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Senate Foreign Relations Committee Holds a Hearing on Authorization for Use of Military Force, Panel 1

LIST OF PANEL MEMBERS AND WITNESSES

MENENDEZ:

This hearing will come to order. Let me welcome our panelists to this important hearing on how, when and where the United States brings to bear the power of our military. The 9/11 AUMF has served the United States well. It has provided broad authority for the United States to pursue and dismantle Al-Qaeda in Afghanistan and Pakistan, and a foundation to authorize U.S. operations against Al-Qaeda elsewhere, and against groups and individuals which have operationally associated themselves with Al-Qaeda, like Al-Qaeda in the Arabian Peninsula, an expansion that the Congress and U.S. courts have endorsed.

That said, with the winding down of significant U.S. military activities in Afghanistan by the end of this year, it is appropriate to begin reassessing the 9/11 AUMF in light of new circumstances and new threats that have evolved over time. The president himself recognized this a year ago, when he said that he looked forward to engaging Congress and the American people in efforts to refine and ultimately repeal the AUMF's mandate. He also said that he quote, "Would not sign laws designed to expand this mandate further."

I feel it's time to seriously consider what options and tools we have to counter what appears to be a continued and, in some regions, growing threat of terrorism to the United States. This hearing will consider existing authorities, under the current authorization for the use of military force, as well as what additional statutory authorities that may be required to confront ongoing threats associated with Al-Qaeda and other terrorist entities that threaten the United States, as well as the president's inherent authorities.

I want to hear from our administration witnesses what the thinking has been in the Executive Branch about the current AUMF, and options to either amend or develop a new AUMF to confront the changing threat environments. I would ask all our witnesses to answer a simple question today: is the 9/11 AUMF broken in some way? Is it obsolete? Is it inadequate to the threats we and our friends and allies face today, and for the foreseeable future? If we amend or draft a new AUMF, what would this new authority look like? How would we determine which threats to pursue in order to secure ourselves at home and abroad? And, finally, I'd like to hear the views of each of our witnesses on the prospect of repealing the Iraq AUMF which I personally believe must be repealed. It is my understanding that from a legal and operational perspective there are no barriers to repeal, and no deficiencies of needed authorities to assist the government of Iraq in counterterrorism activities.

These are important questions that must be answered. Now, not at a moment of crisis, is the time to have this important dialogue. There is no issue more important to our national security than whether to use military force, and there is no other committee in the Senate that is seized with this issue more squarely than the Senate Foreign Relations Committee. Current and future threats necessitate our engagement and our attention.

So, with our thanks to the witnesses again for what I look forward to being an informative exchange, let me, before I turn to Senator Corker, we have received a statement for the record from Human Rights First on the issues we will cover in this hearing. I ask unanimous consent that they be included in the record. Without objection, so ordered. Let me recognize the distinguished Ranking Member, Senator Corker for his remarks.

CORKER:

Mr. Chairman I want to thank you for having this hearing, and I want to thank the witnesses for taking their time to be here before us today, and help us.

And I want to thank you on two fronts. Number one, I know we've talked about this for some time and you've honored a commitment which I greatly appreciate, actually the people on both sides of the aisle, and I appreciate the -- the -- the way you've allowed there to be appropriate debate on this committee. I know we both attended a, sort of a discussion last night that I found to be one of the most bizarre I've attended on foreign relations, on foreign policy in our country, and I'm convinced more than ever that this discussion, regarding the AUMF is an important place for us to weigh in, and to help shape policy.

And I want to say on the onset that, to me, this is not about trying to -- to limit the president, and his abilities to carry out activities that I think both of us consider to be very, very important to our security. It's more about us weighing in, and actually giving the president the authorities he needs, but at the same time, us having the responsibility to -- to ensure that we have appropriate policies, especially with where we are today, relative to terrorism around the world.

So, with that, I'm going to read, I hate to read opening statements, but I'm going to do that anyway. And, again, I want to thank you for allowing us to weigh in on one of the most critical issues facing our country. My hope is the committee can lead Congress to fulfilling its constitutional responsibilities in foreign policy, and ensure that we as a nation pursue our national defense in a lawful and accountable way.

One week after the 9/11 attacks, Congress authorized the president to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September the 11th, 2001. More than 12 years later, the president continues to rely on this same 60 word authorization to fight terrorist organizations around the world. I understand why people are concerned and may think that seeking appropriate legal authorization for counterterrorism is either a way to seek expansion of war, or attempt to restrict the president. From my perspective, neither is the case.

In the 13 years since the original authorization, threat to our security has changed substantially. Today's threat is no longer about the hunt for Bin-Laden, and those responsible for the 9/11 attacks. Today's threat is about affiliated groups metastizing across the globe, and the current authorization simply does not make sense anymore. These evolving threats are not secret, and they're clearly openly recognized by this administration.

A State Department reported, released in April, said that while Al-Qaeda's central leadership is diminished, there are affiliated groups -- their affiliated groups are expanding, contributing to a 43 percent increase in global terrorist attacks in 2013 alone. Chairman of the Joint Chiefs, Martin Dempsey, recently testified that the terrorist responsible for killing four Americans in Benghazi are not covered under the current AUMF. Perhaps the most problematic and ironic is the fact that the president may not have the authority to target the most ruthless terrorist organization in Syria, the Islamic State of Iraq and Syria, or ISIS, because of its split with Al-Qaeda.

It would be easier for us to ignore these difficult issues, or to buy the fantasy that Al-Qaeda is dead or dying, and that the tides of war are receding. But no serious observer can look to the world today without concluding that, for the foreseeable future, terrorist groups with global reach will continue to threaten our country, regardless of their link to the 9/11 attacks.

Rather than abdicating the responsibility for confronting this threat, and leaving it to the Executive Branch, Congress has a responsibility to both provide the president with the legal authorities needed to ensure our security, and to define the legal parameters in which this shall be pursued. This hearing provides members of this committee the opportunity to begin that process.

However, since the president suggested in a May -- in a May, 2013 memo that he would engage with Congress on this issue, he has been silent and done nothing. I believe this committee can and will act responsibly. I believe that we can move forward in a bipartisan fashion to ensure that the law reflects reality. That counterterrorism operations respect the law. And that the president has the authority that he needs to keep America safe while respecting the constitution.

This hearing a first step in that direction. The bottom line is that an issue this critical to our security and liberty demands a robust and thorough debate from the elected officials of the American people. As difficult as it may be, congress has to step up to the plate. It's our duty to have this debate. We cannot ask to Americans to serve their country and risk their lives, in the ongoing fight against terrorism, if we will not take our responsibilities seriously here.

So, with that, Mr. Chairman, thank you again for this great hearing and I hope we'll have some results after this hearing is concluded.

MENENDEZ:

Thank you, Senator Corker. Let me, I understand that a class from Jefferson High School of Alexandria, Virginia is with us. We welcome you all to the Senate Foreign Relations Committee today. It's a great topic for you to be listening to as we move in the course of events here. So, welcome.

Our first panel we have Mary McLeod, the State Department's Principal Deputy Legal Advisor, and Stephen Preston the General Counsel of the Department of Defense. Your full statements will be included in the record without objection. I'd ask you to summarize those statements in about five minutes or so, so that the members can engage you in a question and answer session. And, with that, Ms. McLeod, you're recognized.

MCLEOD:

Thank you very much, Chairman Menendez, Ranking Member Corker, and members of the committee for the invitation to speak at this hearing. The administration looks forward to engaging with this committee and the Congress on this important topic.

I'll begin with some introductory remarks, before discussing briefly a few international law aspects of the administration's legal framework for conducting operations pursuant to the 2001 Authorization for Use of Military Force, or AUMF. I will conclude by laying out a few relevant considerations for establishing our legal framework beyond 2014. My colleague, Stephen Preston, General Counsel of the Department of Defense, will then address the current framework under U.S. law for military counterterrorism operations.

As an initial matter, as you noted, the president has made clear his desire to engage with Congress about the future of the AUMF. The president expressed his commitment to move America off a permanent war footing, one year ago, in his speech at the National Defense University, and reaffirmed that commitment in this year's State of the Union address. And the president made clear, in his NDU speech, that his goal is to engage with Congress and the American people to refine and, ultimately, repeal the AUMF.

As we begin our dialogue on this issue, it will be critical to assess our legal authorities, not only within the context of our current military operations, but also in light of future needs, which as -- which as of today's hearing, may not be fully apparent. At the same time, as the president has said, we must keep in mind going forward that not every collection of thugs who have labelled themselves Al-Qaeda will pose a threat to the United States that requires the use of military force in response.

Turning now to international legal considerations. As we consider the future of the AUMF, it will be critical to ensure that U.S. actions continue to be grounded firmly in international law. Under international law the United States has an inherent right of self defense to use force to respond to an armed attack or to the imminent threat of an armed attack. And when in -- and when in an armed conflict, the United States may use force in accordance with the law of war to prosecute that conflict. Our use of military force must comply with international laws' requirements of necessity, proportionality, distinction and humanity.

United States use of force abroad is carried out in furtherance of these international law rights and requirements, and the law of war specifically has and will continue to provide the legal framework for U.S. military actions taking in the armed conflict against Al-Qaeda, Taliban and associated forces. Going forward, the Office of the Legal Adviser of the State Department will continue to work to ensure that we exercise our rights consistent with these and other applicable international law principals.

I also want to note that there's a firm basis in international law to support our friends and partners facing the threat of terrorism within their own borders. Even where violent extremists pose a greater threat to those countries to the United States, we can draw from all elements of national power, including military force in appropriate cases to help them counter these threats.

In Mali, for example, we've been providing military aid to French forces to push back terrorists and other extremists. As the president stated in his speech one year ago, we must define our effort not as a boundless global war on terror, but rather as a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America. Indeed, targeted efforts undertaken in partnership with other countries can be highly effective in countering terrorist threats without keeping the United States on a permanent wartime footing.

With these principals in mind, let me now outline a few considerations regarding a future legal framework. We're currently working to identify an appropriate U.S. military presence in Afghanistan after 2014. We're also working toward the closure of the detention facility at Guantanamo Bay, which the president has reaffirmed will further our national security, our international standing and our ability to cooperate with allies in counterterrorism efforts. We also continue to work with our allies and partners to provide assistance and training to increase their capacity to take effective measures against terrorist organizations.

The State Department is joined by many other U.S. agencies in implementing this comprehensive strategy, which includes a broad range of military and other foreign assistance, law enforcement cooperation, intelligence sharing and diplomatic engagement. All of these efforts are vital to countering threats. This is true, even at times, such as the present, when we are using military forces as part of our response to the terrorist threat. In the long-term, the success of our efforts will depend not exclusively on the use of military force, but also on

sustained attention to achieving effective governance and the rule of law in countries where terrorist threats proliferate.

And, based on all these considerations, we would suggest that our efforts to identify a future legal framework be guided by the following principals. First, any domestic authority that we rely on to use military force should reflect the president's clear direction that we must move America off a permanent wartime footing. As the president stated, this means that we will engage with Congress and the American people to refine and ultimately repeal the AUMF, and that the president will not sign a law designed to expand the AUMF's mandate further.

Second, any authorization to use military force, including any detention operations, must be consistent with international law. Third, we must continue to enhance our cooperation with partner nations to take action within their own borders, including law enforcement action and other forms of engagement where those methods provide the most effective and sustainable means of countering terrorist threats. Finally, we must keep in mind that the president's authority to defend the United States would remain part of any framework that emerges.

thank you very much, and I'll now turn to Stephen Preston to make his statement. And, after that, we'd be happy to answer any questions you may have.

MENENDEZ:

Mr. Preston?

PRESTON:

Thank you, Mr. Chairman, Ranking Member Corker, and the members of the committee. Appreciate this opportunity to appear. I'd like to open with a brief discussion of the current legal framework for U.S. military operations, focusing on how the 2001 Authorization for the Use of Military Force is being applied by the Department of Defense.

Although, the AUMF makes no express mention of specific nations or groups, it was clearly intended to authorize the president to use force against Al-Qaeda, the organization that perpetrated the 9/11 attacks, and the Taliban, which harbored Al-Qaeda. In addition, based on the well established concept of co-belligerency in the laws of war, the AUMF has been interpreted to authorize the use of force against associated forces of Al-Qaeda and the Taliban. As the administration has stated publicly on numerous occasions, to be an associated force, a group must be both an organized, armed group, that has entered the fight alongside Al-Qaeda or the Taliban, and a co-belligerent with Al-Qaeda or the Taliban in hostilities against the United States or its coalition partners. The Department of Defense relies on the AUMF in three contexts: ongoing U.S. military operations in Afghanistan; our ongoing military operations against Al-Qaeda and associated forces outside the United States in the theater of Afghanistan; and detention operations in Afghanistan and at the Guantanamo Bay, Cuba facility. In Afghanistan the U.S. military currently conducts operations pursuant to the AUMF against Al-Qaeda, the Taliban and other terrorist or insurgent groups that are engaged alongside Al-Qaeda and the Taliban, in hostilities against the United States and its coalition parties -- partners. In addition the ISAF and U.S. rules of engagement permit the targeting of hostile personnel in Afghanistan based on the threat they pose to U.S., coalition and Afghan forces or to civilians.

Outside the United States, in areas of active hostilities, the U.S. military currently takes direct action under the AUMF that is capture and lethal operations in the following circumstances. First, in Yemen, the U.S. military has conducted direct action targeting members of Al-Qaeda in the Arabian Peninsula. AQHP is an organized, armed group that is part of Al-Qaeda, or at least an associated force of Al-Qaeda for the purposes of the AUMF. Second, the U.S. military has also conducted capture or lethal operations under the AUMF outside Afghanistan against individuals who were part of Al-Qaeda and targeted as such. For example, in Somalia, the U.S. military has conducted direct action against a limited number of targets, who have been determined to be part of Al-Qaeda. And, in Libya, in October 2013, in reliance on the AUMF, U.S. forces captured long-time Al-Qaeda member, Abu Anas al Libi.

Now, the fact that an Al-Qaeda affiliated group has not, to date, been identified as an associated force for purposes of the AUMF does not mean that the United States has made a final determination that the group is not an associated force. We are prepared to review this question whenever a situation arises in which it may be necessary to take direct action against the terrorist group in order to protect our country. Lastly, in our ongoing armed conflict against Al-Qaeda, the Taliban and associated forces, the U.S. military relies on the authority of the AUMF to hold enemy belligerents in military detention in Afghanistan and at the detention facility at Guantanamo Bay.

The AUMF is not the only authority the president has to use force to keep us safe. For example, the president has authority, under the United States constitution to use military force as needed to defend the nation against armed attacks or imminent threats of armed attack. This inherent right of self-defense is also recognized in international law. Looking forward, the central question is what future legal framework will provide the authorities necessary in order for our government to meet the terrorist threat to our country, but will not greatly exceed what is needed to meet the threat. As was made clear in the president's NDU speech last year, the answer is not legislation granting the executive unbound powers more suited for traditional armed conflicts between nation states. Rather, the objective is a framework that will support a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America. The challenge is to ensure that the authorities for U.S. military operations are both adequate and appropriately tailored to the threat.

And, with that, I look forward to answering your questions.

MENENDEZ:

Well, thank you, both. I know you -- you stuck to your scripts, so let me try to get you off your script, and go back to my original questions. Is the 9/11 AUMF broken in some way? Is it obsolete? Is it inadequate to the threats we and our friends and allies face today in the foreseeable future? If offer that up for either one of you to answer, both of you to answer.

PRESTON:

(OFF-MIKE)

MENENDEZ:

You have to ...

PRESTON:

Let me begin, Mr. Chairman, and say that I agree with the views expressed on behalf of DOD a little more than a year ago, in a hearing before the Senate Armed Services Committee that the AUMF is adequate in order to prosecute and continue to prosecute the current armed conflict against Al-Qaeda, the Taliban and associated forces. To the extent that the United States is threatened by a terrorist group to which the AUMF has not been determined to apply, the president, as we've said, has authority under the U.S. Constitution to defend the nation against armed attacks and imminent threats of such attacks, and therefore has the authority to use military force against groups in order to protect the country from that threat.

MENENDEZ:

Is it obsolete in any way?

PRESTON:

Well, as I think as the president has observed, we have reached a time now, 12 years into the conflict, where it's appropriate to review the AUMF with an eye towards its refinement and ultimately its repeal. In my view, I would say what we're looking for and looking to develop is a legal framework for the future that will enable us to continue fighting the terroristic threat in our country, and at the same time, to take the country off a permanent wartime footing.

MENENDEZ:

all right. Let me ask you a series of questions to further define this. One is specifically that I hope can have a relatively easy answer, which is on the Iraq AUMF. The U.S. ended its combat operations in Iraq in 2010, and in fact, withdrew all of its military forces that same year. Since then, Congress has, on a number of occasions, examined the possibility of repealing the 2002 AUMF authorizing our Iraq operations, but the administration has repeatedly opposed those efforts. Starting with you, Ms. McLeod, can you explain to the committee, one, whether the administration continues to oppose repeal of the Iraq AUMF? And, if so, why? And I'd like to hear your answer to this, Mr. Preston, as well.

MCLEOD:

Certainly, Chairman Menendez, and thank you for inviting to testify here today. AS you said, the United States has ended combat operations in Iraq, and we've withdrawn our military forces, and I can confirm that we're not relying on the 2002 Iraq AUMF for any military operations, nor do we intend to do so. And, I am here to tell you today, that the administration now supports repeal of the 2002 Iraq AUMF.

PRESTON:

Mr. Chairman, I agree. That is certainly my understanding as well.

MENENDEZ:

all right. That brings to full circle my view, which we shouldn't have been in Iraq in the first place. And that's why I voted against it, and I'd be happy to repeal it now. Expressions of approval or disapproval of any of the statements that take place in this hearing are inappropriate, and I would urge the audience to act accordingly.

My second question is one I'd like for both of you to answer. If the AUMF were to expire, would the president be able to conduct counter-terror operations, such as drone strikes in Yemen, or other operations against the perpetrators of the Benghazi attack, using existing legal authorities? Or would a new or amended AUMF be required to conduct such operations?

MCLEOD:

Thank you, Mr. Chairman. Let me begin. The AUMF currently, as we've said, authorizes the use of force against Al-Qaeda, Taliban and associated forces. And, in Yemen, the U.S. military has conducted direct action, targeting members of Al-Qaeda in the Arabian Peninsula, known as AQAP, which has -- had been determined to be either part of -- has been determined to be at least either part of or at least associated with Al-Qaeda. And, as you mentioned, Senator, Article II of the constitution provides the president with the authority to target with military force those who pose an imminent threat of armed attack against the United States. And as both a domestic law matter and an international law matter, this authority to act in self-defense doesn't depend on the existence of an AUMF. With respect to the AUMF, though, in particular we are still in an armed conflict as of today with Al-Qaeda, Taliban and associated forces, and the AUMF continues to provide a source of authority to use military force against those groups when necessary, including associated detention operations. And I would also note that the, as I said in statement, that the president has and uses a range of other authorities to counter terrorist threats and these include law enforcement, intelligence, foreign assistance authority ...

MENENDEZ:

So, your answer, just to synthesize it for me, so because I -- I know when I deal with lawyers ...

(LAUGHTER)

MENENDEZ:

...I have to, I get to. Is -- your answer, therefore, is you do not need a new, and from your view, a new or amended AUMF to -- to conduct such operations?

MCLEOD:

Not to -- not for the president to take action against imminent threats to the United States.

MENENDEZ:

Is that your view, Mr. Preston?

PRESTON:

I agree.

MENENDEZ:

Now, the question is -- is acting against the perpetrators of Benghazi's attack an imminent threat?

MCLEOD:

Steve (ph), you do it.

MENENDEZ:

I'd be happy for either one of you to answer.

(LAUGHTER)

MCLEOD:

We'll -- we'll answer. I'll again ...

MENENDEZ:

I know, because you're not going to go to the next senator until you do, so.

(LAUGHTER)

MCLEOD:

OK, I know, I promise I'm going to answer right now. Senator, the United States remains committed to using every lawful tool available to bring the perpetrators of the Benghazi attacks to justice, and we think we have adequate tools to meet that objective.

MENENDEZ:

You think you have adequate tools to meet that objective?

MCLEOD:

Yes.

MENENDEZ:

And can -- can you give me a sense of what those tools are?

MCLEOD:

The -- well, the administration favors bringing those responsible for the attacks to justice through prosecution in an Article III court. And, the Justice Department is conducting an investigation to -- to try and achieve that end.

MENENDEZ:

Yes, and if that investigation leads to the identification of perpetrators, how would you act against the perpetrators? Under what authority?

PRESTON:

Sir, perhaps I could chime in and say...

MENENDEZ:

Yes.

PRESTON:

I think we've a range of authorities and the -- our government is committed to making full use of all lawfully available instruments and action power to bring these people to justice and to ensure that they do not present a threat to this country.

To the extent that they present an imminent threat of violent attack to this country, the president has under the Constitution, authority to use force in order to protect this country. Beyond that, to the extent (inaudible) presented with a concrete situation, we're in a position to evaluate and reevaluate whether they would qualify under the AUMF.

In -- in addition, quite apart from the use of military force and those authorities, there is law enforcement authority to apprehend and bring to justice, try and prosecute these criminals.

MENENDEZ:

Let me ask you two final questions before I turn to Senator Corker.

What authorities does the 9/11 AUMF give the president in terms of authorities to use force that he doesn't already possess in other authorities including Article II of the Constitution?

MCLEOD:

Senator, as we've said, the president does have authority under Article II to protect the nation against the imminent threat of armed attack.

However as the president has said and -- and I agree with, it's always better and more powerful to have the executive branch and Congress working together on issues...

MENENDEZ:

Yeah, that's not my question.

My question is very simple. In order to determine what we do moving forward -- I don't mean to interrupt you but I've got to get a sense, at least from an administration perspective of what you feel the AUMF gave you that you didn't have otherwise constitutionally or through some other statutory provisions because if you're telling me that you have all the authorities in the world to go ahead and do everything that the 9/11 AUMF provided then that AUMF wasn't necessary.

So give me a sense of what you got through the AUMF that you don't have under existing constitutional or statutory law?

MCLEOD:

Senator, if I might answer that, I -- I think it would be fair to say that with or without an AUMF, to the extent that it -- it grants authority for the use of military force against Al Qaida and the Taliban and associated forces in which we're in armed conflict and -- and to the extent that those groups continue to pose an imminent threat of violent attack to this country, the president does have constitutional authority to act.

It's not...

MENENDEZ:

Are you telling us that AUMF wasn't necessary...

MCLEOD:

No, sir.

MENENDEZ:

... other than an expression of congressional support for that engagement?

MCLEOD:

Not an unimportant point, Mr. Chairman.

But I -- I think the point that these two sources of authority are not and I don't think were ever intended to be mutually exclusive. And in fact, as your question suggests, there are very largely overlapping when it comes to groups that present a terrorist threat of attack to this country.

I'm not going to tell you there are no differences between the two. The -- the concept between an -- an authorization for the use of military force, which names enemy groups and similar to law of war -- law of war concepts enables the use of force against groups including to degrade those forces without specific reference to imminent threat is not the same concept or approach as the president's constitutional authority to defend the country against imminent threat and that parallel international law concept of national self defense in which it's rooted in the presence of imminent threat.

But I think in terms of the authority to protect this country against these groups, at least some of which present a threat of imminent attack against the United States, both the statute and the Constitution provide authority for the president to use military force to protect us.

MENENDEZ:

Senator Corker:

CORKER:

Mr. Chairman, I have to say several of us were involved in a very bizarre discussion last night. This is -- continues a very bizarre discussion.

I -- I do want to say for those who are reading the transcripts, Ms. McLeod, it's -- it's unbelievable to me that to answer our questions, you have to find a place -- a pre-prepared statement to make and cannot answer these questions directly yourself, which is troubling to me.

But let me just -- I think what you've said, if I can synthesize the legalese that you've used is that the president needs no AUMF to carry out the terrorist -- the counterterrorism activities we're carrying out around the world. If I heard you correctly, I think that's what you said.

Is that correct?

MCLEOD:

Senator, I think what I said was he has authority to use military force...

CORKER:

(inaudible)

MCLEOD:

It's going off. I'm sorry.

CORKER:

I think what I heard say is that he has the authority to carry the activities he's carrying out without really having an AUMF. And Mr. President -- Mr. Preston with a degree of legalese has, I think, said something similar.

I'd just like to know, yes or no.

If the 2001 AUMF was undone, can the president carry out the activities that he's carrying out right now?

MCLEOD:

Yes, I believe he could, Senator Corker. But...

CORKER:

But we really...

MCLEOD:

... I do think...

CORKER:

... at Congress don't need to be involved in this subject at all.

MCLEOD:

What I was going to say in addition is that I think when we're talking about sustained military engagements, it's definitely appropriate to get authorizations for use of military force...

CORKER:

Are we in sustained military operations now against terrorists?

MCLEOD:

Certainly...

CORKER:

I know the president a year ago said we weren't. We were doing targeted -- I forgot the phraseology that he used and maybe it was to circumvent this. I don't know.

But -- but are we or are we not in a continuous effort against Al Qaida and affiliated groups? Yes or no?

I like, for the record, she has to look at the other person to -- to get the answer.

I find this very disconcerting today.

Do you -- I guess you want to answer it for her?

PRESTON:

Sorry, I didn't understand your question was directed solely at her...

CORKER:

Well, let me -- Ms. McLeod, since you're at State Department and that's who we have jurisdiction over and I noticed a staffer has given you the answer there, if you would read it for us, it would be great.

MCLEOD:

Could you repeat your question, Senator Corker?

CORKER:

Does the president have the ability without an AUMF to carry out the activities that he's carrying out today against -- against terrorists, affiliates of Al Qaida, and are we or are we not engaged in continuous activity against them?

MCLEOD:

We continue to be in an armed conflict with Al Qaida...

CORKER:

So we're in continuous activity?

So do we need an AUMF or not?

MCLEOD:

I think as we've said, it is important to...

CORKER:

Important for what reason? Politically or legally?

MCLEOD:

In part, politically but also because when the Congress has a role to play...

CORKER:

Well, tell me what that role is because if I understand what you said before, the president can carry out the activities he's carrying out without an AUMF. So it sounds to me like we're pretty irrelevant to the process from the administration standpoint.

MCLEOD:

That is not true, Senator Corker.

CORKER:

Well, tell me how we are relevant?

MCLEOD:

We have consulted closely with the Congress on our counterterrorism activities.

CORKER:

OK.

I want to ask -- let me change topics.

I'm really -- this is not the line of questioning I expected but I also expected a different type of testimony today on one of the most important issues that our nation deals with.

But Mr. President, do you think -- Mr. Preston, excuse me, do you believe that the 9/11 AUMF authorizes you to take action against all terrorist group that -- that present an ongoing serious threat to the United States?

Are -- are there any terrorist groups that you think the AUMF doesn't -- sounds like y'all don't think we need an AUMF at all. So it's kind of becoming an irrelevant question. But -- but are there terrorist groups per the AUMF that you don't think is relevant, that you don't have the ability to go against?

PRESTON:

Senator, I -- I would not say the AUMF is irrelevant or that Congress's role isn't relevant.

The point we were trying -- that I was trying to make is that there's very robust authority both in the AUMF and in the Article II in terms of the president's powers...

CORKER:

Are there -- are there groups that we cannot go against today? Yes or no?

PRESTON:

Yes, sir.

The -- I mean, let me finish the point, which is to say the president has invited us to focus and engage in dialogue with Congress about the continued necessity and utility of the AUMF or follow-on legal regime.

To answer your question more directly, the AUMF applies to Al Qaida, Taliban, groups and individuals that are part of Al Qaida and the Taliban and associated...

CORKER:

That wasn't the question.

And you're really frustrating me.

PRESTON:

There are...

CORKER:

And I have a generally good nature. But I'm really getting upset, OK?

Are there groups today that the administration cannot go against because the AUMF does not allow you to do? Terrorist groups?

PRESTON:

Senator Corker, I'm not aware of any foreign terrorist group that presents a threat of violent attack on this country that the president lacks authority to use military force to defend against as necessary simply because they have not been determined to be an associated force within the AUMF.

In other words, if -- if a group that is not or may not be covered by the AUMF presents a threat of violent attack to this country, the president does have authority to take action including military action to protect the country from that threat.

CORKER:

So there are groups that didn't exist at the time but are affiliated with Al Qaida that today are covered by the 9/11 AUMF even though they didn't exist at the time.

PRESTON:

That's -- that's correct, sir.

The way I look at it is the AUMF, not by name but essentially identified the Taliban and Al Qaida as our enemies and that other groups, most notably AQAP, which has emerged since that time, have made themselves our enemy by joining with Al Qaida and engaging in hostilities against our country.

CORKER:

So the group that I discussed in my opening comments, ISIS, which is split from Al Qaida, that is not affiliated with Al Qaida -- and actually I heard administration officials had expressed concerns about their ability to deal

them in Syria and as they migrate back across into -- to Iraq, are you saying that even they're not a part of Al Qaida, you have the authority to go against them?

PRESTON:

Senator, what we would do if we were presented with a need and an opportunity, contemplating the use of military force, would be to examine what our authorities were. And that would consist, first of all, of determining whether or not they would fall within the AUMF, as an associated force, using the definition that we have provided. Or if not, if they present a threat of imminent attack on this country, we could rely on the president's inherent constitutional authority.

CORKER:

So, you wouldn't rely on the AUMF? He'd just have authority to do whatever?

PRESTON:

We could rely on the AUMF to the extent that this group, or any other group is covered by the AUMF.

CORKER:

But -- I thought you just -- yeah.

Mr. Chairman, I find this bizarre. And I hope that our next group of witnesses is a little more clear.

I do want to say that both of you indicated the president has asked you to engage in Cong -- with Congress on this. To my knowledge -- I'm the ranking member of this committee and -- along with other members on this committee, have expressed interest in the AUMF for some time. I have had no reach-out from the administration. My guess is, the chairman has not. I'd love to know if Tim or anybody else has. I know everybody's expressed concern.

So, that is another line of hollow comments from this administration.

You have reached out in no way to talk to us about refining this. I understand you guys want to refine and replace some -- or repeal -- refine and repeal. And I do hope at some point, you'll define what that is. But this is a -- a -- this is a hearing that's not particularly gratifying. And I do look forward to talking to you more in the future.

PRESTON:

Sir, we look forward to engaging with you and the committee and the other Congress and committees, as well. I will say, since the president's speech, the administration has devoted a great deal of energy to -- to focusing on the draw down in Afghanistan and what the mission and presence will be there, to redouble the effort to clear detainees from Gitmo towards the closure of that facility. Implementation of policy guidance concerning counterterrorism operations outside of Afghanistan -- we have tried to be in continuous dialogue with congressional committees on that, including on the BSA and such.

And those are the precursors to focusing on possible repeal and in the meantime, refinement of the AUMF. And we've made progress. Particularly, I can speak for we agency lawyers in focusing on what sort of legal regime -- what sort of future legal framework might govern. And we very much look forward to engaging with the committee and other committees on that when the administration is prepared to engage in that discussion in earnest.

But a good deal of this is premised on finalization of what the circumstances -- the mission and presence in Afghanistan will be, and that still remains to be finalized.

CORKER:

Mr. President -- Preston -- I don't know why I keep calling you Mr. President.

PRESTON:

I'll try not to get used to it.

CORKER:

Yeah. Yeah.

(LAUGHTER)

CORKER:

That is the -- well, that last statement, about waiting to see what we're going to do in Afghanistan after this presidential election, is one of the most bogus, lacking of substance comment I have ever heard before this committee. It has nothing -- nothing to do with this AUMF. Nothing. And I have to tell you, Mr. Chairman -- I know we were involved in discussion last night -- I think the administration is totally unprepared to discuss this issue. Totally unprepared to decide how many troops we're going to have in Afghanistan. Continue to hide behind this presidential race that's taking place in Afghanistan. We all know what the outcome is going to be. And I just want to say that you discredit our country with -- with statements like you just made -- that we are waiting to see what we're going to do in Afghanistan to determine whether, or what an AUMF needs to look like so --

So, I'm very disappointed in your testimony. I'm disappointed in the White House's ability to deal with substance, but to continue to deal with the optics of the way things are going to look. And I do look forward to that engagement whenever it occurs. It hasn't occurred in a long, long time.

MENENDEZ:

Before I turn to Senator Kaine, I -- I think Mr. Preston's comment is not necessarily -- the way you took it is not necessarily the way I took it in terms of looking at an overall AUMF. I actually have a line of questioning, but I wanted to turn to other members before that I'll want to come back to, specifically on Afghanistan, that might be, I think, what was meant.

I do want to just ask one thing -- prerogative of the chair -- before I turn to Senator Kaine so I don't lose the train of thought.

Basically, up to now, what I hear is that there's no reason why the administration would oppose the repeal of the 9/11 AUMF totally, because you basically say the president has all the authorities, notwithstanding the AUMF.

PRESTON:

Mr. Chairman, I think that's precisely the task that the president's put before us in his May NDU speech, which is to examine that question whether, and what would be appropriate in the way of refinement and ultimate repeal of the statute.

We're not here today calling for the immediate repeal of the statute. We're here...

MENENDEZ:

No, I know you're not calling for it, but -- but your answers so far to both myself and the ranking member would indicate that there is no -- there is a view that really, you have all the authorities, constitutionally and otherwise, outside of the AUMF.

PRESTON:

I think what I've tried to address is in terms of fundamentals and the fundamental ability to protect our country against imminent threat of attack. That is not to say that there aren't pros and cons, advantages and disadvantages to having a statutory authorization version relying on the president's authority. That's precisely what we are working through now with the president's initiation.

MENENDEZ:

Well, I -- I...

PRESTON:

We're looking forward to engaging with the committee...

MENENDEZ:

I appreciate that both of you want to preserve to the maximum degree possible all presidential authorities. I get that. I understand. But we are trying in a good faith effort here to actually be helpful, not harmful.

Senator Kaine's been very involved in this issue, and I look forward to his questions.

KAINE:

Thank you, Mr. Chairman and to the witnesses.

These are hard questions, but they're not gotcha questions, because we're trying to figure out what to do with a law that Congress passed. And -- and I have a -- a number of concerns about the AUMF. Congress put in it no temporal or geographic limitation. Congress did not put such limitations in the AUMF.

Administration witnesses testified last year before the Armed Services Committee -- opined pretty blithely that the war, so declared, would likely last another 25 or 30 years. I don't think that's what Congress intended.

I have concerns about the breadth of the definition that both administrations -- the Bush and Obama administrations -- have used about the associated entities to al Qaida that could be targeted. I have concern about allowance of military action against those who intend harm against coalition partners, which is a huge group of partners. That was not part of the AUMF language.

And I have some concern that Congress rejected a notion of preemptive war in drafting the original AUMF, but the interpretation, especially of the coalition partners and associated entities phrases have essentially allowed preemptive action in contravention to what Congress originally intended.

But to my colleagues, this is something that I think only we can solve. Because, as we heard from administration witnesses in the Armed Services hearing last year, an executive is comfortable with a carte blanche. Why wouldn't they be comfortable with a carte blanche? And they're -- they're not going to move, I don't think, as

expeditiously to -- to reign in a carte blanche as we probably need to. So, if there's going to be action taken here, it's up to Congress to take it. And of course we want thoughts and guidance and opinions from the administration so that we take the right action, and not the wrong action.

If a bill was introduced today -- you've indicated that the administration supports the repeal of the Iraq AUMF. If a bill was introduced today to repeal the 9/14 '01 AUMF, would the administration's position be support, oppose, or "I don't know"?

MCLEOD:

As of today, Senator, I think the answer is, we don't know.

KAINE:

Is that fair, Mr. Preston?

PRESTON:

What I would say, Senator Kaine, is that the prospect of repealing AUMF is precisely what the president has functionally asked us to do. And the administration wants to engage with Congress to decide.

KAINE:

So -- so -- and I follow that...

MCLEOD:

And if I could just say...

KAINE:

Please, Ms. McLeod.

MCLEOD:

... and I -- I think we're not here to say that it should be repealed today, although it's clear that that is the president's ultimate goal.

KAINE:

Well, so, I asked this question because the president did suggest that we should engage around these questions in the speech that he gave in May of 2013. That's one year ago.

So, as of today, one year later, if a bill was introduced to repeal the AUMF, the position would not be support, and the position would not be opposed. In your testimony, the position would be, "I don't know what the administration's view would be about such a proposal."

MCLEOD:

I...

KAINE:

Is that -- Mrs. McLeod, that was your testimony. And, Mr. Preston?

PRESTON:

We did not come here this morning equipped to answer that question.

KAINE:

OK.

Let me ask this. What is the United States doing right now of importance that it could not do without the AUMF?

So, let -- let me give you some examp -- well, please, answer, then I have some example questions.

PRESTON:

Well, I think, as we discussed earlier, in terms of -- the AUMF provides broad authority to use force against al Qaida, the Taliban...

KAINE:

That's covered -- it's ground already covered. What is the United States doing right now that it could not do if there was no AUMF?

PRESTON:

In terms of the authority to use military force in order to address an imminent threat of armed attack against this country, that the president's constitutional authority would enable him to...

KAINE:

Right, so that's what he can do, but what could -- what could we not do if there was no AUMF? Let me be more specific. Is there ample authority without the AUMF for follow-on U.S. military force in Afghanistan? If the AUMF did not exist, is there ample legal authority for follow-on U.S. military force presence in Afghanistan?

PRESTON:

I think, sir, that that would have to be addressed with Congress. Right now, we have that authorization. Without that authorization, depending on the nature and scope of the U.S. mission post-2014, we may well need to engage with Congress in terms -- under the War Powers process, or otherwise.

KAINE:

So, the absence of an AUMF could affect the legality of U.S. presence in Afghanistan.

Let me ask you a second one. Would the absence of the AUMF affect the carrying out of C.T. operations by the Department of Defense? I know there are separate statutes dealing with C.T. operations by other agencies, but would the absence of an AUMF affect the carrying out of C.T. operations by the Department of Defense?

PRESTON:

Not in terms of our ability to address imminent threat of armed attacks.

KAINE:

So there would not be a worry about the absence of an AUMF effecting DOD CT operations?

PRESTON:

Not for that purpose. Now in terms of -- the fact is that our authority on which we have relied up until now has been the AUMF so we would have to reexamine the impact of its repeal on our ongoing operations.

KAINE:

So there would be some potential effect on ongoing operations in the absence of an AUMF that you would like to engage in.

PRESTON:

There certainly is and that is I think in know for a fact is what we are focusing on now within the administration engaging with you, the committee and other committees in exploring...

KAINE:

Just so you'll know, when you say looking forward to engaging what we here over here is this is what engaging is. You know, and so when we come to a hearing and we're talking and we're told that we look forward to having somebody engage with us, it's like what's why we're here. We're doing the hearing, we're engaging.

Let me ask a third one. Would the absence of an AU -- so we don't like it to be deferred to a day that we may never get to. We're trying to do this right now. Would the absence of an AUMF raise legal questions about the continued detention of the detainees at Guantanamo?

MCLEOD:

We are holding the detainees pursuant to the law of war so as long as we are in an armed conflict with Al-Qaeda, I think we would have authority to continue to hold them.

KAINE:

OK, so -- Mr. Preston...

PRESTON:

To further answer the AUMF does provide domestic authority for those purposes so I think in the absence of an AUMF, and this is one of the issues that we're looking at, we would have to focus on what its impact is on our ability to continue to hold detainees.

KAINE:

So, if I could just summarize what I've heard is the administration does not have a current position about whether it would support an AUMF repeal.

The issues of at least concern for examination say the administration believes it has the ability to counter imminent threats against the United States under constitutional powers or international laws of war, but the absence of an AUMF would require some reexamination of DOD powers for certain CT operations, the continued detention of detainees at Guantanamo or domestically, or the follow-on status of US forces in Afghanistan. Those would be three areas is where the absence of the AUMF would cause at least the lawyers to say we're not sure we want to repeal the AUMF.

PRESTON:

Senator Kaine, those are all issues that are proper considerations and part of the mix as we focus on what the legal framework should be in the future after Iraq in Afghanistan...

KAINE:

See this is helpful and I'll conclude Mr. Chairman because if there is an effort to refine, we have to refine around what are the concerns. Carte blanche is a bad thing. Time to get done with the carte blanche grant of authority to the executive. But we do -- we would want to come up and have a meaningful discussion about the particular areas and we just identified there where there is at least a need to examine what might happen if the status quo were changed and there would be no AUMF. Thank you Mr. Chairman.

MENENDEZ:

Thank you. Senator Rubio.

RUBIO:

Thank you Mr. Chairman. Mr. Preston as I think you and others have also stated (ph) to in their statements Al-Qaeda has changed -- the nature of Al-Qaeda has dramatically changed over the last number of years its now spread to a number of different countries just since 2012 although Al-Qaeda was on the run we've actually seen safe haven the number of places including Syria, we've given reports of course of Iraq, Libya has become increasingly unstable. So this is evolving in many ways more dangers threat than it used to be.

So let me ask you, under the administrations interpretation of the 2001 AUMF, which of these affiliates are we currently authorized are able to use all necessary and appropriate forces against. Which of the Al-Qaeda affiliates are we authorized to use force against under the existing AUMF?

PRESTON:

Pardon me. Senator Rubio I believe that the administration has pursued a policy of being as transparent on matters of national security as national security will permit in this particular area I think that we have been very clear in stating for all the congress and publicly where it is that U.S. forces are using military force under the AUMF against who and on what basis.

My prepared statement, my oral statement today it clearly states the groups against which the United States is currently operating in which the United States military is currently applying military force under the authority of the AUMF.

RUBIO:

I guess why reason that I'm asking that question is the nature of Al-Qaeda has changed since the AUMF was first passed. It has spread to different places. As as I understand what you've said here today the administration has not taken a position as to whether the existing AUMF should be expanded or revised to take into account the changing nature of the threat.

PRESTON:

Well the president has made very clear that he would not support expanding the existing AUMF, but he's also made very clear that he fully supports the effort to examine the AUMF towards its refinement to assure that it is narrowly tailored to meet that evolving threat.

RUBIO:

Does he not support expanding the AUMF because he doesn't believe he needs that authority, he already has it? Or is it because he simply wants to bring to an end this conflict and he believes that the war against Al-Qaeda is winding up?

PRESTON:

I think he's explained it in terms of wanting authority towards a series of persistent targeted efforts to dismantle specific networks of violence extremist that threaten our country and getting away from a regime in which there is powers more suited for traditional armed conflict between nation=states...

(CROSSTALK)

RUBIO:

But I guess the problem that I have is -- I'm trying to understand is it because he believes that the existing authorities he now has because Al-Qaeda continues to evolve and find new havens in which to operate from and we can't necessarily predict where that is ten years out, five years out, three years out. So what I'm trying to understand from a legal perspective is, is it his belief that under his inherent powers commander in chief he doesn't need the authority of the congress to go after that or and therefore we no longer need to expand the AUMF or revise it to account for that new threat?

PRESTON:

Sir, I think his beliefs are best stated in his public statements and most particularly the NDU speech and the State of the Union.

RUBIO:

Which State of the Union? Because in my State of the Union he said that Al-Qaeda was on the run and that basically made it sound like they were incapable of imposing an ongoing threat. I think now he wouldn't say that given today the realities that we now seen emerge.

PRESTON:

I was referring to his most recent State of the Union, but my point is that we are engaged in an effort at addressing precisely the questions that you are posing in terms of what future legal framework is best suited to adequately meet the terrorist threat as it evolves and narrowly tailor to meet that threat and not granting unbound powers of all-out war fighting of the sort you get between nation-states.

RUBIO:

But -- but again, going back to this analogy that you're using of nation states, it is in fact a reality in the 21st century that one of the challenges we have is that these most dangerous conflicts that we now find ourselves in are not against nation states. They're against non-state actors who don't necessarily have the confines of a nation state, but they present a very serious risk to the United States.

And -- and so I guess my problem with the terminology that you keep using in terms of pulling us away from conflicts that may look like the ones we once had against nation states is that in essence that is the modern threat, is -- is these -- in addition to nation states that pose a threat are these non-state actors that are a very serious threat.

But I want to -- I want to pivot back to another point that I know is of interest to some members of the committee, and that is the following. We have open source reporting in evidence, for example, that in Syria there are a large number of foreign fighters, including many Westerners. And I read an open source reporting article today that estimated that as many as 100 Americans may be involved with Jihadist groups within Syria.

What authorities does the United States have to target individual American -- even if they happen to be American citizens who are affiliated with radical groups such as these and are actively participating in their efforts to target America and America's interests?

PRESTON:

Senator Rubio, the United States has the authority to target individuals, including Americans, who pose an imminent threat to our -- an armed attack to our country. And it's of course a very grave matter to decide to use lethal force against a US citizen, but in some cases it has proven to be necessary.

RUBIO:

Ms. McLeod, I wanted to ask you actually, in your view and in the view of the State Department, is Al-Qaeda and its affiliates today, are they a widespread threat against America or are they a targeted threat against America?

Are they just isolated groups that from time to time are problematic or is this part of a larger growing, evolving problem that quite frankly at this stage is unpredictable but seems to trend towards growth

MCLEOD:

I think it's fair to say, as I believe the president said in his NDU speech, that while core Al-Qaeda has been greatly diminished, there is an evolving threat with respect to affiliates of Al-Qaeda who are located in various parts of the world.

RUBIO:

Isn't it fair to say that instead of one core Al-Qaeda we now see emerging eight or nine core Al-Qaedas just because they're now dispersed into different areas? And in addition to Al-Qaeda, by the way, the -- they are not the only radical Islamic threat that -- that the West faces, Al-Qaeda as we define it. There are also other radical groups out there that -- that we know pose a threat to American interests around the world and even potentially in the homeland, right?

MCLEOD:

Yes, that's correct. And I believe -- and some of those would not be covered by the AUMF. But as I believe we said, we believe the president has authority to proceed against those groups if they indeed...

RUBIO:

So just to understand the position, there are additional groups outside of the Taliban and Al-Qaeda that pose a serious threat to our national security. They re not covered under the AUMF, but you do not believe that we need to revise the AUMF to cover them because you have existing constitutional authorities that allow you to target them if in fact they pose that threat.

MCLEOD:

I didn't say that we have determined that there are other groups that pose an imminent threat to the United States. I said we'd have the authority to proceed against them if we indeed made those determinations.

RUBIO:

Without an AUMF expansion.

MENENDEZ:

Senator Johnson?

JOHNSON:

Thank you, Mr. Chair. I'm finding this hearing quite confusing. It is true that on May 23, 2013, President Obama did declare the global war on terror over. That's a correct statement. True? Does he believe that? You're working with this administration. Do you believe President Obama believes the global war on terror is over?

PRESTON:

(OFF-MIKE) guess I would just point out I believe the view of the administration is that we are engaged in armed conflict. We're engaged in armed conflict with Al-Q, with the Taliban and with associated forces. That conflict continues.

JOHNSON:

So really nobody in the administration really believes the global war on terror is over. We're still involved in conflict.

PRESTON:

I think the administration has a -- has not embraced the characterization of the global war on terror as if the enemy here were a religion or a -- or a set of techniques...

JOHNSON:

Semantically -- semantically, we're not in a global war on terror. We're just in a -- a war against terrorist elements.

PRESTON:

We are -- we are at war with Al-Qaeda, the Taliban and associated forces. And we are actively involved in efforts to detect and address threats from terrorist elements otherwise.

JOHNSON:

Do you believe the AUMF covered the current situation?

PRESTON:

I think the AUMF has served well in providing full authority to use military force against our enemies in those conflicts.

JOHNSON:

So why wouldn't the administration have a position on whether or not they want the AUMF to continue or they want it repealed?

PRESTON:

I think the administration through the president almost a year ago clearly stated a policy favoring refinement and ultimately repeal of the statute. That I don't think translates into necessarily immediate repeal of the statute.

JOHNSON:

So has the administration proposed any refinement or any redefinition of -- of the AUMF? Have they provided language in terms of what they think they need to handle the current situation?

MCLEOD:

No Senator, we have not. We are -- we need to talk to -- to engage with you all to get your ideas and take them back (inaudible).

JOHNSON:

Like Senator McCain said, this is engagement. Why -- why wouldn't you lay down a proposal so we could evaluate it? Why wouldn't the administration -- as president of the United States, he is in charge of foreign policy. He's the commander in chief. Why wouldn't he bring us the language he needs to prosecute this evolving war on terror?

I mean, that's what I'd like to see. I don't think it's my job. I'm not an attorney. I don't understand the complexity of these things. I'd like to see the administration propose what it needs in a refined operation authorization of use of military force.

PRESTON:

Senator Johnson, if I might -- if I might add, you know, it seems that the president in May established an objective, if you will. The repeal -- the refinement and ultimately a repeal. He has set us about a course to focus on and develop a future legal framework.

JOHNSON:

Good. Good. So we're on a course. Is he going to provide any kind of road map in terms of what he needs? He -- he is the commander in chief. He's the one that needs the authorization.

Is he going to come to Congress and let us know what he needs to stay within his constitutional powers to protect this nation? Is he going to provide a proposal that we can review and that we can debate, or are we supposed to come up with it? What's the process going to be?

PRESTON:

I think as he said in May of last year, that he envisions the administration engaging with Congress, with this and other Congresses...

JOHNSON:

That was -- that was a year ago. He declared the war on terror over and now we're having a hearing and there's no proposal. There's on language. There's really nothing that I'm hearing in this setting in terms of what he wants, what he needs. When are we going to get that? How do we get to that point? Where's the engagement actually occur then?

PRESTON:

The way I would describe it, sir, is that -- that he has established an objective, a vision if you will that we formulate a post-Iran -- excuse me, a post-Iraq and Afghanistan legal framework.

JOHNSON:

So who's -- who's going to do that?

PRESTON:

He didn't establish that as an immediate tasking but as something that we need to take on deliberately and at the -- and then engage with...

JOHNSON:

So why -- why did he declare the war on terror over a year ago? I mean, again, this makes no sense to me. Can you -- again, I'm not an attorney. I'm relatively new to this process here. Can you define an imminent threat?

If we do away with the AUMF and we didn't have one on the books, and I believe the president does have the authority to protect this nation, what is an imminent threat? Can you explain that in layman's terms? How is that made operational?

MCLEOD:

Senator Johnson, most obviously an individual who's planning a specific attack against US persons would be an imminent threat against the United States.

And (inaudible) it's hard to articulate all of the factors that would go into a decision whether an individual poses an imminent threat, but I want to read to you from what the attorney general said in explaining this concept because the Justice Department has done some long and hard thinking on this.

And he explained that the determination of whether an individual presents an imminent threat may incorporate consideration of the relevant window of opportunity to act against that individual, the possible harm that missing the window could create, and the likelihood of heading off further disastrous attacks against the United States.

And then he said with respect to the kind of terrorist threat that we're facing today we learned on 9/11 that Al-Qaeda has demonstrated the ability to strike with little or no notice and to cause devastating casualties. Its leaders are continually planning attacks against the United States and they do not behave like a traditional military wearing uniforms, carrying arms openly, or massing forces in preparation for an attack.

Given these facts, the constitution does not require the president to delay action until some theoretical end stage of planning when the precise time, place and manner of an attack become clear. Such a requirement would create an unacceptably high risk that our efforts would fail and that Americans would (inaudible).

JOHNSON:

OK, listen. I -- I completely understand this is an amorphous, evolving, incredibly difficult threat. And I realize the standards are quite amorphous as well. I guess what I'm -- I guess what I'm asking for is the administration, this president lead, that he comes and poses to us what language, what -- what he needs to actually carry out his constitutional duty of protecting this nation.

That would be the way I would like to see the administration engage with us. Thank you, Mr. Chairman.

MCLEOD:

Senator, we'll certainly take that back.

MENENDEZ:

Let me just before I call the next member, I think in fairness to these witnesses, policy is not their purview. Legal analysis is. And it's in that context that I invited these witnesses to appear before the committee to get a legal analysis of the issues that surrounded the president and any potential AUMF.

Members of course are free to pursue policy discussions, but if I wanted to hear the policy of the administration I probably would have invited a different set of witnesses. And I may do that in the future.

PRESTON:

I'd just like to say though the fact is that what the witnesses have said is they do not know what current operations rely on the AUMF. That is what they've said. So in fairness, they may not be speaking to policy, but they can't even answer the question as to what operations rely on what authority.

MENENDEZ:

Well I'm referring to the broader questions that have been raised here about what does the administration view as the AUMF that they would desire. I don't think that that is in the bailiwick of the witnesses before us in that context.

But Senator Murphy has deferred for the moment, so Senator Flake, you're up next. And you're going to defer to Senator McCain. Senator McCain?

MCCAIN:

Thank you, and I appreciate the deference that Senator Flake gives to me, and I'm sure it will be short lived. I thank you, Mr. Chairman. I thank my friend. Mr. Preston, in testimony in the Senate Armed Services Committee, the director of national intelligence James Clapper and the director of the DIA agreed that Al-Qaeda and its associated forces are not on the run and not on the path to defeat.

Subsequent testimony in the Armed Services Committee, General Austin, General Rodriguez and others stated the threat posted by Al- Qaeda and its associated forces is increasing, not decreasing, in their geographic areas of responsibilities.

Do you agree with our senior military and intelligence leaders that Al-Qaeda and its associated forces have not been defeated?

PRESTON:

As general counsel...

MCCAIN:

You know, it's a fairly straightforward question. Do you agree with our senior military intelligence?

PRESTON:

My lane (ph) is the law, so I would defer to the senior intelligence.

MCCAIN:

So you don't want to answer.

PRESTON:

(Inaudible) matters of intelligence and operations.

MCCAIN:

I see. Working over at the Department of Defense you wouldn't have a view of that, even though you told this committee that your confirmation that you would answer questions if -- if asked. In your personal opinion, do you think that the DOD counterterrorism operations and those that conduct them are better served by maintaining the 2001 AUMF unchanged, repealing or updating it in some way, Mr. Preston?

PRESTON:

Senator McCain, that is precisely the set of issues that we agency lawyers in the administration are focused on and that the president I think has foretold engaging with Congress on.

MCCAIN:

Again, a non-answer. So according to your answers to previous questions, it is either with or without AUMF authority the United States can attack those that pose a imminent threat to the United States of America. Is that correct?

PRESTON:

I believe the legal authority is there. Yes, sir.

MCCAIN:

I see. And would you say that the people who attacked our embassy -- our consulate in Benghazi are a terrorist organization?

PRESTON:

I understand that they are. Yes, sir.

MCCAIN:

So therefore would we have the authority to strike with a drone members of that organization that attacked our consulate and killed four Americans?

PRESTON:

I think if and when a concrete situation is presented the judgment is that that group presents the requisite threat, then there is that authority, or if that group is determined to fall within the AUMF there would be that authority.

MCCAIN:

So you just agreed that they were part of a terrorist organization, right?

PRESTON:

Yes, sir.

MCCAIN:

So if they're part of a terrorist organization, according to the interpretation of AUMF, then is it your view that the president has the authority to -- to attack them and eliminate them?

PRESTON:

I think there are multiple potential sources...

MCCAIN:

I'm asking in your view, does the president under the AUMF and the authorities that you say he has, do they have a legal right to strike members of the organization that committed the attack on Benghazi?

PRESTON:

There is the authority to use military force if they present an imminent threat and or if they qualify as an associated force of Al-Qaeda. So the...

MCCAIN:

I just asked you if they did and you said yes.

PRESTON:

Well sir, that depends on the particular factual circumstances and it's a judgment that's made on that basis. The -- the answer -- I think the short answer is that the -- that the -- our government is committed to applying all lawfully available instruments of national power. That includes law enforcement...

MCCAIN:

I'm asking specifically about a situation where four Americans were killed that was carried out by a terrorist organization. That has been the conclusion. Whether the president of the United States in your legal opinion has the authority to strike these people and to eliminate them. Now that's a pretty straightforward question.

PRESTON:

And I think I've tried to answer it as straightforward...

MCCAIN:

Then the answer is yes or no. Does he have the authority or not? You're not being straightforward, sir.

PRESTON:

There are two sources of authority...

MCCAIN:

I am asking whether he has the authority, not the sources of authority.

PRESTON:

That requires a determination (inaudible).

MCCAIN:

Third non-answer. Nicely done.

PRESTON:

I try my best.

MCCAIN:

It's remarkable. So does the -- the president said he wants to refine and ultimately repeal the AUMF's mandate. That was his speech at the -- the president's speech at National Defense University. Does that mean that if the AUMF were repealed that that would mean that the detention facility at Guantanamo would be then closed?

PRESTON:

I think that is a critical issue that is in the mix inasmuch as the AUMF is a domestic source of authority for (inaudible).

MCCAIN:

I'm asking again, does that mean that the detention facility at Guantanamo would then required to be closed if the AUMF were, as the president desires, ultimately repealed?

PRESTON:

It would create a substantial question about our ability to do long-term detention, which is what is going on at the Guantanamo facility.

MCCAIN:

I'm wasting the committee's time.

MENENDEZ:

Senator Murphy?

MURPHY:

Thank you very much, Mr. Chairman. This morning I unfortunately missed part of the hearing. I was under the wonderful care of a constituent of Senator Kaine's getting a root canal. And it sounds like the experience of the

witnesses and perhaps some members of this committee may have been more or less pleasant than my experience this morning, but I'm glad to be here.

And what has been explained to me is that the panel has given a pretty robust defense of the administration's Article II powers. And I guess if I was sitting in your seat I would probably do the same or some version of the same with maybe some more specific answers as to the hypotheticals that were I think pretty clear to be posed today.

So let me ask you a broader question. I think there's a reason why it's Article II that lays out the administration's powers and not Article I. I think there's a reason why we are all subject to Article I and there are very specific powers given to Congress with respect to foreign affairs in Article I. The power to declare war and the power to raise armies.

And so I'm just going to ask you -- you're both lawyers. You both have studied both articles well. I'm just going to ask a very broad question, which is in your mind, where does Article II powers end and Article I powers begin? What's your rendering of what is left in Article I if we understand the broad rendering of Article II powers that you've explained today?

Tell us what -- instead of explaining what your role is, let me flip it. Explain to us what our role is.

PRESTON (?):

Senator, let me start with a very general proposition, which is a strongly held belief that our government works best and our nation is strongest in matters of military force and war when both do the political branches are working together.

So the short and perhaps most important answer is both Congress and the executive need and ought to work together on matters of military force and war. Beyond that, it is I think very much a part of the president's initiative in May in the NDU speech in inviting dialogue with Congress to ensure that the administration is engaging with Congress as we seek to develop that future legal framework.

Congress obviously enacted the 2001 AUMF and provided the congressional (inaudible) for the use of force in that setting, and we very much look forward to engaging with Congress as we seek to shape what that follow-on or future legal framework will look like.

MURPHY:

Ms. McLeod?

MCLEOD:

Senator Murphy, I don't think I'm going to be able even though I'm a lawyer to give you a precise delineation of authority between the Congress and the executive branch in the area of the use of military force.

I think this has been a subject of much debate in the scholarly world and I think that the War Powers Resolution was enacted to try and achieve a mechanism under which we could consult with the Congress before using force and provide reporting and, if necessary, get authorization.

MURPHY:

You clearly believe that if an individual has made a threat against the United States and is carrying it out you have existing authority with or without the AUMF to pursue that individual. Correct?

MCLEOD:

If they pose an imminent threat, yes. But I'd point out there are other constraints that can come into play. If that individual's in a different country, there are certain considerations of sovereignty that we have to address. So you have to consider whether you can get consent, or if not, you have to consider whether that country is unable or unwilling to address the threat to us, in which case we would still feel we were able to...

MURPHY:

But those are considerations separate and aside from whether or not you need consent from Congress.

MCLEOD:

Yes.

MURPHY:

If an organization has made -- has in your mind constituted an imminent threat, is there any limitation on the size of that organization that would require you to come to the Congress so long as you had made a determination that they posed an imminent threat?

MCLEOD:

No, I don't -- I don't think so.

MURPHY:

A nation harboring an entity that poses an imminent threat in coordination with that entity that poses an imminent threat, if that country has not itself expressed a threat to the United States but is harboring an entity or organization that poses an imminent threat, in order to pursue conduct against that nation, do you need prior congressional authorization?

MCLEOD:

Well, I -- I'd say that our actions taken in self-defense always have to be necessary and proportionate. So we would have to go through that analysis before considering what action if any we could take against a state that harbored terrorists.

And we'd have to consider -- I think I'm -- we would have to think about whether that -- whether individuals in that state or the government of that state actually posed an imminent threat.

MURPHY:

And there wouldn't necessarily be a time limitation on it. So let me get this straight. So you are -- you are suggesting that the state itself would have to pose an imminent threat, not simply harboring or providing or hosting an organization that provides an imminent threat.

MCLEOD:

I -- I think I need to think about it -- your question (inaudible) I can't give you a definitive answer.

MURPHY:

I'll -- I'll end my line of questioning there. I mean, to the extent that we -- I'll express the same level of frustration that others have on the panel have faced here. That's a critical question, in part because, you know, we have dealt with that question in real terms over the last decade.

We had a nation that harbored a terrorist group that arguably did not present an independent threat to the United States. In that case there was an authorization of military force.

But a suggestion that the executive can undertake an action against a sovereign independent nation simply because they have made a decision to harbor that organization and not have to come to the United States Congress with war-making authorities for that authorization, that's -- I would love a clear no to -- to -- to that question.

I would love a clear indication that if a nation has not presented an imminent threat and is simply harboring an organization that -- that in order to wage war against a sovereign nation you would have to come to the United States for authorization.

MCLEOD:

Senator, I would -- I would note that we did just that.

MURPHY:

I understand you did, but to the -- but it would be nice to hear very clearly that your interpretation of the law is that you are always required in that circumstance to come to the Congress.

MENENDEZ:

Senator Flake?

FLAKE:

Thank you. I had planned to -- I believe it was already asked by Senator Corker. Just in the absence of -- if the AUMF were to sunset tomorrow, what advice would you give to the president in terms of what activities we're involved in around the world that we would need to cease? And I understand that you say none of them, that you would not offer any advice to disengage or to not continue anything that's being done. Is that...

NELSON:

I think, Senator, what I would say is that the impact of that on operations in Afghanistan and against Al-Qaeda elsewhere, detention operations, those are all things that we would need to examine in framing whatever future follow-on legal framework would be in place.

The point we were making earlier is that on the fundamental question of authority to take military action in order to address and protect the country from imminent threat of armed attack, that that authority does exist in the constitution with the president quite apart from the presence of a legislative authorization.

FLAKE:

There's been quite a bit of talk of hypotheticals here, what would happen here or there. Why don't we take an actual case here? I'd like your explanation as to where the president got his authority.

Let's take Libya. In the spring of 2011, was Libya a sovereign country?

MCLEOD:

Yes, it was.

FLAKE:

Was there an imminent threat posed to the United States?

MCLEOD:

In the case of Libya, the U.S. took military action as a matter of international law pursuant to an authorization by the U.N. Security Council, which has authority to take measures that are binding on states or can give authority to states to take action in order to address threats to peace and security.

FLAKE:

So, not pursuant to any AUMF here. But -- but we took military action that wasn't under the auspices of the United Nations.

MCLEOD:

No, it wasn't under the auspices per say, but the Security Council resolutions specifically authorized NATO and others to take the military action.

FLAKE:

We -- we took military action, though, independent of the United Nations, on our own. We put Osprey aircraft there; we -- we needed to rescue a pilot later.

So, this was not action that was pursuant to a U.N. Security Council resolution, was it not? This was action that we took independent still (ph).

MCLEOD:

I believe it was pursuant to the U.N. Security Council resolution, Senator.

FLAKE:

But right now we're moving troops to Italy to be closer to the situation in Libya. If we were to move in, what auspices would be -- be moving in now?

I -- I think we hear reports that four additional Osprey aircraft arrived overnight in Italy to join four B-52s and 200 Marines that had been moved there last week.

Libya -- things are going south there pretty quickly. If we were to move into Libya and take some action there, would it be under -- under what authority would it be?

MCLEOD:

Senator, I believe the troops that are in Italy are -- are being positioned there in case our personnel at the U.S. Embassy need to be evacuated, which is a very standard...

FLAKE:

Certainly.

MCLEOD:

Operation.

FLAKE:

Nobody would argue with that. But additional action that was taken -- that would be taken, would -- would it be pursuant to some U.N. Security Council resolution or -- or under the president's Article II powers or -- certainly not under any AUMF that's (ph) been (ph) passed (ph)...

MCLEOD:

Well, I'm not aware that any sort of military action beyond the possibility of going and extracting our personnel has been under discussion.

FLAKE:

All right. Well, I -- I said I share the frustration that others here have expressed that we were told that an additional, -- you know, the president would like to refine AUMF and ultimately eliminate it.

But when asked what would change if the AUMF were absent tomorrow and we -- we didn't have it, then we don't get much of an answer on what would change, in terms of any activities we're involved with now.

So, it leaves Congress with not much direction from the administration as to what the administration really wants here. So, it's just -- it's a bit confusing.

Thank you.

MENENDEZ:

Let me -- I have a couple other questions and maybe one or two members who have some, OK?

Let me -- look, I think part of our challenge here is that this area of the law is not fully defined. And so, that is -- at least from my perspective. So, I think that's part of the challenge.

But I do want to clarify some things, or at least understand clearly for the record where you stand.

In pursuance of Senator Flake's questions, our action in Libya was a humanitarian act and, in a sense, may be subject to, you know, a NATO action and may be subject to some Security Council resolutions.

But is it -- is it your opinion -- is it your opinion that those authorizations of a NATO operation or a Security Council resolution allows the -- a president who isn't responding to imminent threat to circumvent the United States Congress in terms of an authorization for the use of force? Because that's basically what I heard you say. And if I'm wrong about understanding what you said, please correct me.

MCLEOD:

No, Senator, that wasn't what I was saying. I was talking about...

MENENDEZ:

What did you say?

MCLEOD:

International law authority for us to -- to use force in that case.

MENENDEZ:

But international law authority to use force -- that's what gives you the imprimatur to go act against a certain country.

But to use the forces of the United States even under that international law, would you not have to come to the Congress to get authorization to act, especially when it is not an imminent threat situation?

MCLEOD:

In that -- in the case of Libya, we did file a report, if not more than one report, under the War Powers Resolution. And we consulted with the Congress on the actions we were taking.

MENENDEZ:

The -- the...

MCLEOD:

But it's true -- we did not seek prior authorization.

MENENDEZ:

Yeah. And even under the War Powers Act, of course there would be an action by the president. But within a certain time period, there would have to be a -- a response from the Congress.

I -- I am concerned, while I believe in Security Council resolutions to create international support and efforts and direction to intervene in the sovereignty of another country, I still am concerned that when we want to participate under such an umbrella, that there must be an authorization of the Congress to do so if it's not an imminent threat situation.

So, the -- you know, I'd like you (ph) all go and rethink that and come back and some point -- either you or policymakers -- to define for us what your view is. It may not be my view, but I'd like to hear what your view is.

Let me ask you -- did the president need the authorization for the use of force, had he decided to act in the chemical weapons issue in Syria?

MCLEOD:

The -- as you know, the president ultimately did decide that he would seek international (ph) authorization.

MENENDEZ:

I know he did. And -- but my question is did he need to do that or do you believe he had the authorities, based upon what had transpired in Syria with Assad using chemical weapons against his people?

Did he need authority or did he not need authority? Did he have the authority to act independent of the Congress?

MCLEOD:

I -- Senator, it would be my view, but I -- mine was not -- I was not the one who made this decision. It would not (ph) be my view that he would have the authority to act, but that it was prudent as he did to seek the...

MENENDEZ:

You believe he had the authority to act notwithstanding? Now, that's not, per say, an imminent threat to the United States, as far as I can tell. It's certainly something I strongly supported -- giving the president the power for, as did most of the members of this committee.

But there is no indication, at least to my knowledge, that those chemical weapons would be used against U.S. citizens, U.S. forces or whatnot. So, this is -- this is where we need to define what is the standard.

Let me ask you a third question, and you can divvy up your responses as may be appropriate between your two respective roles.

The U.S. plans to end its combat operations in Afghanistan by the end of the year while the 2001 AUMF has been the primary basis in domestic law authorizing these operations. This authorization is not limited to operations in Afghanistan.

Nevertheless, the end of combat operations in Afghanistan and the absence of sustained combat operations under the 2001 AUMF in any other theater will undoubtedly have implications for the continued use of this authority in other context.

So, could you please describe for the committee what you anticipate to be the consequences, in terms of the limits of legal authority of the end of Afghanistan combat operations in the following three areas: one, the tension operations at Guantanamo Bay in Cuba; two, targeted killing operations against al-Qaeda and associated forces; and three, Defense Department counterterrorism operations, including relevant security assistance?

PRESTON:

Let me tackle that one, Mr. Chairman.

MENENDEZ:

OK.

PRESTON:

Ms. McLeod can supplement as appropriate.

Let me address that first generally and then specifically the areas that you mentioned. The president has made clear that it is not in our national interest to remain on perpetual wartime footing and that this war, like all others, will come to an end.

At the same time, while the mission in -- the U.S. military mission in Afghanistan after 2014 is an important milestone, it doesn't necessarily mark the end of the armed conflict with the Taliban.

Now, of course, as we seek to finalize what precisely the presence and mission in Afghanistan will be, we'll be better able to judge its impact on that armed conflict.

By a similar token, even when the conflict against al-Qaeda ends, it -- that will not necessarily mark -- I'm sorry -- even when the conflict with the Taliban ends, that will not necessarily mark the end of the conflict with al-Qaeda. And it's in that context that we look at the three issues that you raised.

First, I believe it was detention -- the United States will continue to have legal authority to detain individuals from al-Qaeda, the Taliban, associated forces until the end of the armed conflict as a matter of international law, and as we discussed earlier under the AUMF.

In terms of the targeted strikes that you're referring to, and I would say more broadly, direct action against counterterrorism targets -- which would include capture operations or lethal operations -- again, while the U.S. mission in Afghanistan is a -- a -- and it's narrowing post-2014 is an important consideration, we will retain the authority to use force as appropriate against our enemies in the armed conflict and otherwise to protect the country.

The third area that you mentioned is foreign assistance or counter -- other counterterrorism activities and assistance. And that, again, notwithstanding the narrowing of the mission in Afghanistan, we would expect the DOD's assistance efforts -- in particular, capacity building by partner countries will continue apace and unabated.

MENENDEZ:

So, your answer, then, to my three specific questions is that you will have continuing legal authority notwithstanding the ending of that conflict or any narrowing or repealing of the AUMF under which you are operating in Afghanistan?

PRESTON:

I agree with most of what you said, sir. With the end of the conflict -- and we do face issues about -- under international law principles, the extent to which use of force in certain applications would continue to be justified under international law.

MENENDEZ:

Let me -- let me do (ph) one (ph) more (ph), OK, and then I'll turn to Senator Corker.

Would it be far to stay -- say that statutory authorization essentially provides a broader authority on which to act militarily, particularly in the absence of an immediate threat?

PRESTON:

It certainly can. And in the case of the AUMF, it does represent a broad grant of authority.

MENENDEZ:

And an AUMF also transcends the War Power Resolution because it requires the president to come to Congress for authorization 30 days after insertion of the U.S. forces in hostilities?

PRESTON:

That's right. Legislative authorization provides Congress' participation in that decision.

MENENDEZ:

Now, Senator?

CORKER:

Mr. Chairman, I'll be very brief. I do want to thank you for having this hearing. I think it's been very educational for all involved, even though it's been difficult to get direct answers.

I think it's really highlighted, in many ways, a real debate that needs to occur here and action taken by the committee.

I do want to say for my friends who may not have been here during the Libya debate -- I know that Harold Koh is here and to be a witness in just a moment. I know sometimes people leave these hearings.

But when we challenged the administration over the War Powers Act issue as we were bombing Libya -- bombing Libya, Mr. Koh testified on behalf of the State Department that we were not involved in hostilities in Libya.

So, I just want to highlight the fact that this is a real debate that we need to have. There are people who, on behalf of the administration, want to give any answer that works for the administration; will justify actions that, to me, go beyond. And so, I really want to thank you so much for having this debate.

And I would like to ask Mr. Preston which of these groups -- I'm going to name some groups -- you're authorized to go after under the 9/11 AUMF? AQAP -- yes or no?

PRESTON:

As I said in my statement we previously disclosed that AQAP is a part of...

CORKER:

Is that yes? I want to move through this quickly. Yes or no?

PRESTON:

Yes, sir.

CORKER:

ISIS?

PRESTON:

Sir, with respect to groups in addition to the ones that I am (ph)...

(CROSSTALK)

CORKER:

Yes or no? I want a yes or no answer. Are you authorized under the 9/11 AUMF to go after ISIS?

PRESTON:

Sir, I can't speak publicly about which groups -- particular groups we may or may not have determined...

CORKER:

Is this a classified answer? Is that the reason?

PRESTON:

That's my understanding, yes, sir.

CORKER:

So, I do wonder how -- again, this gets back to a topic many of us discussed last night. I don't know how we can debate these issues when you cannot even tell us whether we can or cannot go after groups based on authorizations that Congress itself passed. I just want to highlight that.

AQIM? Can we go after AQIM?

PRESTON:

Same answer, sir.

(CROSSTALK)

CORKER:

Yes or no? Same answer -- classified, you cannot tell us...

PRESTON:

We would (ph)...

CORKER:

Whether we can go after groups in Northern Africa that are committing (ph) terrorists...

PRESTON:

We have publicly identified the groups that we are operating against using military force under AUMF. As for other groups, whether or not they would qualify is a determination that's made as concrete situations are presented...

CORKER:

Well, there are very concrete situations happening. So, right now, you have made a determination, I guess, with ISIS; very concrete things are happening there and AQIM. So, I assume in a classified setting, you could share with us whether, in fact, you have the authority to go after these groups. Is that correct?

PRESTON:

In a classified setting, we could discuss the available classified intelligence and how the standards...

CORKER:

I just want to know if we can or cannot. Can you tell me those things in a classified setting?

PRESTON:

That would have to take place in a classified setting.

CORKER:

OK. Well, I'll set that up the first day we're back and I look forward to that meeting.

Al-Nusra?

PRESTON:

Sir, again, the groups that -- that we've not identified as groups we are currently operating against, the intelligence and applications of standards under the AUMF is not something that we're prepared to discuss in an open session.

CORKER:

But in a classified setting, you will share that with the entire committee?

PRESTON:

That would have to take place in a classified setting.

CORKER:

Well, since we -- I -- I just will close with this. I -- Miss McLeod, I know I gave you somewhat of a hard time and I know that you're sent up here on behalf of the State Department to represent the State Department.

And I actually want to say to you that my wrath should really be taken towards the State Department and not yourself.

We asked people to come up here today to answer questions that I think are a great challenge for our nation to -- to deal with. And just as Anne Patterson came up here 56 days ago and told us that she would be glad to lay out to us what our strategy or our policy was in Syria -- this never happened; I think you all know.

And I realized, actually, last night while the administration's been hiding behind intelligence -- not being able to share it. I realized last night that the administration has no policy in Syria -- has no strategy in Syria. And that's why they haven't been willing to talk with us about this.

It just dawned on me last night why this stonewalling is taking place. There's no objective there other than acting like we're doing something.

And I just want to say to this group, it's obvious the administration has no opinion -- has no opinion on whether we should refine the AUMF or not.

And I just want to say to Chad (ph), who works on behalf of the State Department, you would serve the State Department much better by actually sending folks up here who can speak to these issues, or just tell us that there is no opinion that the State Department has.

And so, with that, I thank you both for being here. I apologize on behalf of the departments you represent -- them sending you up here when they really don't have, quote, as the chairman referenced appropriately, "they haven't made any policy statements."

I do hope the committee will take this issue up. And again, I want to thank the chairman for -- for his diligence. My guess is this has piqued a lot of interest here and my guess is that if we're going to be responsible senators, we should respond.

MENENDEZ:

Senator Durbin?

DURBIN:

Very briefly, because I know there's another panel.

I don't know that there were any members of the Senate who really understood when we voted on this authorization for the use of military force what we were voting for.

We were reacting to the 9/11 attack and saying "go after those responsible." None of us could've envisioned that we were voting for the longest war in the history of the United States, which still goes on to this day.

None of us could've understood the military aspects and non- military aspects of the commitment that we're making.

And I think it is entirely appropriate, though monumentally challenging, for us to take on a redefinition of the Authorization of the Use of Military Force.

And I would say to my friend -- and he is my friend, Senator Corker -- to say his frustration over this reflects many things, not the least of which are the rules of the Senate about how information is exchanged and given to members of the Senate.

As I mentioned to him last night in a separate meeting, in a separate capacity from this committee, I am told things that are members are not. And I understood when witnesses come before us and say I, you know, "I'm duty-bound not to disclose classified information in an open public hearing. It may endanger lives of Americans and others."

That is a responsibility that I'm sure you take very seriously. And I would not put you on the spot as whether or not any specific piece of information -- your right to make that claim.

But I -- I do believe we need to discuss as an institution the exchange of more information so that we understand the nature of this conflict we are now in with terrorism. It is much different than any of us envisioned when we were voting that day on the Authorization of the Use of Military Force.

Thank you, Mr. Chairman.

PRESTON:

Sir, if I could just thank the senator for those comments. And really (ph) about the information -- we will take back Senator Corker's request for additional information that I'm not at liberty to provide. Thank you.

MENENDEZ:

Is there any other member who has any other questions? If not, with the appreciation of the committee, this -- this panel is excused.

CQ Transcriptions, May 21, 2014

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Senate Foreign Relations Committee Holds Hearing on Use of Military Force, Panel 2

LIST OF PANEL MEMBERS AND WITNESSES

MENENDEZ:

Let me call up our next panel -- very important panel. The Honorable Harold Koh, sterling professor International Law at Yale Law School and former State Department legal advisor; and the Honorable Michael Mukasey, partner at Debevoise & Plimpton, former attorney general of the United States.

Welcome, both of you, to the committee. We appreciate your willingness to share your insights.

Your full statements are going to be included in the record without objection. So, I'd ask you to try to summarize them in about five minutes or so. And this way, we can get into the type of dialogue that we just had with the previous panel.

And with that, Mr. Koh, you're recognized.

KOH:

Thank you, Mr. Chair, Ranking Member Corker, for inviting me back.

A year ago, the president gave a speech at the National Defense University that outlined elements of his post-9/11 terrorism strategy. And there are three aspects that I think are particularly important and achievable, which I described in my written statement.

First, eventually ending the war with al-Qaeda and the associated forces when the facts on the ground permit. And that's the key -- the nature of the threat on the ground is what matters and is logically prior to any legal action. Second, eventually repealing the AUMF. And third, in the meantime, narrowing its mandate.

And to me, each of these three elements -- ending the war with al-Qaeda, seeking repeal and narrowing the AUMF -- is possible in time. So, there are three questions to which each the answer, I think, should be yes.

Should our long-term goal be ending the war? Yes; I think we should choose an exit strategy over perpetual war because war has as distorting effect on our priorities, our economies and our liberties. And under our -- our Constitution, peace is the norm; perpetual war is a distortion.

And I do not think that Congress should extend or expand the war over the president's objection. First of all, it's Congress' role to end wars. And secondly, in our entire constitutional history, I know of no example where Congress has enacted a law to expand or extend a war over the explicit objection of the president, and this should not be the first such occasion. So, should we end the war? Yes.

Second, could you eventually, when the facts on the ground allow, repeal the AUMF without leaving legal gaps in our authority to target or detain? And the answer is yes, when the situation on the ground permits.

With regard to both targeting and detention, think of it as belt and suspenders. Last May, the president signed a presidential policy guidance that formalized the executive branch's targeting practice and made clear that they conform to domestic and international law.

And that lawfulness of this executive branch action depends on two things -- the existence of an armed conflict with al-Qaeda, the Taliban and associated forces, but it separately -- and this is the suspenders part -- rests on

the president's lawful authority to act in self-defense against continuing and imminent threats to the United States.

Now, if al-Qaeda is defeated on the ground and you don't need to have an armed conflict with them but all threats are not ended, you can move the belt and we (ph) repeal the AUMF and still have enough legal authority on your side through the law of self-defense.

And I describe, on pages seven to nine of my testimony, that if Congress would like this to be done in a statute as opposed to Article II constitutional authority, it could codify the self-defense authority with regard to continuing imminent threats so that Congress could place conditions on reporting and the like.

What about detention? Same thing -- if the facts on the ground lead to the situation where the U.S. has transitioned Afghan attention to Afghan control, where traditional detention tools can be used for some of the other individuals and can work with Congress on a plan to close Guantanamo, at that point there would be no need for law of war detention authority.

What the AUMF gives you is the authority to act against belligerent combatants as targets or as detainees. And if you don't need to do that anymore, you do not need the AUMF anymore.

Third and finally, it doesn't make sense to amend the AUMF. My view is to expand it and create an ongoing war is not a good idea. No new legislation is better than bad new legislation.

But if Congress wants to set the stage for repeal by narrowing the AUMF, I suggest in pages 12 through 14 of my written statement how this could be done.

And I suggest four particular steps Congress might consider: first, a sunset provision; second, stronger congressional reporting requirements; third, stronger public reporting requirements, particularly about civilian casualties; and finally, exploration of some kind of post -- post-external review mechanism to examine the legality of past drone strikes.

So, in closing, the three goals -- eventually ending the war, eventually seeking repeal and narrowing the AUMF -- are important. They are achievable and they're worthy of thoughtful consideration by this committee and Congress.

My point is simple: the AUMF is not the only law we have. We have other laws. We shouldn't treat the AUMF as perpetual all-purpose security blanket that can be distorted and that will itself become a distorting force.

We can, in time, when the facts on the ground permit, repeal the AUMF and rely on other authorities to fill these gaps. And not to do so, from that point, I think would be bad for our counterterrorism policy and bad for our Constitution.

Thank you.

MENENDEZ:
General Mukasey?

MUKASEY:
Mr. Chairman, first of all, thank you for holding this hearing. Thank you for -- for hearing me and having me here as part of the process.

I did submit a brief statement. I don't want to duplicate what's in it because this hearing has developed certain questions that I think are front (ph) of (ph) your mind and the minds of the rest of the members and I properly ought to address those rather than simply go off on my own oration.

With respect to your -- the questions that you posed of -- to the other witnesses at the beginning, is the AUMF -- I think the words you used were "broken, obsolete, inadequate." I'm not sure what broken means in this context, but obsolete and inadequate, for sure.

I think that the -- the nature of the threat that we face now is essentially the same as the nature of the threat we faced on and before 9/11, even though we may not have been fully aware of it before 9/11, and that is that there are people who are committed, as a matter of religious belief, so they say, to destroy Western civilization. And we are the principal focus of their energies and their activities, although we're not the only focus.

We could declare tomorrow that the war was over; we could repeal the AUMF; we could repeal every enabling piece of legislation that we have and that would not change their agenda. They get a vote in this.

And I think that it is unrealistic for us to talk about simply taking a statute off the books as if that, in fact, would change things on the ground.

I do think, however, that the AUMF can and should be changed. In what ways? It names -- it does name particular entities. It names al-Qaeda; it names the Taliban; it talks about associated groups and groups that are working in concert with them.

What that has necessitated, as you saw to some extent with the testimony of the -- of the prior witnesses, is some degree of somersaults to find out whether this organization or that organization is or isn't associated, is or isn't support al-Qaeda as -- as -- as it's been identified.

I think rather than doing that, you could come up with a list of organizations, come up with a set of goals that those organizations pursue in common, and then in very much the same way that the State Department puts groups on list of foreign terrorist organizations, have a consultative process involving the State Department, the Defense Department, the Justice Department and Homeland Security to include entities that whether they are directly associated or not are pursuing the same goal that we know generated the attacks of 9/11 and the attacks before that.

That Congress would then maintain an ongoing involvement with that process and could examine the - the legitimacy of having groups on that list or not. And could examine what steps have to be taken. Detention authority is - detention authority is not even mentioned in the AOMF. As I understand it, it is simply a derivative authority from the existence of a war. I think we ought to provide for detention authority in a straightforward way, determining who, how and - and under what circumstances. And I'm happy to answer your questions.

MENENDEZ:

Well, thank you. Thank you both very much. Let me go to - ask you both one of the first questions I asked the previous panel, what does the 9/11 AUMF provide the president in terms of authorities to use force that he doesn't already possess in other authorities?

KOH:

So, Senator I think a point that didn't clearly emerge is there are two states of affairs. One is armed conflict. When we're in an armed conflict with an organized group that's of a certain intensity and duration, as a matter of law, it's easier to conduct that ongoing struggle until you reach a point where they are defeated. And certainly on September 19, 2001, we were in that state of affairs. You had al-Qaeda, the Taliban and associated forces that went on. And many major actions were taken as part of an armed conflict.

At a certain point, and this is what Jay Johnson called the tipping point, you could say that that group has essentially been defeated. They may not surrender, but at that point they are less of an organized group than they are a set of threats. And when you have that set of threats and you consider them a continuing eminent threat, you can get rid of the belt and go with the suspenders, which is the authority and - to respond to those

continuing eminent threats in self-defense against known attackers. And the question is, when do you do that? You have to do it when the situation on the ground permits.

So you were giving an example of Iraq. It may well be that now, several years after all troops are withdrawn, is a good time to withdrawal the AUMF authority, where it might not have been in the last days of the drawdown when there were still American soldiers there. So that is the key, is we have a belt and suspender system, but the armed conflict scenario works best when you are in an ongoing conflict with an organized armed group and you need to be using targeting and detention on a very regular basis. That does not fit well into the sporadic threat scenario.

MENENDEZ:

But my - my question still prevails. Trying to get a greater clarity of answer. Could the president have conducted and continue to conduct all activities that he's been conducting absent an AUMF of 09/11?

KOH:

Well, I don't - I'm - I'm no longer part of the information flow on the threat stream. My view is that some parts of al-Qaeda have been pretty much subdued. Other parts are still very active; AQAP, AQIM. And then there are other entities, which are dangerous, but they're not going to attack the homeland. And they're not part of al-Qaeda. And they don't fall under the AUMF. However, they do present continuing threats. For example, the Benghazi attackers. So, you have a legal authority to respond to them, even without an AUMF.

MENENDEZ:

General Mukasey, do you have a view?

MUKASEY:

The -- I think part of it was responded to before. The AUMF does override the War Powers Act. And so any action taken would not have to be reported under the War Powers Act. In addition, it provides a coordinating mechanism for responses. Yes, there is Article-2 authority for the president to respond to eminent threats. But evaluating eminence, as was pointed out before, can be an elusive process. Particularly when, obviously, we're not privy to the plans of terrorists. They don't tell us precisely when they're going to act. They don't tell us necessarily when they're even -- what precisely they're planning. But once they're identified as a terrorist organization, it is, I think, rational at least to consider members of those organizations and the organizations themselves, to constitute eminent threats unless -- unless there's good evidence to the contrary.

MENENDEZ:

The previous panelists suggested, I think by their testimony, that absent the AUMF Article-2 provisions, would give the president all of the authorities that he needed to continue to conduct those operations. Almost seemed like it was superfluous to have an AUMF. Is -- is that a view that you share? And if not, what is the difference in your view?

KOH:

So Senator, a little history of the kind that Senator Durbin recalled, I think it's helpful. On September 11, the nation was shocked. People wanted the president to respond with all available tools. He could invoke his Article-2 authority, but Congress gave him a very broad statutory authority as well. But, it was supposed to be against those people who were responsible for September 11, and to prevent a future September 11. In the last administration, these two rationales were merged. Constitutional authority was invoked all the time.

The AUMF was used in a very broad way. There was a lot of objection to that. At the beginning of this administration, at this point, we were in the middle of habeas litigation, et cetera, the Justice Department offered a narrowing interpretation of the AUMF, and the Obama administration shifted to the AUMF as the main basis for its activities. It rejected the notion that there was a global war on terror, but said that there was a war against al-Qaeda, the Taliban and associated forces. It wasn't limited to just one country, but it wasn't -- it wasn't the whole world either. And the net result of that is, there's been more of a convergence on the legal rationale.

A year ago, the president at the NDU, not only gave a speech setting forth the standards, but signed presidential policy guidance specifying those standards. So I think we're now operating in a world in which the president's power is, by his own statement, much more constrained. And he stated that his long-term goal is to bring the war to an end.

MENENDEZ:

So, based upon your answer, if the AUMF was repealed and the president, as you described, relying on that AUMF for action, would either have to cease such activities, or he would then have to turn to his -- to make his Article-2 claims?

KOH:

Well, let me just make a hypothetical situation. If the president thought he needed to make 100 more strikes against al-Qaeda to defeat them, it would be very unwise to eliminate the AUMF. If he thought that the core of al-Qaeda has been defeated, that al-Qaeda, those remnants might occasionally strike, that would be a moment in which it would be safe to move for repeal of AUMF authority and rely on self-defense authorities going forward.

In other words, the self-defense arguments are not all-purpose alternatives. Finally, if Congress wanted to codify the self-defense authorities in a more limited way, that would be narrowing of the AUMF. And to my mind, that would be more appropriate for a situation in which there were fewer need to attack, or detain al-Qaeda, the Taliban, or associated forces.

MENENDEZ:

What would happen to the government's legal authority to continue to detain prisoners at Guantanamo, hypothetically if the 2001 AUMF were repealed?

KOH:

Well again, Senator it would depend on how many people were there. If there are 150 people or so, if those who were in Yemen, had been moved to Yemen pursuant to negotiations that are apparently going on, if those who are Taliban hadn't moved off, if you were talking about a small group of people. Some of those individuals might still be detainable under criminal detention authority. Some of them might be -- for example, under immigration detention authorities. Some of them might have to be dealt with by new legislation considered by you. But that would be at that point, a very small number of people. Say 30 people as opposed 150 people.

MENENDEZ:

And regardless of the size, what's the legal authority if the AUMF is repealed? What is the legal authority to detain people at Guantanamo?

KOH:

Well, we just have to remember Senator, that the AUMF is belligerent, combatant authority. Authority to use necessary and appropriate force against belligerent combatants. Individuals may not be detainable as belligerent combatants, but they may be criminals. They may have committed immigration violations. They may be subject to other forms of civilian detention. And you have to evaluate that on an individualized basis.

MENENDEZ:

But civilian detention in a place like Guantanamo?

KOH:

I -- my understanding is that the goal would be to move people off of Guantanamo. But this is to me, akin to the question, if you're trying to bail out a boat, you worry about the last four inches of water when you get there. I think the main challenge now is to bring the numbers in Guantanamo down by moving off people who can be transferred. By moving off people...

(CROSSTALK)

MENENDEZ:

...that there's a broader essence of policy of what's a legal authority to detain people in a place like Guantanamo? Whether 150 are there and tomorrow there will be a different Guantanamo. And that's what I was trying...

(CROSSTALK)

KOH:

Senator Menendez, the Justice Department last week issued a report in response to a congressional mandate, which described the legal authorities that would be used if individuals were brought from Guantanamo to the United States and I think they would be anticipating a relatively small number at the point at which that would be exercised. They argue there are various legal authorities. I think you have to engage them to see whether you agree.

MENENDEZ:

Senator Corker?

CORKER:

Thank you Mr. Chairman and thank you both for being here. It seems to me that -- that the description of eminent threat is one that -- that over time needs to be teased out. I mean, you guys agree that eminent threat is one that -- can evolve determined -- based on what someone actually wants to do, and really is difficult to define?

KOH:

I think the term that's being used is, continuing eminent threat, which is even a narrower set of people. So, we know what an eminent threat is, Senator. You know, a guy gets on a plane wearing underwear in his bomb -- a bomb in his underwear, or in his sneakers. And the next thing to do is to launch the attack. That's an eminent threat. But if you have an organization which is repeatedly planning attacks, and sometimes they use underwear bombs. Sometimes they use shoes. Sometimes they use cartridges. Sometimes they use something in Times Square, the need to act against them may come earlier because they never use the same delivery mechanism twice. I mean they will not fly a plane to...

(CROSSTALK)

CORKER:

And I think the point you make about that type of threat is certainly really clear. But, my guess is, if we get into a classified setting, discuss these things, there are numbers of groups that the administration has determined that are under, you know, this eminent threat issue. And, you know, I don't know AQAP? I don't know, are they planning threats against us today? ISIS of Syria? Are they -- are they -- right now they have their hands full. My guess is at some point they may well do that. But, if we determine that they're an eminent threat...

(CROSSTALK)

CORKER:

...that would be an interesting...

(CROSSTALK)

KOH:

You -- you...

(CROSSTALK)

CORKER:

...an interesting question to you?

KOH:

You've looked at the intelligence, and -- and...

(CROSSTALK)

CORKER:

No I haven't...

(CROSSTALK)

CORKER:

...I haven't looked at intelligence. I want to make sure if any intelligence people are watching, I have not looked at the intelligence, I'm just basing my question off of the last witness.

KOH:

In general terms, it -- the primary factors are whether they've attacked us before. Whether they had success in that, and whether they are planning to attack us again in the very near future. And, whether all signs leave no innocent explanation for that. That's an eminent threat.

CORKER:

And to the -- to the question that Mr. Preston raised earlier about Afghanistan and -- and getting back to the fact that the administration has not called -- called this a global war on terror, but has -- you know, is certainly

carrying out terrorist -- counterterrorist operations all around the globe. If Afghanistan winds down, at some point. Let's say 24 months from now we don't have people doing what they now, today are doing. Would there need to be an AUMF to continue to -- to strike entities that, you know, could pose a threat to us down the road? And I'd like both of you to answer that, if you would?

KOH:

Unfortunately there are many terrorist networks. But you can distinguish two kinds. Those who want to attack us; attack our buildings, attack our people, attack our soil and those who are just dangerous or have local aspirations, and they may not like us. Now, the latter group are not members of al-Qaeda, we're not at war with them. And we may not like them and they may not like us, but we have to keep them under surveillance. The group that we care about are those who would attack the homeland and who pose a continuing and eminent threat of doing so. And where you think that there's a very good likelihood because they did it before.

CORKER:

Mr. Mukasey?

MUKASEY:

The standard is, continuing eminent threat. The -- I think we're -- where I part company to a certain extent, with -- with Professor Koh is the characterization of some of the local groups as people who, quote "don't like us", end quote. It's much more than that. There are people who are -- who have this attacking our homeland figuratively on their -- on their list of things to do on the refrigerator in the morning, if they have refrigerators. So I -- I would be somewhat more generous in my definition. But, yes it has to be continuing eminent threat. And one that can be rationally interpreted as a continuing eminent threat.

CORKER:

And so -- but -- but let me come back. I mean if we -- if we end the actual physical operations that we have ongoing in -- in -- in Afghanistan. I know there may be covert activities that would not as -- as Murphy (ph) pointed out earlier, may not be defined under these. But would we need to continue to have an AUMF of any kind to continue our fight against, not the global war on terror for this administration, but terror that happens all around the world?

MUKASEY:

As -- as a legal matter? There is at least one vote in Hamdi (ph) that says that we need it in order -- in order to detain. But more broadly, and I -- I know the last group was cautioned to stay away from policy, but this does trench into policy. We need some kind of backing from Congress in order for the country to be behind any effort that we make. And that's true regardless of where we do it.

CORKER:

But I don't think Mr. Koh agrees with that?

KOH:

Well, I agree with your view, Senator that Congress has a role to play in defining how much authority it wants the president to have, to deal with the current situation. And the current situation, it seems to me, is one where if the organizations with which we have been in armed conflict for the last 13 years, are reduced in danger, you could shrink the AUMF to address their remnants. Or at a certain point when you think that they're a sporadic threat, you could eliminate the AUMF all together and rely on continuing an eminent threat.

But that would allow you, for example, it seems to me, to have legal authority to as an eminent threat, deal with the people who killed our citizens in Benghazi. They did it before. They pose a continuing eminent threat. They seem to raise those issues. Now, there would be things that would need to be done. If the Libyan government is capable of addressing them, you might have to defer to that first.

CORKER:

Mr. Chairman, thank you. And thank you both for being here.

MENENDEZ:

Senator Murphy?

MURPHY:

Thank you Mr. Chairman. Mr. Koh I really appreciate your suggestions on how Congress can grapple with this expanded Article-2 authority. Especially if perhaps the future absence of an AUMF. I guess you -- you hear that one of the questions -- and this is a question for General Mukasey as well, you hear that we have twin struggles here. We have a struggle with what authority we grant the president. And then, we have a struggle with what role then Congress plays to oversee that authority. And part of the danger that I see is that as more and more potential activities happen under covert authorities, there is a very small group of Senators and Congressman that actually get to oversee those questions of, what is an eminent threat?

There's a tiny select group of people who have jurisdiction and clearance in order to determine whether there is, or is not, an eminent threat that would trigger those Article-2 authorities. I would love to get rid of AUMF. But, my concern is that we then live in a world in which the determination of eminent threat and the factors that go into that, are available to be debated by a very small number of Senators and Congressman. And given how fuzzy the first panel suggested the limitations on that authority are, reserving the authority as I heard it, to -- to take action against a sovereign nation without consulting Congress first, what's both of your recommendations on how we provide for a more robust and open debate in Congress about the specifics, relative to authorities under Article-2?

KOH:

So, Senator your questions I think illustrate the -- how -- what's the relationship between the constitutional authority of the president and statutory authority of the Congress? And maybe the best way to think of it is what we call, framework statutes. There's a constitutional space in which the president can act and if he acted under constitutional authority, it wouldn't be illegal, but he has no guidance. And so in many areas of the law, intelligence oversight, international emergencies, sanctions, arms export control, Congress has passed essentially framework legislation that defines what can and cannot be done. Defines the reporting requirements.

It defines who is supposed to be part of the process. And clarifies what some of these issues mean. For example, if you clarify what continuing an eminent threat means. Now the reason why it's important to put it this way is, if that statute suddenly disappears, would the president still have authority? As a constitutional matter, probably yes. But would that be the best policy, as opposed to working with Congress to be, what they called in the Steel-Cedar (ph) case, Category-1, the highest level of legitimacy.

Clearly it's better for Congress to frame this constitutional space and then for the president to operate pursuant to these rules, both the restrictions, as well as getting the authorities.

MURPHY:

General Mukasey, do you see a policy danger in a limited number of members of Congress being involved in these discussions about Article-2 authority in the absence of...

MUKASEY:
Of a statute?

MURPHY:
Yes.

MUKASEY:
Absolutely. And I think you put your finger on a good reason for, not simply letting the AUMF lapse, or get it off the books, but rather reshaping it, doing some of what Professor Koh suggested. Maybe what I suggested before. You have -- because if you have a statute on the books, then this committee, the intelligence committees, the armed services committee, can conduct their oversight functions. In addition to having particular members of Congress briefed -- a limited number of members of Congress briefed and have that information restricted to only a few people.

MURPHY:
And I think the claim that many of us have made is that, as you -- as we have seen broadened, the authority to conduct activities under Article-2 to conduct ongoing, large-scale military activities in a covert manner, it becomes more problematic to not have the foreign relations committee and the foreign affairs committee read into those matters. Because they have broad, and sometimes crippling foreign policy implications for the United States. I -- I think it's a worthwhile endeavor.

I want to just follow up on some questions the chairman was asking the first panel specific to the authority on operations in Syria. I -- I'm not sure that we got -- the answer was, was that there was authority for the president to conduct military operations in Syria as was initially proposed, without congressional authorization. I wasn't particularly clear as to where that authority would have come from. But, let me just ask that to both of you. Did -- do you believe that the president had authority, should he have decided independently to take military action in Syria, as he had proposed and asked Congress for authority, without congressional authorization?

KOH:
Sir, I think it depends on what he would have done. If -- if -- if what he did was simply hit a couple of chemical weapons sites and that was a one-time thing, we'd be hard pressed to say that was unconstitutional. The -- the question, as a matter of law is -- is it war in a constitutional -- if its war, Congress has to approve it. A one-time hit on a bunch of chemical weapons, may not rise to the level. If it goes on for 60 days, then under the War Powers Resolution, the question is, is it hostilities in a statutory sense? And contrary to what Senator Corker said, the setting up of the no-fly zone happened in 10 days. 60 days on, less than one percent of the ordinance in Kosovo was being dropped in Libya.

My view was then, and it remains that it wasn't hostilities in a statutory sense, I -- I want to come back to one point, Senator which I think is important, I think Congress has three options. One bad option, which I would urge you not to pursue, which is to use a sense of frustration with the AUMF, to expand it and extend it inadvertently. I think that would perpetuate war. I think you have two good options -- two better options. One is, if you want to narrow it to meet the current situation, and then ultimately repeal it, that's the best.

If this is not a good time to legislate, because people can't agree, you could see whether the situation on the ground leads to the eventual diminishing of the threat of al-Qaeda, and just repeal it later. In other words, not

narrow, but just move to the repeal later on down the road. But I think that's the real choice. Don't extend and expand. Either wait and repeal, or narrow and repeal.

MURPHY:

I know we have a vote on the floor, so I'll yield back at this point.

MENENDEZ:

Well with thanks to both of you, of the committee for your insights and I have a feeling we'll be continually seeking to engage you in the days ahead. The record for this hearing will be held open until the close of business on Friday. And with that, this hearing is adjourned.

CQ Transcriptions, May 21, 2014

List of Panel Members and Witnesses

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