Still active in national security, Gen. Keane continues to advise senior government officials on national security and the war in Afghanistan.

General Keane is a career infantry paratrooper, a combat veteran of Vietnam, decorated for valor, who spent much of his military life in operational commands where his units were employed in Somalia, Haiti, Bosnia and Kosovo. He commanded the famed 101<sup>st</sup> Airborne Division (Air Assault) and the legendary 18<sup>th</sup> Airborne Corps, the Army's largest war fighting organization.

General Keane graduated from Fordham University with a Bachelor of Science degree in Accounting and a Master of Arts degree in Philosophy from Western Kentucky University. He is a graduate of the Army War College and the Command and General Staff College.

**DISCLOSURE FORM FOR WITNESSES  
COMMITTEE ON ARMED SERVICES  
U.S. HOUSE OF REPRESENTATIVES**

**INSTRUCTION TO WITNESSES:** Rule 11, clause 2(g)(5), of the Rules of the U.S. House of Representatives for the 114<sup>th</sup> Congress requires nongovernmental witnesses appearing before House committees to include in their written statements a curriculum vitae and a disclosure of the amount and source of any federal contracts or grants (including subcontracts and subgrants), or contracts or payments originating with a foreign government, received during the current and two previous calendar years either by the witness or by an entity represented by the witness and related to the subject matter of the hearing. This form is intended to assist witnesses appearing before the House Committee on Armed Services in complying with the House rule. Please note that a copy of these statements, with appropriate redactions to protect the witness's personal privacy (including home address and phone number) will be made publicly available in electronic form not later than one day after the witness's appearance before the committee. Witnesses may list additional grants, contracts, or payments on additional sheets, if necessary.

Witness name: John M. Keane

Capacity in which appearing: (check one)

☒ Individual

☐ Representative

If appearing in a representative capacity, name of the company, association or other entity being represented: \_\_\_\_\_

**Federal Contract or Grant Information:** If you or the entity you represent before the Committee on Armed Services has contracts (including subcontracts) or grants (including subgrants) with the federal government, please provide the following information:

2015

Federal grant/ contract	Federal agency	Dollar value	Subject of contract or grant
		N/A	

2014

Federal grant/ contract	Federal agency	Dollar value	Subject of contract or grant
	N/A		

2013

Federal grant/ contract	Federal agency	Dollar value	Subject of contract or grant
	N/A		

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2015

Foreign contract/ payment	Foreign government	Dollar value	Subject of contract or payment
	N/A		

2014

Foreign contract/ payment	Foreign government	Dollar value	Subject of contract or payment
		N/A	

2013

Foreign contract/ payment	Foreign government	Dollar value	Subject of contract or payment
		N/A	

**“Outside Perspectives on the President’s Proposed  
Authorization for the Use of Military Force Against  
the Islamic State of Iraq and the Levant”**

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**Prepared Testimony of Robert Chesney**

Charles I. Francis Professor in Law  
Associate Dean for Academic Affairs  
Director, Strauss Center for International Security & Law  
The University of Texas at Austin

**Before the House Armed Services Committee**

**February 26, 2015**

Chairman Thornberry, Ranking Member Smith, and members of the committee, thank you for the opportunity to testify on this important topic. Though debates no doubt will always rage regarding whether and when it is strictly necessary for Congress to assent in order for the use of force to be constitutional, there is no doubt that it is always important and desirable for Congress to express its views when American's armed forces are sent into harm's way.

I begin by summarizing four key takeaways from the pages that follow:

1. The administration has not abandoned its claims of authority to attack ISIL under Article II or the 2001 AUMF, rendering the constraints set forth in the draft AUMF largely (though not entirely) academic as a legal matter.
2. There is no on-point precedent for authorizing military force to “defeat” an enemy while at the same time forbidding the Commander-in-Chief to engage in certain forms of ground combat operations towards that end; prior AUMFs that authorized only limited forms of force did so in connection with narrower objectives, such as stopping foreign powers from seizing American shipping or participating in peacekeeping operations.
3. Whether it is constitutional or not, any limitation on the role of ground forces in the AUMF must not create unnecessary legal uncertainty for commanders. The draft's vague prohibition on “enduring offensive ground combat operations” violates this principle.
4. Sunset provisions are especially desirable in an AUMF where, as here, the nature of the mission is uncertain, the demands of meeting the mission likely will evolve over time, and the benefits of refreshing the democratic legitimacy of an overseas military operation accordingly are higher than normal.

I explain these claims in more detail below, along with a number of other points. Part I begins by placing the Administration's proposal in context with the authority the Administration already claims under color of Article II of the Constitution of the United States as well as the 2001 AUMF directed at al Qaeda. Part II surveys the provisions of the draft AUMF that have generated the most controversy and debate, including: (a) its lack of a stated purpose; (b) the prohibition on “enduring offensive ground combat operations”; (c) its definition of “associated forces”; (d) its transparency and oversight provision; (e) its relationship to the Law of Armed Conflict; (f) its sunset clause; and (g) one final matter that has flown under the radar up to this point insofar as ISIL is concerned.

### I. Would This AUMF Matter, Given Other Claimed Authorities?

Yes, but not much.

Several commentators have observed that the Administration's draft AUMF may be largely academic (at least on the constraint side), since it fails to address the existing authorities—Article II of the Constitution of the United States and the 2001 al Qaeda AUMF—that the Administration has relied upon to conduct operations against ISIL up to this point, operations that appear more or less comparable to what the Administration appears to contemplate conducting under color of the draft AUMF were it to pass.<sup>1</sup> This observations seems accurate to me.

Recall that when U.S. airstrikes against ISIL began in August 2014, the President invoked his authority under Article II of the Constitution to justify them. No mention was made of any AUMF at that time. In a letter to Congress, he explained:

I have authorized the U.S. Armed Forces to conduct targeted airstrikes in Iraq. These military operations will be limited in their scope and duration as necessary to protect American personnel in Iraq by stopping the current advance on Erbil by the terrorist group Islamic State of Iraq and the Levant and to help forces in Iraq as they fight to break the siege of Mount Sinjar and protect the civilians trapped there. ... I have directed these actions, which are in the national security and foreign policy interests of the United States, pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive.<sup>2</sup>

Nine days later, the President issued a second letter to Congress repeating this line of argument, this time in connection with air strikes to drive ISIL fighters away from the Mosul Dam:

The failure of the Mosul Dam could threaten the lives of large numbers of civilians, endanger U.S. personnel and facilities, including the U.S. Embassy in

<sup>1</sup> See, e.g., Jack Goldsmith, "Errors and Misconceptions About the Obama Draft AUMF," *LAWFARE* (Feb. 16, 2015) (available at <http://www.lawfareblog.com/2015/02/errors-and-misconceptions-about-the-obama-draft-aumf/>); Marty Lederman, "Suggestions for Clarifying/Amending the President's Draft ISIL AUMF," *JUST SECURITY* (Feb. 12, 2015) (available at <http://justsecurity.org/19928/suggestions-clarifyingamending-draft-aumf/>). A number of prior AUMF proposals, in contrast, have included language that in various ways clarified that they would be the sole statutory authority for anti-ISIL operations going forward, superseding the 2001 AUMF in that context.

<sup>2</sup> Letter from the President to the Speaker of the House (Aug. 8, 2014) (available at <http://www.lawfareblog.com/wp-content/uploads/2014/08/IraqWPR.pdf>).



Baghdad, and prevent the Iraqi government from providing critical services to the Iraqi populace. Pursuant to this authorization, on the evening of August 15, 2014, U.S. military forces commenced targeted airstrike operations in Iraq. I have directed these actions, which are in the national security and foreign policy interests of the United States, pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive. These actions are being undertaken in coordination with the Iraqi government.<sup>3</sup>

This assertion of unilateral executive-branch authority to deploy the armed forces into a combat setting was consistent, to some degree, with the Administration's prior assertion of similar authority in connection with the multi-month air campaign against the regime of Muammar Gaddafi in Libya in 2011, as well as the Administration's consideration of airstrikes against the Assad regime in Syria in connection with the use of chemical weapons in 2013. In both those cases, the Administration appeared to assert that the President has authority to use some degree of military force in pursuit of important national interests, at least where American forces will not be present on the ground in a direct combat role.

Though the Administration has since added claims under color of the 2001 al Qaeda AUMF (i.e., the statutory foundation for all al Qaeda-related military activity around the world, including not just the Af-Pak region but also Yemen and Somalia to give two pressing examples) and the 2002 Iraq AUMF, it has not backed away from its assertion of Article II authority. And the logic of its Article II claims as first expressed in August 2014—i.e., that force may be used to (i) stop ISIL forces from threatening U.S. personnel on the ground in Iraq or (ii) protect Iraqi civilians from imminent harm at ISIL's hands—arguably have extensive application to the situation in Iraq today. First, U.S. personnel are now present on the ground in much greater numbers than in August 2014, and they are there on a comparatively widespread basis bringing them into geographic proximity to ISIL in many places.<sup>4</sup> The Administration's extended "force protection" theory would go a considerable way towards justifying continuing the use of force against ISIL on this basis alone. Similarly, the fact that ISIL currently controls a considerable amount of territory—including Mosul—means that the protection-of-civilians theory also has substantial application.

<sup>3</sup> Letter from the President to the Speaker of the House (Aug. 17, 2014) (available at <http://www.whitehouse.gov/the-press-office/2014/08/17/letter-president-war-powers-resolution-regarding-iraq>).

<sup>4</sup> See "Bombers Make It Onto Iraq Base Used by U.S. Troops," CBS News (Feb. 13, 2015) (available at <http://www.cbsnews.com/news/suicide-bombers-iraq-ain-al-assad-airbase-us-marines-near-isis/>).

None of this is to say that either theory is, or is not, persuasive as applied in Iraq then or now.<sup>5</sup> The point, rather, is that there may be little about current anti-ISIL operations that actually depends, as a legal matter, on the relevance of any AUMF given the breadth of the Administration's understanding of its Article II authority. On this view, the relevance of an AUMF is to enhance the legal and political legitimacy of the current campaign, but it is not strictly necessary to create that legitimacy in the first place.<sup>6</sup>

A similar point can be made about the Administration's eventual decision to invoke the 2001 al Qaeda AUMF in connection with anti-ISIL operations, in addition to its assertion of Article II authority. In early September 2014, Administration officials confirmed that they were now prepared to invoke the 2001 al Qaeda AUMF in support of the accelerating operations against ISIL. One official explained the underlying theory, which held that ISIL amounted to a partial successor to al Qaeda:

Based on ISIL's longstanding relationship with al-Qa'ida (AQ) and Usama bin Laden; its long history of conducting, and continued desire to conduct, attacks against U.S. persons and interests, the extensive history of U.S. combat operations against ISIL dating back to the time the group first affiliated with AQ in 2004; and ISIL's position – supported by some individual members and factions of AQ-aligned groups – that it is the true inheritor of Usama bin Laden's legacy, the President may rely on the 2001 AUMF as statutory authority for the use of force against ISIL, notwithstanding the recent public split between AQ's senior leadership and ISIL.<sup>7</sup>

Whatever the merits of this theory—I was among those who questioned it—the important thing about it is that the Administration continues to embrace it, and nothing in the draft AUMF for ISIS purports to limit or abandon it (let alone to terminate the 2001 AUMF itself). This is rather significant, since none of the constraint provisions that the Administration has included in its proposed AUMF for ISIL appear in the 2001 AUMF.<sup>8</sup>

<sup>5</sup> For skepticism about application of the Article II argument to support a sustained air campaign, see Jack Goldsmith, "The Relatively Weak Article II Basis for Bombing Iraq and Syria (and Remember the President's August 31, 2013 Speech?)" (June 14, 2014) (available at <http://www.lawfareblog.com/2014/06/the-relatively-weak-article-ii-basis-for-bombing-iraq-and-syria-and-remember-the-presidents-august-31-2013-speech/>).

<sup>6</sup> Note that this perspective is closely related to the long-standing view that the executive branch has Article II authority to use lethal force in order to prevent terrorist attacks against the United States in at least some circumstances, quite apart from whether there is any AUMF. I discuss this topic at length in Robert M. Chesney, *Postwar*, 5 HARVARD NATIONAL SECURITY JOURNAL 305 (2014) (available at <http://ssrn.com/abstract=2332228>).

<sup>7</sup> The statement was published at <http://justsecurity.org/14799/legal-theory-presidents-military-initiative-isil/>.

<sup>8</sup> The Draft AUMF does, in contrast, terminate the 2002 Iraq AUMF, which the administration also has cited in support of its current operations.

On this view, passage of the draft AUMF would add a third layer of legal authorization on top of two others already asserted by the Administration in support of current combat operations (Article II, and the 2001 AUMF). Bearing this in mind, does the draft AUMF really matter?

At one level, the answer must be yes. Neither the Article II nor the 2001 AUMF arguments recounted above are without critics, and the draft AUMF would definitively remove lingering questions regarding the Administration's authority to conduct the current campaign. Of course, there is no reason to think that the merits of the Article II or 2001 AUMF arguments are likely to find their way into court anytime soon, and hence some will doubt whether there really is anything to settle in this respect. For my part, I think it is quite important, if for no other reason than that our armed forces should not be sent into harm's way with such uncertainty lingering over their mission if the political will exists—as it seems to in this setting—to present a united front between the President and Congress in support of their mission.

A separate way in which the draft AUMF might matter is in connection with the various constraints it entails, which I will discuss in more detail in the next Part. But some have argued that those constraints are meaningless if they do not also bind the President in acting under his claims of Article II and 2001 AUMF authority.

Is this correct? I think it largely is, but the question is a bit more complicated than seems to be the case at first blush. First, there is no doubt that adoption of these constraints will have genuine *political* impact, making it considerably more costly for this or a future Administration to act in violation of them notwithstanding the existence of the parallel (and comparatively unconstrained) Article II and 2001 AUMF tracks. Second, some may argue that these constraints really should be read to apply to the 2001 AUMF (if not Article II as well) insofar as ISIL is concerned, by implication (i.e., despite the lack of explicit language to that effect). That may or may not be a plausible reading of the draft AUMF, but the argument likely would be made sooner or later, thus adding at least a bit to the teeth of the constraints. Finally, the constraints certainly would have full effect insofar as there are any situations covered by the draft AUMF but not by the 2001 AUMF or Article II—and as noted below in the discussion of “associated forces,” there is some reason to think that the draft AUMF does break new ground to a limited extent.

What if anything should Congress do in light of all this? Professor Marty Lederman has suggested adding in the language from Section 6 of the 2014 AUMF draft from the Senate Foreign Relations Committee, which stated that

“The provisions of this joint resolution pertaining to the authorization for use of force against the Islamic State of Iraq and the Levant shall supersede any preceding authorization for use of military force.”<sup>9</sup>

I would clarify that a bit in order to avoid a reading suggesting that the new AUMF entirely replaces the 2001 AUMF in *all* respects, thereby potentially leaving al Qaeda entities uncovered unintentionally. The following language would accomplish this:

“The provisions of this joint resolution shall supersede the terms of any preceding authorization for use of military force in relation to the Islamic State of Iraq and the Levant and its associated forces.”

Would the White House accept this shift? Apparently so. On February 23<sup>rd</sup>, the media reported that the White House is aware of this issue and willing to address it through changes to the draft AUMF. As an initial matter, White House officials apparently explained, the President would “no longer rely on the authority approved in 2001” in order to justify operations against ISIL if a new ISIL-specific AUMF is passed. More significantly, a White House official expressly invited Congress to “make that clear within the statute by adding that limitation to the authorization.”<sup>10</sup> Why the White House did not do this in its own draft to begin with is not clear; perhaps it was not possible to generate sufficient internal consensus on the point, and the hope (or expectation) was the Congress in any event would take the lead in breaking with the 2001 AUMF as the basis for anti-ISIL operations. At any rate, it appears the Administration would support such a shift.

All that said: adding this language would suffice to address the overlap with authorities under the 2001 AUMF, but it would not speak to the parallel claims of authority that the Administration has made under Article II itself. The draft AUMF in theory could be amended to clarify not only that it is the sole *statutory* authority for using force against ISIL, but also the sole authority of any kind, to the exclusion of Article II authority. In my view, however, such an attempted preclusion of Article II authority would likely be unconstitutional. The actual answer of course would depend on the scope of the particular claim of Article II authority at issue.

<sup>9</sup> See *supra* note 1.

<sup>10</sup> Nedra Pickler, “Obama Open to Changes to Military Authority Against IS,” Assoc. Press (Feb. 23, 2014) (available at [http://hosted.ap.org/dynamic/stories/U/US\\_CONGRESS\\_WAR\\_POWERS/SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT](http://hosted.ap.org/dynamic/stories/U/US_CONGRESS_WAR_POWERS/SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT)).

## II. The Contested Provisions of the Draft AUMF

I turn now to a review of various elements of the Administration's draft AUMF that have attracted criticism.

### A. The Lack of a Stated Purpose

When Congress authorized force in the aftermath of the 9/11 attacks, it specified a particular objective and it did so in the operative provision of the joint resolution:

“(a) In General.—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.*” (emphasis added)

That purposive language was no afterthought, but rather was the product of considerable discussion between the White House and Congressional leaders.

The Administration's draft AUMF for ISIL is curiously different in that respect, both because it lacks any purposive language<sup>11</sup> and because, so far as the public record indicates, here has not yet been meaningful dialogue between the White House and Congress regarding what such language might say.<sup>12</sup> The key operative provision authorizing force in the draft AUMF—section 2(a)—provides:

“(a) AUTHORIZATION.—The President is authorized, subject to the limitations in subsection (c), to use the Armed Forces of the United States as the President determines to be necessary and appropriate against ISIL or associated persons or forces as defined in section 5.”

The task of defining the purpose of the U.S. military intervention against ISIL is a matter for policymakers, *not lawyers*, to decide. That said, I note that the President in

<sup>11</sup> The one reference to purpose in the draft AUMF, contained in one of the Whereas clauses, refers vaguely to “*working with regional and global allies and partners to degrade and defeat ISIL, to cut off its funding, to stop the flow of foreign fighters to its ranks, and to support local communities as they reject ISIL.*” (emphasis added).

<sup>12</sup> President Obama has previously declared that the goal of U.S. policy is to “degrade, and ultimately destroy, ISIL through a comprehensive and sustained counterterrorism strategy.” Statement by the President (Sep. 10, 2014) (available at <http://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1>). But note the nuance in that language; that policy calls for ISIL's destruction via a multifaceted counterterrorism strategy that includes a major role for U.S. air power but that contemplates local ground forces rather than U.S. forces playing the lead role in taking the fight to ISIL on land.

his transmittal letter conveying the draft AUMF to Congress offered a statement of purpose of sorts:

“I am submitting a draft AUMF that would authorize the continued use of military force to degrade and defeat ISIL.”<sup>13</sup>

This language leaves much unsaid. It does not clarify, for example, whether our underlying purpose is to prop up the government of Iraq, to preserve Iraq’s territorial integrity, to prevent ISIL from maintaining a safe haven there or in Syria, to minimize ISIL’s capacity to conduct external operations, to destroy ISIL outright, or some combination of the above. Relatedly, the President’s language does not actually define what it means to “defeat” ISIL. These are all pressing questions for Congress and the White House to explore. And yet inclusion of the “degrade and defeat” language in the operative portion of the statute would at least be an improvement over the status quo.<sup>14</sup>

#### **B. “Enduring Offensive Ground Combat Operations”**

The most striking constraint contained in the draft AUMF is found in section 2(c), which provides:

“(c) LIMITATIONS.— The authority granted in subsection (a) does not authorize the use of the United States Armed Forces in enduring offensive ground combat operations.”

The “enduring offensive ground combat” language at the heart of this provision is grossly indeterminate on its face. It is entirely unclear what counts as “enduring,” at least on the margins. Does a ground deployment become enduring after a few weeks? A few months? Only after a few years? “Offensive” is equally uncertain in this setting. Will the upcoming operation to liberate Mosul be offensive, for example, given that it was ISIL that first attacked and then occupied that city? What about any given attack on ISIL forces caught out in the open, perhaps moving to carry out an attack somewhere?

<sup>13</sup> The letter is posted at <http://www.lawfareblog.com/wp-content/uploads/2015/02/02-11-15-White-House-AUMF-Transmittal-Letter.pdf>.

<sup>14</sup> I note that in a draft AUMF composed by me, Jack Goldsmith, Matt Waxman, and Benjamin Wittes in November 2014, we too failed to specify a particular purpose in our proposed operative section. See “A Draft AUMF to Get the Discussion Going,” LAWFARE (available at <http://www.lawfareblog.com/2014/11/a-draft-aumf-to-get-the-discussion-going/>).

It is not that we have no idea what the Administration has in mind here. The transmittal letter lays down several markers, for what it is worth. On one hand, the President writes that the

“draft AUMF would not authorize long-term, large-scale ground combat operations like those our Nation conducted in Iraq and Afghanistan. Local forces, rather than U.S. military forces, should be deployed to conduct such operations.”<sup>15</sup>

On the other hand, certain other ground operations would be permitted. To wit:

“The authorization I propose would provide the flexibility to conduct ground combat operations in other, more limited circumstances, such as rescue operations involving U.S. or coalition personnel or the use of special operations forces to take military action against ISIL leadership. It would also authorize the use of U.S. forces in situations where ground combat operations are not expected or intended, such as intelligence collection and sharing, missions to enable kinetic strikes, or the provision of operational planning and other forms of advice and assistance to partner forces.”<sup>16</sup>

But this leaves a great deal uncertain. Can military advisers embedded with Iraqi and Kurdish units fire their weapons when those units are engaged with ISIL, for example, apart from in strictly-immediate self-defense? Why would that not be ok, if SOF raids targeting leadership targets is permitted? Commanders should not be left to guess where the boundary lines lie. If the use of ground forces *are* to be constrained, far more care must be taken to develop, articulate, and enshrine the boundary lines.

*Should* the use of ground forces be constrained at all? That too is not a question for lawyers, at least not when framed in that way. But there is a related question that is decidedly legal: Would any such constraint be constitutional?

Some have argued that Congress plainly does have authority to impose such a constraint if it wishes to do so, not just pursuant to the power of the purse (a point which few would dispute) but also simply as a condition for issuing an AUMF in the first instance. Others argue that such an intervention would improperly infringe the President’s authority as Commander-in-Chief (particularly the notion that the particulars of waging war, once properly authorized, should be left to the President).

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

Advocates of the view that section 2(c) is constitutional have pointed out that Congress has on many past occasions authorized to use the military only for limited means or in limited ways. Leading examples along those lines include:

- The several statutes Congress enacted during the Naval (Quasi) War with France during the Adams Administration, each of which called for the use of naval force against French vessels in response to “depredations on the commerce of the United States.”<sup>17</sup>
- The statutes Congress enacted in the early 19<sup>th</sup> century to authorize the use of force against Barbary Coast pirates preying upon American shipping.<sup>18</sup>
- An 1890 statute authorizing the President to take measures he deems necessary to compel Venezuela to provide satisfaction for its earlier seizure of three American own steamships.<sup>19</sup>
- A 1955 statute authorizing the President to use the armed forces as necessary to protect Formosa [Taiwan] and the Pescadores from attack.<sup>20</sup>
- A 1983 statute authorizing the continued deployment of U.S. forces in Lebanon as part of a multinational peacekeeping force despite the outbreak of hostilities there, subject to limits specified in an exchange of diplomatic notes between the United States and Lebanon.<sup>21</sup>

Each of these examples bears some similarity to the present case, but most are readily distinguished, and none are precisely on point. Simply put, we have never before had a situation in which the United States sought to “defeat” or “destroy” a military enemy while Congress affirmatively forbade the Commander-in-Chief from pursuing that end with ground forces. The only close example on the list would be the Naval (Quasi) War statutes that famously authorized the Adams Administration to employ the Navy to seize French vessels, and even then only in limited circumstances (limitations that Chief Justice Marshall enforced in *Little v. Barreme*).<sup>22</sup> That example can be distinguished, however, on the ground that America’s aim in using force against France was quite limited, and certainly nothing like the call for “defeat” and “destruction” characterizing current policy towards ISIL. Put another way, the Naval

<sup>17</sup> Act of May 28, 1798, ch. 48, 1 Stat. 561; Act of June 28, 1798, 1 Stat. 574; Act of July 9, 1798, ch. 68, 1 Stat. 578).

<sup>18</sup> Act of Feb. 6, 1802, ch. 4, 2 Stat. 129 (Tripoli); Act of Mar. 3, 1815, ch. 90, 3 Stat. 230 (Algiers). Note, though, that in both these cases Congress not only authorized the use of the navy but also included a general authorization “for the President...to cause to be done all such other acts of precaution or hostility, as the state of war will justify, and may in his opinion require.” See *id.* s.2.

<sup>19</sup> Joint Resolution of June 19, 1890, 26 Stat. 674.

<sup>20</sup> Act of Jan. 29, 1955, ch. 4, 69 Stat. 7.

<sup>21</sup> Pub. L. 98-119, 97 Stat. 804 (Oct. 12, 1983).

<sup>22</sup> 6 U.S. 170 (1804).



(Quasi) War with France was not a situation in which the United States was doing its level best to destroy a military opponent, as does appear to be the aim with ISIL.

Of course, it is equally true that we do not have a clear example of something similar to s. 2(c) being proposed but then rejected on constitutional ground in the past. The absence of an on-point practical precedent thus is best understood merely to make the constitutional question harder, not to conclusively resolve it.

This leaves both sides in the debate to argue from deeper principles about the respective privileges of the President and Congress. There are few clear lines in this area, unfortunately, particularly when a novel constraint such as this arises. My own view is that this is an unusually close case, and an unwise proposal, but I do not think it lies beyond the powers of Congress in the current circumstances. Were the facts to change—for example, if it became the case that an “enduring offensive ground combat operation” was necessary in order to prevent ISIL from attacking the United States directly, thus more directly implicating the Article II authority and duty of the President to take actions to defend the nation—my answer might well be different. To the best of my knowledge, however, this is not currently the case.

### **C. The Associated Forces Definition**

There has been some talk of the associated forces definition in the draft AUMF, including criticism for its failure to include the language of “co-belligerency” and its inclusion of the notion that ISIL may spawn “successor groups.” I am not convinced that the absence of the co-belligerency language has practical significance, but I also think it is wise to tap into the existing understandings of “associated forces” that the government and the courts have developed over more than a dozen years’ worth of experience in connection with the 2001 AUMF. There seems to be no harm in tweaking the language to do this. As for the notion of pre-incorporating successor groups that may emerge later, the experience of this Administration reading precisely that argument into the 2001 AUMF suggests that such language will be implied into any ISIL AUMF in any event, unless of course the idea is affirmatively prohibited.

### **D. Transparency and Oversight**

The draft AUMF makes a tantalizing gesture towards transparency and oversight in the government’s application of the authority it confers, but falls short of the mark by (i) failing to explain in any detail just what events or actions actually trigger the reporting requirement, and (ii) limiting the reporting to Congress while saying nothing about disclosures to the public. The provision should be amended to at least require

periodic disclosure to the public as to any new groups or organizations brought within the scope of the associated forces language in the AUMF, and also with respect to uses of force under color of the AUMF in locations outside of Iraq or Syria (such as, say, Libya). Thought also should be given as to how authority granted under an ISIL AUMF would relate to the HASC-originated reporting requirements previously adopted for Special Military Operations.

#### **E. The Law of Armed Conflict**

The draft AUMF is conspicuously silent with respect to whether the force it authorizes must comport with the law of armed conflict (“LOAC”). This is not unusual, to be sure; usually AUMFs do not say anything explicitly on this point, and LOAC’s relevance instead is simply assumed when, for example, litigation may arise requiring a judgment on the matter. In this particular instance, however, the precise way in which s.2(a) grants authority does raise at least the possibility that the President will receive discretion to determine that some actions inconsistent with LOAC nonetheless are “necessary and appropriate” under the statute. This would probably not be a fair reading, but to dispel any doubt it would be worth including language in the AUMF clearly stating LOAC’s relevance.

#### **F. The Sunset Clause**

Sunset clauses offer a mix of advantages and disadvantages. They are problematic insofar as one believes that (i) the authority in issue will be desirable to maintain when the sunset arrives but (ii) for some reason there is a substantial risk that this insight will not be appreciated or acted upon. They are beneficial, on the other hand, in that they compel a future Congress and President to commit their own political capital should they wish to preserve a sunset authority, in which case the authority receives an injection of fresh political and legal legitimacy (not to mention a fresh public airing on the merits and in light of changed circumstances).

In this case, there are special factors militating in favor of a sunset of *some* kind. As noted above, there is a degree of uncertainty regarding the military’s mission. That, combined with the high likelihood of substantially-changed facts on the ground in Iraq and Syria in the years ahead, cuts in favor of ensuring that a future President and Congress will come to grips with these issues on their own. The current debate surrounding the continuing vitality of the 2001 AUMF is a good illustration of the way in which the passage of time and evolution of facts on the ground can erode perceptions of legitimacy for long-standing AUMFs, generating friction and doubt that unhelpfully overhangs the decisions of military commanders. More generally, it is

highly desirable as a matter of democratic accountability that the people's representatives periodically weigh in on—and invest their own political capital in—armed conflicts that have become protracted. And so too for a new president.

All that said, it is problematic to time the sunset such that the need to consider renewal would fall on the desk of a just-elected president, and it is imperative as well to minimize any impression that the United States from the outset is focused more on exiting the mission rather than accomplishing it (a matter of atmospherics, yes, but one that matters both in terms of the enemy's perceptions and the perceptions of our allies). To address both these concerns, I recommend shifting the term of the proposed sunset clause from three to five years.<sup>23</sup>

### G. Detention

I close by noting that the draft AUMF is conspicuously silent on the subject of detention. At one level this is understandable; the Administration plainly would prefer for the Government of Iraq or others to take responsibility for any detention that occurs in connection with ISIL members, and this may well be the most desirable approach as a matter of policy. It is disconcerting, however, to contemplate the enactment of an AUMF that will authorize continued use of airstrikes and other forms of lethal military force under color of the law of armed conflict, but that will be silent with respect to the possibility that the United States might, in the right circumstances, want to or even need to employ LOAC-compliant detention of captured ISIL personnel. I hope that this committee, and Congress more generally, will give thought to this matter.

\* \* \*

Thank you for your time and attention. I look forward to the opportunity to answer your questions.

Robert Chesney

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<sup>23</sup> This is a revised view, as I previously had suggested that three years might suffice. See *supra* note 14.

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Bobby Chesney is the Charles I. Francis Professor in Law and Associate Dean for Academic Affairs at the University of Texas School of Law. In addition, he is the Director-Designate of the Robert S. Strauss Center for International Security and Law. In 2009, Professor Chesney served in the Justice Department in connection with the Detention Policy Task Force created by Executive Order 13493. He also previously served the Intelligence Community as an associate member of the Intelligence Science Board and as a member of the Advanced Technology Board. In addition to his current positions at the University of Texas, he is a non-resident Senior Fellow of the Brookings Institution, a member of the American Law Institute, a senior editor for the Journal of National Security Law & Policy, and a past chair of Section on National Security Law of the Association of American Law Schools (as well as of the AALS Section on New Law Teachers). He is a co-founder and contributor to [www.lawfareblog.com](http://www.lawfareblog.com), the leading source for analysis, commentary, and news relating to law and national security. Professor Chesney's scholarship focuses on U.S. national security policies and institutions, encompassing both domestic and international law issues. Among other things, he has written about military detention, the use of lethal force, civilian criminal prosecution in terrorism-related cases, civil litigation involving the state secrets privilege, and the convergence of functions across the military and the Intelligence Community. Pending projects include two books under contract with Oxford University Press (one that places the legal debates of the post-9/11 period in long-term historical context, and the other examining the evolving judicial role in national security affairs). Professor Chesney's articles may be downloaded from SSRN [here](http://ssrn.com).

In addition to his blogging at Lawfare, those interested in national security law should consider following Professor Chesney on Twitter (@bobbychesney), and might also be interested in the listserv he operates for those interested in receiving updates on national security law developments (to join the listserv, just send him an email with a request to that effect). Professor Chesney is a magna cum laude graduate of both Texas Christian University and Harvard Law School. After law school he clerked for the Honorable Lewis A. Kaplan of the United States District Court for the Southern District of New York and the Honorable Robert D. Sack of the United States Court of Appeals for the Second Circuit. He then practiced with the firm Davis Polk & Wardwell in New York (litigation), before beginning his academic career with Wake Forest University School of Law. There he received a teacher of the year award from the student body in one year, and from the school's dean in another. In 2008 he came to the University of Texas School of Law as a visiting professor, and then joined UT on a permanent basis in 2009. He became the Associate Dean for Academic Affairs in 2011.

Professor Chesney has taught a variety of courses over the years, including Constitutional Law, National Security Law, Evidence, Civil Procedure, and an array of security-related seminars. During the 2013-14 academic year, he will be teaching Constitutional Law I during the fall semester, and in the spring will be teaching both National Security Law and The Law of Armed Conflict.

**DISCLOSURE FORM FOR WITNESSES  
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Co-Principal Investigator/Minerva Initiative	Department of Defense	\$1,919,342-multi year grant beginning 2014	Complex Emergencies and Political Stability in Asia (CEPSA)

**2014**

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Principal Investigator/Minerva Initiative	Department of Defense	\$7,740,775-Multi year grant from 2009-2015	Climate Change and African Political Stability (CCAPS)
Co-Principal Investigator/Minerva Initiative	Department of Defense	\$1,919,342-Multi year grant beginning 2014	Complex Emergencies and Political Stability in Asia (CEPSA)

**2013**

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2014

Foreign contract/ payment	Foreign government	Dollar value	Subject of contract or payment

2013

Foreign contract/ payment	Foreign government	Dollar value	Subject of contract or payment

**Prepared Statement of Benjamin Wittes**  
**Senior Fellow at the Brookings Institution**  
**before the**  
**House Committee on Armed Services**

**“Outside Perspectives on the President’s Proposed Authorization for the Use of Military Force Against the Islamic State of Iraq and the Levant”**

February 26, 2015

Thank you Chairman Thornberry, Ranking Member Smith, and members of the committee for inviting me to present my views on the President’s proposed Authorization for the Use of Military Force against the Islamic State of Iraq and the Levant.<sup>1</sup> I am a senior fellow in Governance Studies at the Brookings Institution. I co-founded and am Editor in Chief of *Lawfare*, a website devoted to sober and serious discussion of “Hard National Security Choices.” I am the author, co-author, or editor of several books on subjects related to law and national security. These include *The Future of Violence: Robots and Germs, Hackers and Drones—Confronting a New Age of Threat* (forthcoming 2015), *Speaking the Law: The Obama Administration’s Addresses on National Security Law* (forthcoming 2015), *Detention and Denial: The Case for Candor After Guantánamo* (2011), *Law and the Long War: The Future of Justice in the Age of Terror* (2008), and *Legislating the War on Terror: An Agenda for Reform* (2009). I have written extensively on both the existing 2001 AUMF and on the need for a new one. The views I am expressing here are my own.

I want to advance two basic arguments today. First, I will argue that the administration’s draft ISIL AUMF is a significantly flawed document, though flawed in ways somewhat different from many of the criticisms being advanced against it. Second, I will argue that many—though not all—of the legitimate criticisms that people of diverse politics are making against the administration’s draft do not apply, or apply with significantly lesser force, to a draft AUMF that Jack Goldsmith, Matthew Waxman, my co-panelist Robert Chesney, and I put forth last year. Given the widespread criticisms of the administration’s draft, I want to suggest that our draft

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<sup>1</sup> The proposal is available at [http://www.whitehouse.gov/sites/default/files/docs/aumf\\_02112015.pdf](http://www.whitehouse.gov/sites/default/files/docs/aumf_02112015.pdf). See President Barack Obama, Letter from the President—Authorization for the Use of United States Armed Forces in connection with the Islamic State of Iraq and the Levant, Feb. 11, 2015, <http://www.whitehouse.gov/the-press-office/2015/02/11/letter-president-authorization-use-united-states-armed-forces-connection>.



may provide an alternative way forward for this body as it contemplates authorizing military force against ISIL.

### Criticisms Worth Rejecting

The administration's draft AUMF faces a variety of criticisms, criticisms that are by no means of equal weight. Let me start, therefore, by dispensing with a number of criticisms of the draft that are, in my judgment at least, meritless.

Many critics have worried that the draft AUMF would unduly limit the President—and his successor—in prosecuting the war against ISIL. In this regard, some have worried about limitations on the use of ground forces.<sup>2</sup> Others have argued the problem is chiefly the three-year proposed sunset provision.<sup>3</sup> Still others have voiced concerns about both.<sup>4</sup>

Yet both concerns are actually misplaced, at least as a legal matter, and for largely the same reasons. First, the authorization is not the President's only source of power to wage war, so limiting an authorization does not limit presidential authority to the extent that other authorities exist for the contemplated action. And second, because the proposed authorization leaves in place the 2001 AUMF, which the administration has construed broadly to cover all current operations against ISIL, there is no dearth of underlying authority at all—even before one reaches the President's inherent Article II power to act in self-defense of the nation. While the authorization may create a measure of political constraint, it generates essentially no meaningful legal constraints.

<sup>2</sup> See, e.g., David Cohen, *John McCain: Don't Handcuff President*, POLITICO (Feb. 15, 2015, 1:28 PM), <http://www.politico.com/story/2015/02/mccain-dont-handcuff-president-115218.html> (quoting Sen. John McCain (R-Ariz.), who states: "To restrain him in our authorization of him taking military action, I think, frankly, is unconstitutional and eventually leads to 535 commanders in chief"; "I think we should not restrain the president of the United States. The Congress has the power of the purse. If we don't like what the commander in chief is doing, we can cut off his funds for doing so."). See also Editorial, *No Way To Fight a War*, WASH. POST, Feb. 14, 2014, [http://www.washingtonpost.com/opinions/no-way-to-fight-a-war/2015/02/14/56f83fd2-b3b4-11e4-854b-a38d13486ba1\\_story.html](http://www.washingtonpost.com/opinions/no-way-to-fight-a-war/2015/02/14/56f83fd2-b3b4-11e4-854b-a38d13486ba1_story.html) ("At the same time, his language would constrain the next president, at least during the first year of his or her term. Neither Mr. Obama nor Congress should seek to limit military decisions that might be taken by the next commander in chief, even if the restrictions were not legally binding.").

<sup>3</sup> See, e.g., Ruth Marcus, Op-Ed, *Congress's War Duty*, WASH. POST, Feb. 13, 2015, [http://www.washingtonpost.com/opinions/congresss-war-duty/2015/02/13/2c05860a-b3b8-11e4-827f-93f454140e2b\\_story.html](http://www.washingtonpost.com/opinions/congresss-war-duty/2015/02/13/2c05860a-b3b8-11e4-827f-93f454140e2b_story.html) (arguing for elimination of the sunset provision).

<sup>4</sup> See, e.g., John Yoo, *Say No to the AUMF*, NAT'L REV. (Feb. 2, 2015, 4:00 AM), <http://www.nationalreview.com/article/398434/say-no-aumf-john-yoo>. Yoo writes:

Other unprecedented provisions in this draft AUMF further underscore the Obama administration's lack of seriousness in pursuing ISIS. In addition to the three-year deadline, the White House proposes that Congress prohibit the use of force "in enduring offensive ground combat operations." This bizarre restriction has never appeared before in any declaration of war or authorization for combat operations, nor does the proposal define it. Does it prohibit the deployment of large bodies of troops, such as a whole brigade or division (which, we have informed ISIS, will be there no longer than three years)? Does it restrict the use of heavy armaments, such as M-1 Abrams tanks? Does it bar the construction of bases and military infrastructure?

As Jack Goldsmith has rightly argued:

[T]he Obama draft AUMF does not restrain the President. The ground troops and time limit limitations in the Obama draft limit only what that AUMF authorizes. They do not limit the President's entirely independent and temporally unbound power to use ground troops under the 2001 AUMF (which the President did not propose to repeal). Nor do they affect his probably narrower but still independent authority to introduce ground troops under Article II. If the President wanted to send 100,000 troops to Iraq tomorrow—which he certainly doesn't want to do—he has full congressional authorization to do so under the 2001 AUMF, at least as his administration interprets that law. Nothing in the draft AUMF touches that power.<sup>5</sup>

Moreover, it is implausible, at least to my mind, that the ground-force limitation in the proposed AUMF would meaningfully constrain either this President or his successor even were it the only source of authority to use force. The proposed resolution says that it “does not authorize the use of the United States Armed Forces in enduring offensive ground combat operations.” But the resolution does not define “enduring,” which is a word ripe for elastic interpretation.<sup>6</sup> All offensive combat operations, after all, endure for some period of time—if only the length of time required for a single shot to reach its target. So an administration that wished to find support for long-term, offensive ground operations under this resolution would merely have to convince itself that those operations would not last long *enough* to count as “enduring.” What's more, as long as the President might reasonably characterize such operations as defensive, the restriction would not apply at all—enduring defensive ground operations lying outside of its express terms.

A number of commentators have also complained that the draft resolution contains no hard geographic limitations that would contain the authorization to Iraq or Syria.<sup>7</sup> This criticism denigrates what is actually a virtue in the President's draft. ISIL is a fluid enemy that is by no means likely to restrict its activities to Iraq and Syria. Groups elsewhere—for example, in Egypt,<sup>8</sup> Libya,<sup>9</sup> Algeria<sup>10</sup> and Afghanistan<sup>11</sup>—have already associated themselves with ISIS.<sup>12</sup> At

<sup>5</sup> Jack Goldsmith, *Errors and Misconceptions About the Obama Draft AUMF*, LAWFARE (Feb. 16, 2015, 3:03 PM), <http://www.lawfareblog.com/2015/02/errors-and-misconceptions-about-the-obama-draft-aumf>.

<sup>6</sup> See Ilya Somin, *Reactions to the Obama Administration's Proposed ISIS AUMF*, WASH. POST: VOLOKH CONSPIRACY, Feb. 15, 2015, <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/15/reactions-to-the-obama-administrations-isis-aumf/>.

<sup>7</sup> See, e.g., Editorial, *Obama Seeks an Expansive War Authorization to Combat ISIS*, N.Y. TIMES, Feb. 11, 2015, <http://www.nytimes.com/2015/02/12/opinion/obama-seeking-an-expansive-war-authorization-congress.html> (“The parameters of a proposed war authorization the White House sent to Congress on Wednesday, however, are alarmingly broad. It does not limit the battlefield to Syria and Iraq, the strongholds of the Islamic State, also known as ISIS or ISIL, which is attempting to form a caliphate.”).

<sup>8</sup> Patrick Kingsley, Martin Chulov & Lotfy Salman, *Egyptian Jihadists Pledge Allegiance to ISIS*, GUARDIAN (Nov. 10, 2014, 4:11 EST), <http://www.theguardian.com/world/2014/nov/10/egyptian-jihadists-pledge-allegiance-isis> (reporting that Ansar Beit al-Maqdis, Egypt's most active jihadi group, had pledged its loyalty to the Islamic State).

<sup>9</sup> Paul Cruickshank, Nic Robertson, Tim Lister & Jomana Karadsheh, *ISIS Comes to Libya*, CNN (Feb. 16, 2015, 6:34 AM), <http://www.cnn.com/2014/11/18/world/isis-libya>.

least to the extent that such pledges of loyalty amount to co-belligerency within the meaning of international law and to the extent that action on the soil of the relevant country would be otherwise lawful, it seems shortsighted for Congress to withhold authorization on grounds that the ISIL component in question does not happen to operate within specific territories Congress anticipated up to three years in advance. Had the 2001 AUMF contained geographic limitations of this type, it would have been an entirely ineffective instrument against, for example, Al Qaeda in the Arabian Peninsula.

### Criticisms with Merit

The administration's draft, however, has serious problems, which mostly have their roots in the proposal's breadth. The document does not, on its face, appear broad. The administration's lawyers wrote it cleverly to create the appearance of significant limitations. And as I have attempted to show above, they have succeeded to a significant degree in conveying that impression to many people—the result being that the administration's draft has been denounced for tying presidential hands.<sup>13</sup> In fact, however, the real problem runs in the other direction. While offering an appearance of accepting restraints, the document contains virtually no meaningful ones at all. The reason is its failure to grapple at all with the 2001 AUMF, which—as numerous observers have noted—it leaves in place without a sunset.<sup>14</sup>

The result is that under the administration's proposal, at least as a legal matter, the President would have all the authority he has today—including all the authority to fight ISIL—under the

<sup>10</sup> Madeline Grant, *French Tourist 'Beheaded' by ISIS-Linked Group in Algeria*, NEWSWEEK (Sept. 24, 2014, 12:19 PM), <http://www.newsweek.com/french-tourist-beheaded-isis-linked-group-algeria-272897>.

<sup>11</sup> Joseph Goldstein, *Afghan Strike Is Said to Kill Commander Linked to ISIS*, N.Y. TIMES, Feb. 9, 2015, <http://www.nytimes.com/2015/02/10/world/asia/former-taliban-commander-who-joined-isis-is-said-to-be-killed-in-afghanistan.html>.

<sup>12</sup> Earlier this month, Lt. Gen. Vincent R. Stewart, the director of the Defense Intelligence Agency, stated that ISIL is "beginning to assemble a growing international footprint." Eric Schmitt & David D. Kirkpatrick, *Islamic State Sprouting Limbs Beyond Its Base*, N.Y. TIMES, Feb. 14, 2015, <http://www.nytimes.com/2015/02/15/world/middleeast/islamic-state-sprouting-limbs-beyond-mideast.html>.

<sup>13</sup> See Burgess Everett & Manu Raju, *President Obama's War Pushes Rift with the Left*, POLITICO (Feb. 23, 2015, 5:39 AM), <http://www.politico.com/story/2015/02/president-obamas-war-push-faces-rift-with-the-left-115329.html> (noting that Republicans in control of Congress insist that the White House's three-year draft does too much to limit President Obama and his successor).

<sup>14</sup> Stephen Vladeck, *Obama Doubles Down on Perpetual War*, MSNBC (Feb. 11, 2015, 11:35 AM), <http://www.msnbc.com/msnbc/obamas-aumf-asks-congress-perpetual-war>. See also Joel Gillin, *Obama Isn't Ready to Give Up His Broad War Powers*, New Repub., Feb. 12, 2015, <http://www.newrepublic.com/article/121043/obamas-isis-aumf-would-leave-2001-war-powers-place>; Jennifer Bendery, *Here's Why Obama's Request For War Limits Does Nothing To Limit War*, HUFFINGTON POST (Feb. 12, 2015, 9:59 AM), [http://www.huffingtonpost.com/2015/02/11/obama-war-authorization-isis\\_n\\_6664900.html](http://www.huffingtonpost.com/2015/02/11/obama-war-authorization-isis_n_6664900.html).

2001 AUMF. And *in addition*, he would be granted three years of even broader authority to target ISIL and its associated forces, which the draft resolution defines broadly.<sup>15</sup>

Thus the limitation on ground forces is entirely meaningless, since the 2001 AUMF remains in place and contains no such limitation.<sup>16</sup> This does not particularly concern me, as I do not favor a limitation on ground forces. Those who do favor such a limitation should be particularly concerned, however, by one that exists only optically.

The three-year sunset is also largely meaningless. The only authority, as I read it, that would actually sunset three years from the passage of the administration's draft would be the authority to target those associated forces of ISIL that might not be covered separately by the 2001 AUMF and that did not pose the sort of imminent threat that would bring them under the ambit of the President's inherent Article II authority.<sup>17</sup> Given the sweep of the administration's current interpretation of the 2001 AUMF, this is likely to be a small set of forces indeed.

Again, it is possible that these apparent restrictions will operate as genuine political constraints. They will not, however, *legally* constrain the President as a casual reader of the proposal might expect.

The reporting requirements, which are quite anemic on their own terms, are similarly empty. As proposed, section 4 would require a twice-annual report to Congress—though not to the public—

<sup>15</sup> For more on the administration's broad interpretation of associated forces, see Jack Goldsmith, Ryan Goodman & Steve Vladeck, *Six Questions Congress Should Ask the Administration about Its ISIL AUMF*, LAWFARE (Feb. 20, 2015, 11:00 AM), <http://www.lawfareblog.com/2015/02/six-questions-congress-should-ask-the-administration-about-its-isil-aumf/> (“[T]he Administration draft’s definition of ‘associated forces’ is far broader than any interpretation that has previously been offered by the U.S. government.”). See also Jack Goldsmith, *The Administration’s Hard-To-Fathom Draft AUMF*, LAWFARE (Feb. 12, 2015, 6:33 AM), <http://www.lawfareblog.com/2015/02/the-administrations-hard-to-fathom-draft-aumf/> (noting that section 5 of the draft AUMF defines “associated persons or forces . . . more broadly than I have ever seen”); Ryan Goodman, *Obama’s Forever War Starts Now*, FOREIGN POL’Y, Feb. 12, 2015, <http://foreignpolicy.com/2015/02/12/obamas-forever-war-starts-now-aumf-isis-islamic-state/> (noting that “if the authorization to strike al Qaeda targets has been far reaching, the Islamic State AUMF is even broader”); Ryan Goodman, *AUMF, “Associated Forces,” and Slippery Slopes: Two More Data Points*, JUST SECURITY (Feb. 18, 2015, 9:08 AM) <http://justsecurity.org/20163/aumf-associated-forces-slippery-slopes-data-points/> (“[T]he language defining associated forces in the President’s proposal is written in a way that appears broader than the framework that the administration has long been using under the 2001 AUMF”); Marty Lederman, *Suggestions for clarifying/amending the President’s Draft ISIL AUMF*, JUST SECURITY (Feb. 12, 2015, 8:02 AM), <http://justsecurity.org/19928/suggestions-clarifyingamending-draft-aumf/> (arguing that section 5 of the draft AUMF is problematic in that it does not invoke the concept of belligerency to make clear Congress intends only to cover groups that fall within the concept of co-belligerency under the laws of war; does not refer to the requirement that the group be “organized [and] armed”; and suggests that “necessary and appropriate force” can be employed against “associated persons” not part of ISIL).

<sup>16</sup> See Mike Lillis, *Pelosi on the Spot as War Debate Begins*, THE HILL (Feb. 12, 2015, 6:00 AM), <http://thehill.com/homenews/house/232580-pelosi-faces-dilemma-on-presidents-legislation> (quoting Rep. Jim McGovern (D-Mass.), who states that the language forbidding “enduring offensive ground combat operations” is not a limitation but rather “language that’s supposed to make people like me feel better . . . . In real terms, it doesn’t mean anything.”)

<sup>17</sup> Jack Goldsmith has effectively argued this point. See Goldsmith, *supra* note 15.

“on specific actions taken pursuant to this authorization.” The trouble is that the proposal would not require reporting on such actions to the extent the President takes them pursuant to the 2001 AUMF. Nor, as Goldsmith, Stephen Vladeck, and Ryan Goodman point out, does it define “what *is* a ‘specific action’ that must be reported under the terms of the provision.”<sup>18</sup> So it’s not clear that the law would require reporting with respect to any particular action, nor is it clear—assuming some actions would require reporting—what the character of those actions might be.

Finally, to say that the administration is correct to resist specific geographic limits in its draft is not to say that Congress should refrain from offering *any* geographic guidance in its authorization. The administration’s draft, for example, would, as a matter of U.S. domestic law, authorize operations in a great many countries where international law might prohibit them. For example, the draft by its terms would authorize military operations on the soil of non-consenting states in situations that do not amount to imminent threats and in circumstances in which the states in question were neither unable nor unwilling to neutralize the threats emanating from their territories. While I do not anticipate the Obama administration using the authorization in this fashion, there is something to be said for limiting the geography of the authorization to those places where international law would actually permit the use of force.

To summarize the matter bluntly, the administration’s draft fails—and intentionally fails—to address the relationship between this new authorization and the 2001 authorization. The result is that its authorities are, optics notwithstanding, simply additive with respect to presidential authority.

This is a problem for two distinct reasons. One is that the accretion of presidential authority under successive AUMFs, each lacking significant accountability mechanisms, is not a healthy thing. It is not a healthy thing for a Congress that wants to function as a partner in defining the parameters of a war. And it is not a healthy thing either for the Executive Branch, for which the essentially blank check serves to reduce accountability and diminish strategic focus.

The second reason is that most analysts agree that the 2001 AUMF is badly out of date and warrants reform on its own terms. Tied to the September 11 attacks, it no longer describes well the conflict the United States is currently pursuing, a conflict that includes groups that had nothing to do with 9/11 in parts of the world quite remote from those places where the core of the AUMF conflict has taken place. While I believe the administration’s reading of the law, which has allowed it to reach such targets where they lurk, is generally a reasonable one, it is not obvious when one reads the text of a law authorizing force against groups responsible for 9/11 how it authorizes force against groups in Yemen that did not exist in 2001. What’s more, the administration’s reading of the law has stopped short of reaching some potentially important targets against which a reasonable Congress might wish it to wield a freer hand.

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<sup>18</sup> Goldsmith, Goodman & Vladeck, *supra* note 15 (emphasis in original).

The AUMF, in other words, describes rather badly the conflict that the United States is currently fighting, and that problem is likely to get far worse in the coming years, barring unpersuasively broad interpretations of the document like the one the administration has adopted to bring ISIL within its reach. The President has publicly committed to refining and ultimately repealing the 2001 AUMF.<sup>19</sup> But his current proposal inexplicably declines to refine the existing authorization in the course of defining new authorities. This is not a course Congress should follow.

### **An Alternative Approach**

In November of last year, Chesney, Goldsmith, Waxman, and I jointly drafted a possible AUMF.<sup>20</sup> Unlike the President's recent proposal, our proposal aimed to integrate authorization for the fight against ISIL into authorization for the larger conflict. It aimed to supplant the existing AUMF. And it aimed to have genuine accountability mechanisms and genuine limitations.

It read in its entirety as follows:

To revise and clarify the authority of the President to use all necessary and appropriate force against certain terrorists or terrorist organizations.

*Whereas . . .*

#### **SEC 1. Short Title**

This joint resolution may be cited as the "Revised Authorization for Use of Military Force of 2014"

#### **SEC. 2. Authorization for Use of Force**

(a) The President is authorized to use all necessary and appropriate force against Al Qaeda, the Islamic State, and the Afghan Taliban.

(b) The authorization of force in Section 2(a) extends to associated forces of the entities listed in section 2(a) insofar as such forces are engaged in hostilities against the United States.

#### **SEC 3. Geography**

The authorization of force in Section 2 extends only to operations in places where force can be used consistent with applicable international law concerning sovereignty and the use of force.

#### **SEC 4. Sunset Clause**

<sup>19</sup> See Barack Obama, President of the United States, Remarks at the National Defense University (May 23, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

<sup>20</sup> Robert Chesney, Jack Goldsmith, Matthew Waxman & Benjamin Wittes, *Draft AUMF to Get the Discussion Going*, LAWFARE (Nov. 10, 2014, 1:00 PM), <http://www.lawfareblog.com/2014/11/a-draft-aumf-to-get-the-discussion-going>.

The authorization granted in Section 2 shall terminate on the date that is 36 months after the date of the enactment of this joint resolution.

#### SEC. 5. Reporting

(a) In addition to all reporting requirements under the War Powers Resolution or other applicable statute, the President shall:

(1) no less often than every ninety days publish in unclassified form a list of the entities against which the force authorized in Section 2 has been deployed and, to the extent not strictly precluded by national security, where such force was deployed;

(2) no less often than every ninety days report to the Senate and House armed services, foreign relations or affairs, and intelligence committees the geographic location of operations carried out pursuant to Section 2, and a summary of the factual predicate for concluding that an entity is an “associated force” covered by Section 2. To the extent strictly necessary in the interests of national security, this report may be made in classified form.

(b) If the President deploys force under his constitutional authorities in Article II against a terrorist or terrorist organization that does not fall within the authorization in Section 2, he shall, in addition to all reporting requirements under the War Powers Resolution or other applicable statute, comply with the reporting requirements specified in Section 5(a) concerning the identities of the terrorist or terrorist organizations, the geographic location of the use of force, and the summary of the factual predicate for the use of force.

#### SEC. 6. Repeal of Prior Authorizations

(a) The September 18, 2001 Authorization to Use Military Force (Public Law 107–40; 50 U.S.C. 1541 note) is repealed.

(b) The Authorization for Use of Military Force Against Iraq Resolution of 2002 (Public Law 107–243; 50 U.S.C. 1541 note) is repealed.

#### SEC. 7. War Powers Resolution Requirements

Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that section (a) is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

A few aspects of this proposal are notable in light of the criticisms that the President’s draft has faced.

First, unlike the administration’s draft, our proposal would subsume the current AUMF—which currently covers, as the administration and the courts have interpreted it, Al Qaeda, the Taliban, and associated forces—and then repeals the underlying document. The result is that there would be a single authorization for fighting Al Qaeda, the Taliban, ISIL, and all of their associated forces. There would be no duplication in the authorization that would allow an administration effectively to avoid congressional limitations by relying on a substantially overlapping document.

Second, because there would be no duplication in the authorization, the proposal's sunset provision would actually mean something. To be precise, as we wrote the draft, the authorization for the entirety of the overseas counterterrorism effort would expire, absent renewal, after three years. This does not mean we think the conflict will be over three years from now. I, for one, do not. It means only that we think it important Congress continue to be involved in decision-making and conflict definition. The sunset is a way of forcing renewed legislative attention to the question of the conflict's parameters.

For those who regard the three-year sunset as signaling weakness to the enemy or an absence of long-term commitment to the fight, there's a simple remedy: Add more time. The sunset could be after five years, or even after ten. The specific time frame is less important than having some clear mechanism built into the authorization to prevent it from functioning as an authorization for Forever War.

Third, while the draft does not contain specific geographic limitations, it "extends only to operations in places where force can be used consistent with applicable international law concerning sovereignty and the use of force." This limitation could be satisfied by the principle of consent as it is currently in Iraq and Afghanistan. The limitation would also permit force to be used in Syria to the extent international law permits it, as the administration currently claims it does. It would also permit the use of force in countries that do not consent to operations on their territory to the extent their sovereignty is overridden by self-defense principles. The United States's view of its authority to operate in the territory of non-consenting countries that it deems unwilling or unable to mitigate threats emanating from within their borders is not accepted universally.<sup>21</sup> And the proposal does not try to determine the proper substance of international law on that point. It simply says that the administration has Congress's authorization to use force only in those locations where international law permits it.

Fourth, the proposal contains significantly more robust reporting requirements than does the administration's draft. Instead of requiring a twice-annual report on ill-defined "specific activities," it requires publication four times a year of an unclassified list of the entities against which force has been deployed under the resolution. It requires more-detailed reporting to the congressional armed services committees. And it requires reporting as well on operations undertaken under Article II inherent authority.

I have no doubt that this proposal could stand significant improvement in a number of areas. For example, the debate over whether the administration has defined "associated forces" too broadly makes me wonder whether we have limited it too strictly in this proposal. That said, our draft offers an approach that is far less susceptible than the administration's draft to the concerns raised by scholars and analysts across the political spectrum. As this body considers how to authorize the conflict against ISIL—and how that authorization should interact with the existing authorization for use of force against Al Qaeda—our proposal may offer an alternative way forward that might attract a broader swath of support.

Thank you very much. I look forward to taking your questions.

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<sup>21</sup> For a detailed discussion of the unwilling or unable standard, see Ashley S. Deeks, "*Unwilling or Unable*": Toward a Normative Framework for Extraterritorial Self-Defense, 52 VA. J. INT'L L. 483 (2012).



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**Senior Fellow, Governance Studies, The Brookings Institution**

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His previous books include *Detention and Denial: The Case for Candor After Guantanamo* (Brookings Institution Press, 2011), *Law and the Long War: The Future of Justice in the Age of Terror* (Penguin Press, 2008), *Confirmation Wars: Preserving Independent Courts in Angry Times* (Rowman & Littlefield and the Hoover Institution Press, 2006), and *Starr: A Reassessment* (Yale University Press, 2002).

He was co-editor of *Constitution 3.0: Freedom and Technological Change* (Brookings Institution Press 2011), editor of *Campaign 2012: Twelve Independent Ideas for Improving American Public Policy* (Brookings Institution Press, 2012), and editor of *Legislating the War on Terror: An Agenda for Reform* (Brookings Institution Press, 2009).

Between 1997 and 2006, he served as an editorial writer for *The Washington Post* specializing in legal affairs. Before joining the editorial page staff of *The Washington Post*, Wittes covered the Justice Department and federal regulatory agencies as a reporter and news editor at *Legal Times*. His writing has also appeared in a wide range of journals and magazines including *The Atlantic*, *Slate*, *The New Republic*, *The Wilson Quarterly*, *The Weekly Standard*, *Policy Review*, and *First Things*.

Benjamin Wittes was born in Boston, Massachusetts. He graduated from Oberlin College in 1990, and he has a second-degree black belt in taekwondo and also trains in aikido.

**DISCLOSURE FORM FOR WITNESSES  
COMMITTEE ON ARMED SERVICES  
U.S. HOUSE OF REPRESENTATIVES**

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**Capacity in which appearing:** (check one)

☒ Individual

☐ Representative

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**DOCUMENTS SUBMITTED FOR THE RECORD**

FEBRUARY 26, 2015

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*...ideas  
defining  
a free  
society*

February 24, 2015

The Honorable Mac Thornberry, Chairman  
The Honorable Adam Smith, Ranking Member  
2216 Rayburn House Office Building  
Washington, D.C. 20515

Dear Chairman Thornberry and Ranking Member Smith,

Thank you for the opportunity to comment on the pending Authorization for the Use of Military Force (AUMF). I will confine my remarks to the strategic and military factors that favor Congress passing a robust AUMF to deal with the worsening situation.

A strong AUMF, supported by a majority of both parties in both houses, will send an essential message of American steadfastness to our people and to the global audience. Its passage will demonstrate our country's fundamental unity and enable a broader commitment to deal firmly with a real and growing threat.

Following a decade-plus of fighting for poorly articulated political end states, the Congress needs to restore clarity to our policy if we are to gain the American people's confidence and enlist the assistance of potential allies, while sending a chilling note that we mean business to our enemies. With enemy influence expanding rapidly, patience or half-measures cannot replace a coherent strategy for taking measured steps, aligned with allies, to counter the mutating threat. Your AUMF should be constructed to be one building block in a coherent, integrated strategy for dealing with a region erupting in crises. Thus the AUMF needs to serve an enabling role for defeating this enemy, and not a restrictive function. Congress' voice in the AUMF must not reassure our adversary in advance what we will not do:

1. We do not enter wars to withdraw; when we must fight we fight to win. We should not set arbitrary deadlines which would only go to show our hearts are not really in the game and would unintentionally embolden our enemies with the goal of outlasting us.
2. We should not establish geographic limits in a fight against a franchising, trans-national terrorist group and its associates. Our AUMF must be fit for the purpose of defeating this specific enemy (a non-state entity) and whoever stands with them, but not be hidebound by the rules for how we fought previous wars against nation states. We must adapt to our time and the threat and not try to fight as we did in previous wars using rules no longer applicable.
3. The AUMF should put the enemy on notice that we will use all our military capabilities. If employing our ground forces will help build the international

coalition against ISIS, will hasten the enemy's defeat, will help to suffocate ISIS' recruiting through humiliating them on the battlefield, or negatively impact their fundraising cachet, then our Commander-in-Chief should have that option immediately available to achieve our war aims. Against a barbaric enemy striking fear into the hearts of many, especially those living in close proximity to this foe, we must not reassure that enemy in advance that he will not face the fiercest, most skillful and ethical combat force in the world. The Congress should impose strategic reasoning over the impulse to draw back, recognizing the time for half-measures is gone; whether used or not, we should be reluctant to tell the world our heart is not in it by saying we won't send our combat forces. If we believe this threat is as grave and growing as our political leaders say it is, then our means should accommodate our full arsenal, employed as the situation dictates, vice removing some of our power from the equation as if we want to make it a more fair fight.

The AUMF must also make clear that prisoners taken from forces declared hostile will be held until hostilities cease. There is no earthly reason for the Congress to acquiesce to funding a war in which we do not hold prisoners until the fight is over, as is our legitimate right under international law. The AUMF should make clear that the same standards that applied to prisoners in Lincoln's or FDR's day will be imposed today. This will ensure that we have a sustainable detainee policy vice the self-inflicted legal quandary we face today with released detainees returning to the battlefield to fight us.

No issue is graver than the one that you, your committee and the Congress must address in this AUMF. I recommend you craft a document that accepts the foreseeable future is not foreseeable. Thus a clear and unambiguous message is needed from the Congress to restore its place in our system of government, one that demonstrates America can act in a unified manner sufficient to draw allies to our side and to crush an enemy so barbaric that they strike terror far beyond their current reach.

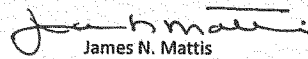
The concept that if America pulls back then others will step forward is proving wrong. A bi-partisan AUMF will demonstrate that America is in this fight to win: half-measures, self-imposed limitations on the Commander-in-Chief's authority or other indicators of tentativeness on our part will not encourage full commitment by allies. They will only provide succor for our enemies and indicate the leading democracy in the world cannot summon the will to defend its values.

None are more reluctant to go again into battle than those of us who have signed letters to next of kin. But if we are going to confront this evil and commit to defeating it, then Congress needs to make a compelling statement of purpose, reminding the world that we are willing to fight to preserve a world irreconcilable with ISIS' world view.



Let me take this opportunity to thank you for your years of support when I testified before your committee. I remain grateful for your leadership and retain my respect for your committee's sentinel and oversight roles in the protection of our country and our way of life. You hold significant responsibility in your hands and my earnest hopes are with you for crafting a bi-partisan stance for our nation.

Sincerely and with great respect,



James N. Mattis  
General, U.S. Marines (retired)



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**QUESTIONS SUBMITTED BY MEMBERS POST HEARING**

FEBRUARY 26, 2015

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#### QUESTIONS SUBMITTED BY MR. SHUSTER

Mr. SHUSTER. Do you believe the Authorization for the Use of Military Force (AUMF) the President is proposing gives our military the flexibility they need to succeed in their mission of destroying the Islamic State of Iraq and the Levant (ISIL)?

President Obama's proposal for a new AUMF "does not authorize the use of the United States Armed Forces in enduring offensive ground combat operations." How do you interpret the phrase "enduring ground operations" and do you believe that statement will be clear to our commanders on the ground?

Do you believe that the lack of clarity in the phrase "enduring ground operations" will lead to delays in military action as commanders seek legal guidance on whether certain operations go outside the scope of the President's AUMF?

Given that in the past, premature withdrawal of U.S. Armed Forces in the Middle East has resulted in regional instability and allowed terrorist groups to gain power, are you concerned that the administration is not planning appropriately for U.S. action after the defeat of ISIL with a limited 3-year AUMF?

The President has placed a 3-year limitation in his proposed AUMF. Do you believe that his current strategy will result in the defeat of ISIL in that timeframe?

General KEANE. [No answer was available at the time of printing.]

Mr. SHUSTER. Mr. Chesney, your testimony highlighted that President Obama's proposed Authorization for the Use of Military Force (AUMF) fails to address several key areas such as defined objectives, adversary detention, and applicability of the Law of Armed Conflict (LOAC). Which omissions do you think should be of greatest concern to this panel as we continue to evaluate the AUMF?

Mr. CHESNEY. The most troubling aspect of the proposed AUMF is the language that attempts, in an indeterminate way, to draw a line between the sort of ground-forces presence that would be lawful and that which would not be. As I testified at the hearing, the nature of the line thus drawn is very far from clear, and would leave commanders uncertain as to the scope of their authorities.

I would also note that, if the last fourteen years have taught us anything about AUMFs, it is that AUMFs going forward ought to contain specific language addressing the metes and bounds of authority to use military detention. The 2001 AUMF did not have such language, and it launched a decade's worth of litigation. Eventually, Congress in an NDAA at last codified the concepts that the courts and the administration had jointly sorted out during those years, but that legislation (like the 2001 AUMF) has a muddy connection to the ISIL scenario. If our use of force against ISIL warrants a new AUMF, then so too should it warrant fresh legislation speaking to detention authority.

Mr. SHUSTER. Do you believe the Authorization for the Use of Military Force (AUMF) the President is proposing gives our military the flexibility they need to succeed in their mission of destroying the Islamic State of Iraq and the Levant (ISIL)?

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Mr. CHESNEY. There have been AUMFs in the past that have authorized only a certain degree of force to be used towards a particular end, but never in our history has this been the case when the specific purpose for using force is supposed to be the utter destruction of an enemy military force. In this instance, the proposed

AUMF precludes the use of ground forces in most circumstances (though just where the line lies is, as noted above, unclear). While it may or may not be wise at any given point in time in fact to deploy U.S. ground forces against ISIL (one can and should be wary of the risks of doing so, particularly if the best estimate is that the American public will not in fact be adequately supportive of such an effort for it to be sustained for a long-enough period to have its full intended effect), it seems unwise to attempt by legislation to preclude the option altogether. Better to leave such judgments to the President to determine in accordance with evolving circumstances, perhaps in conjunction with a sunset clause to ensure ongoing Congressional engagement.

The phrase certainly will not be clear to commander on the ground. It is wide open to reasonable disagreement amongst lawyers who will have to determine whether the line has been crossed by particular proposed operations.

Definitely yes.

The proposed three-year sunset is not the problem (though it may be that some other period aside from three years would be best). If there is a good case for continuing U.S. involvement in this conflict as the expiration of a sunset draws near, Congress and the President should be prepared to take the steps necessary to renew the authority. Put simply, a sunset is not a promise to stop engaging at that point. It may be, of course, that there is not adequate planning taking place for that eventuality. I would not connect that issue to the proposed sunset, however.

It seems very unlikely that ISIL will be destroyed within the next three years. Whether ISIL will be so degraded as to no longer pose a strategic threat is a different question. My instinct is to be skeptical, but I certainly would not claim to have a strong sense of just where ISIL will be in three years. Again, however, this is no reason to reject the idea of using a sunset as a vehicle to ensure continued and refreshed Congressional engagement on the AUMF issue.

Mr. SHUSTER. Mr. Wittes, you made an argument that President Obama's Authorization for the Use of Military Force (AUMF) does not hinder the flexibility of military operations based on the reasoning that the 2001 AUMF can be leveraged to employ ground troops or extend operations. Do you foresee challenges at the execution level in simultaneously executing multiple authorities and do you have any concerns regarding the perceived implications of current AUMF limitations by our allies or enemies?

Mr. WITTES. [No answer was available at the time of printing.]

Mr. SHUSTER. Do you believe the Authorization for the Use of Military Force (AUMF) the President is proposing gives our military the flexibility they need to succeed in their mission of destroying the Islamic State of Iraq and the Levant (ISIL)?

President Obama's proposal for a new AUMF "does not authorize the use of the United States Armed Forces in enduring offensive ground combat operations." How do you interpret the phrase "enduring ground operations" and do you believe that statement will be clear to our commanders on the ground?

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The President has placed a 3-year limitation in his proposed AUMF. Do you believe that his current strategy will result in the defeat of ISIL in that timeframe?

Mr. WITTES. [No answer was available at the time of printing.]

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#### QUESTIONS SUBMITTED BY MR. O'ROURKE

Mr. O'ROURKE. Please explain what a U.S. victory against the Islamic State of Iraq and the Levant would look like in your opinion, and the best way to go about achieving that goal.

Mr. CHESNEY. I confess I am somewhat reluctant to weigh in on this particular question, as my expertise is better directed at the legal questions associated with this matter. That said, I will venture the following observations: First, that which counts as victory depends very much on what the United States determines to define as its goal. There are several possibilities:

- We might aim to destroy ISIL altogether, period.
- We might aim to prevent ISIL from toppling the government of Iraq.

- We might aim to prevent ISIL from prevailing in the Syrian war to the extent that it can control a meaningful amount of territory or population.
- We might aim to prevent the further spread of ISIL to new locations (Egypt, Libya, Afghanistan, etc.).
- We might aim to tamp down the appeal of ISIL's propaganda attempting to spur lone wolves to violence abroad.

We might, of course, aspire to some combination of the above. And whatever the mix of aspirations, they will intersect (and sometimes have to be traded off against) a wide range of related (but distinct) sets of policy goals, such as those relating to the larger Syrian conflict, relations with Iran, and so forth. Finally, one must bear in mind that some of these potential goals are (or would be) easier than others for the administration to embrace and emphasize publicly.

As an outsider I am not in a good position to weigh either the relative desirability of these possible goals, or the extent to which various ones of them are within our realistic reach now or over the long term.

Mr. O'ROURKE. Please explain what a U.S. victory against the Islamic State of Iraq and the Levant would look like in your opinion, and the best way to go about achieving that goal.

Mr. WTTES. [No answer was available at the time of printing.]

