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Fall Symposium on the 2001 and 2002 Authorization for the use of Military Force Resolutions and Their Relevance to the Current Military Operations Against the Islamic State in Iraq and Syria

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**FALL SYMPOSIUM ON THE 2001 AND 2002 AUTHORIZATION FOR
USE OF MILITARY FORCE RESOLUTIONS AND THEIR RELEVANCE
TO THE CURRENT MILITARY OPERATIONS AGAINST THE ISLAMIC
STATE IN IRAQ AND SYRIA.**

KEYNOTE SPEECH

HARVEY RISHIKOF: Thank you very, very much. First of all I would like to say what a great pleasure it is to be here. I have a lot of fondness for American University. Dean Grossman and I started as deans together, and he stayed a little bit longer in one institution than I have. But the other reason I am particularly pleased to be here is because of the panel that you have assembled. I think I know all of the panelists, and it is hard to imagine a greater collection of grey matter on these issues than you have with Laura, and Louis, and Sandra, and Shoon, and with Dan who is going to be moderating it, and then with Stephen if he's here, who is going to moderate, and then Andrew, then two Andrews, and Karen, Daphne, and Cully—it's really an amazing group. And usually in the keynote, they've only given me about fifteen or twenty minutes, so it's much more like being a groom at a wedding. Which is, you're supposed to show up, say "I do," and remain quiet for the rest of the day.

But I am going to just frame it a little bit more seriously, that we've been living with the AUMF now for almost twelve or thirteen years but, and it's dealing with a complex issue. And one of my first jobs when I was at the Bureau, when I came on board, there was a number of domestic terrorism issues. And the domestic terrorism issue that we first, sort of—you're not old enough, I think all, to remember—was Ruby Ridge. And that created a real problem for the legal community as we tried to figure out what to do. And then we had another set—that was like in the early 90s—and around '92, we then had the problem of Koresh and the Waco incident. And that created another level of issues for us to think through how to deal with domestic terrorism.

And then oddly enough, on my watch, the other issue that sort of broke when I was at the federal government was the O.K. bomb in Oklahoma. And it's hard to imagine, but the anniversary of the OK bomb is 2015, April 19th. When I was in Oklahoma, actually, in the beginning of the week, because the law school there is going to launch its first homeland institute, out of a law school, to focus on the issue of domestic terrorism and domestic radicalization. And I am saying this because, when we began to see, when I was at the Bureau, the relationship of domestic terrorism with international terrorism, was when we had, there was the first attempt to take down the World Trade towers, with the Blind Sheikh. And then on my watch when I was at the Bureau, we had something that was extraordinary, which was the attack on the two embassies in Africa.

And I—a small group of us began to realize—that the world was changing; that we had a relationship of domestic and international terrorism that we had not really seen before. And also

that these non-government entities could be quite lethal, and that they were attacking the United States. So one of the seminal documents was—how many of you have read Osama Bin Laden’s 1996 fatwa? Other than—oh, see, the geniuses have all read it, of course—but I encourage you to look at it, because you really see it is a blueprint for the notion of attack.

So with that, the AUMF debate, I see much more as part of a much larger debate. And the first part of the debate is, which many of the panelists are familiar with, is first the issue of, how we understand surveillance? And that’s, as you know, the [PATRIOT Act section] 215, [Foreign Intelligence Surveillance Act section] 702 issue. And that’s generated its own—and many of the people on the panel have also written in that area. And it’s sort of the issue of, the notion of how you understand intelligence, data, and communications in the 21st Century. And that’s at the “fore eyes,” I like to think of this analogy as much more of a snake, that the USG, when it acts in a lethal way, is like a snake. And when a snake slithers into an AOR, it wants the surveil it, the surveillance is our entire apparatus that we use for surveillance. And that increasingly is becoming a major issue about how we understand the role of government, how we understand privacy, and how the world has changed because of big data. And you’ve had conferences on that, but that is at the front end of this big issue. And the second issue is, this is all leaning forward to take care of the threat of terrorism. And terrorism we know is a tactic, and as a tactic, it is associated with certain groups. But we are trying to deal with a tactical problem.

When you move forward to the AUMF, as you all know, what is unprecedented about the AUMF for people of my age, is we declared war not only on states, but we declared war on organizations—which is unprecedented. And we actually declared war on persons—which is unprecedented. And it was unprecedented because we are trying to deal with this new phenomena, an NGO that was lethal. And we also did something which was controversy at that point, was that we decided to use military, and not law enforcement. And that was a major threshold change—that we were going to treat terrorists as a military threat, an NGO, and not a criminal threat. And that has then led to the next level of issues, which was the interrogation debates. And how much when you fight terrorism, it turns on information. That’s the coin of the realm, and it was the coin of the realm because we were moving in the Bureau from what we used to call a prosecutorial paradigm to a prevention paradigm. That was totally new for the Bureau; we used to wait for something to happen before we actually unleashed our resources and capacities and capabilities. But the President started leaning on us to become much more preventive. Which then led to a much more, leaning forward issue, in a whole range of areas.

And then we got the AUMF, which when you look at it, has a very preventive capability—or capacity, depending on how broadly you interpret it. And that’s what you guys are all going to talk about over the next couple of hours: is the different categories, as you are going to parse what the 2001 and 2002 AUMFs mean. And as you know there have been lots of reports—I am sure there are going to be categories that you guys are going to look at—which is: sort of the scope of how you authorize force; how you understand international conditions for the use of force; the types of

military authorization that you are going to be using; how much do you get involved; the targets of the use of military force; what you see as the purpose; whether or not you should have geographical limitations; whether there are military unit limitations; whether or not the targeting, as associated with forces, is going to be limited; whether or not, how you understand, specific provisions for a Syria limitation; whether or not there should be a repeal aspect; whether or not there should be a sunset aspect; how much reporting there should be; this is all the detailed aspects, I'm sure, that you are going to be discussing over the next couple of hours.

And for me, that's interesting, but the large question is—which you will discuss—is: what is the appropriate relationship of the Congress to the Executive, when the Executive projects force. And Lou has written a lot about this, and Lou comes out with a particular perspective, so you will have very strong executive voices, which I don't know how strong they will be on the panels—Dan will be with the executive voice—and a very congressional event. But the bottom line that it comes to, to me, is what we're really considering when you think of the whole gamut of this—starting with the surveillance, to the notion of projecting force, to detention, to interrogation issues, is that we have not solved the problems. We're thirteen years into this, and we do not have clear public policy positions, there is still a great deal of legal debate, as to what is the appropriate way to go, and I think we need to have some resolution, and clarity: a) for the American public, b) for the military, and c) for law enforcement, and d) for the ultimate legitimacy of what we've been doing for the last thirteen years. I just came from a meeting that we're doing, a project at the National War College at NDU, with a range of experts, and I'm co-writing something on the legal issue, and I had to say to them: there's still unsettlement, if we take someone, and capture them, do we bring them to Guantanamo? Do we bring them to Article III courts? We still have military commissions that are not totally resolved. So your AUMF raises all of these issues in different aspects of how an executive should be interpreting it. There are some who believe we should not go forward with the AUMF, not only for political reasons, but because that's just not, at this point in time, something we need the Executive to be involved in with Congress.

People are upset about sunset; [Former] Judge [Michael] Mukasey testified that he believes in a sunset clause that would be 10 years. Every aspect is something that I think you can write about and think about. And I think it is great that AU has decided to do this, and do this debate, it's wonderful; it's a reflection of the grey matter that exists—and I mean that in the most positive way—not the grey matter on your head, but the grey matter in your head. And that Laura has very well-known positions, and is extremely articulate, as is Lou—you've got the people—and I'm really curious, and hope to read the final law review journal on this, as to where you break, as to what is the appropriate way to approach, but the AUMF—all I am saying—is large, and part of a much broader national security set of problems and discussions, that it's nestled into and that it is worthy of having this type of focus. And I want you in the end to think through particularly the law student in the next generation, how you really want Congress to be engaged, when we are using lethality, and we are fighting something that we still have not been able to well-characterize. And should this ultimately be a criminal approach, versus a military approach? We've gone military, but it's unclear to me whether

or not, we should not, for legitimacy purposes, not do this as a criminal matter.

And then I'll end with: this debate spun so many elements, our old, part of the posse, with my committee, is our friend Amos [Guiora] has just penned a law review article on the drone court. That drones, because they are so different as a platform, and because we are not following the Geneva Convention because people actually have uniforms, that we need a special due process requirement process before we use our lethality. Now as you know, Israel has gone down a different route, when it comes to the use of drones and the role of the courts. So I will end with the final point; that you are looking a lot at the role of Congress, but what has been unprecedented, I think, in the last twelve or thirteen years, has been the role of the federal courts intervening in what has traditionally been an executive process. As we sit here, we have the DC courts are dealing with material witness issues, they are adjudicating what makes someone guilty enough to be able to be held. The court is involved in—as people think—if you are guilty enough to be held, are you guilty enough to be a target? So I sort of challenge you to think about, what you think the appropriate role also is of the federal courts down the road, that you think should be playing in this arena, for interpreting what should take place. It's a very large table that you all can I hope write about, and we'll be having a national security writing competition for the American Bar Association, on national security law topics; it's going to be an open topic, and for law students, there will be a five-hundred dollar award if you're selected, so I encourage you to write your second and third year papers on any aspect of this issue, and then submit it to the ABA for the competition, because we want to engage you as the next generation.

I am exactly at 2:30; I'll sum up on that if that's appropriate, so that you stay on time. I would love to stay for the whole day, but unfortunately I have to fly to Seattle, that's why we started at 2:00, I have another lawyer-like commitment. And, I want to thank, though, two people in particular: Jesse, who did an amazing job, he wrote me a set of remarks to do this. And the other individual that is sitting there, as part of the law firm that we've put together is, Renalba. And these two have been really behind a great deal of the work that's done and I want to thank them and recognize them. So with that, I will give up the podium to the next panel, and I look forward to reading what your thoughts and insights are in this particular area. Thanks so much.

FALL AUMF SYMPOSIUM PANEL 1: A HISTORY OF THE WAR POWERS RESOLUTION AND CREATION OF AUMF

DAN MARCUS: Okay, right on time, I'm Dan Marcus I teach National Security Law and Constitutional Law here at the law school in my old age. This panel is going to set the table for Panel 2. Panel 2 is going to deal with sort of the current, burning issues of the existing AUMF to support the war against ISIS or ISIL or the Islamic State and if not, what should we do about it. We're going to provide what we hope will be a broad and interesting background to the current issues by talking about the relationships between the President and Congress under the Constitution with respect to waging war, the War Powers Resolution, which Congress passed in 1974 to try to reset the balance between Congress and the President after the Vietnam War, and the history of the use of AUMFs instead of declarations of war as a vehicle for Congress to authorize the President to go to war.

In a sense, although we did not call it an AUMF at the time, the War Powers Resolution was the product of Congress being dissatisfied with its experience under, what you could say, was the first AUMF, the Gulf of Tonkin Resolution in 1964, which was, maybe a few people in this room besides me will remember personally. I was at law school at the time and this was in the middle of the Vietnam War and it was Lyndon Johnson's effort on the eve of the escalation of the Vietnam War to get congressional buy-in to what he and his predecessors had been doing and what he believed he would be doing in the future. And Congress, after the Vietnam War went south and after the Vietnam War was expanded significantly beyond what many members of Congress thought they were authorizing, although they should have read the language of their authorization and they would have realized they had given Lyndon Johnson and Richard Nixon a blank check, but that was what led, after the Vietnam War had been winding down, to Congress asserting themselves by enacting the War Powers Resolution, which was passed over President Nixon's veto and which was still the law of the land.

With that intro, let me introduce our distinguished panelists. I think you have a handout with their bios so I won't say much about them. Going left to right, from my right, Laura Donahue is sort of the Steve Vladeck, Jennifer Daskel and Dan Marcus combined at Georgetown Law School. She is a Professor of Law and runs the Center for National Security Law at Georgetown and she also has a PhD. Next to her is Lou Fisher, who I told him I would introduce as Mr. War Powers Resolution. Lou is now a scholar-in-residence at the Constitution Project, which has done a lot of very good work on national security issues. Before that, for forty years or so, Lou worked for the Library of Congress, for most of that time at the Congressional Research Service and later at the law library. Lou has written more than any other human being about war powers, the War Powers Resolution, and separation of powers between the President and Congress.

Next to him is Sandra Hodgkinson. Sandra is now in the private sector where she is Vice President and Chief of Staff at DRS Technologies, which is a major defense company and defense contractor. She has a long career in government, before that starting off in the JAG Corps, occupying several senior positions at the Department of Defense including being Deputy Assistant of Defense for Detainee Affairs.

Next to Sandra is Shoon Murray who is our guest from the main campus. June is at the AU School for International Service and has a PhD in Political Science. If Mr. Fisher is Mr. War Powers Resolution, June is Ms. AUMF because she has just completed a book, which we all should read on the AUMF of 2001, probably the most important most controversial AUMF in history, although the Gulf of Tonkin resolution if we call it a AUMF we might give it a run for its money.

Ok, with that intro, I'm going to moderate a discussion, we are not going to have opening statements, there is so much to talk about here that I think we ought to get right into it. Let me start by just reminding the law students here, some of whom if we have 1Ls here haven't even taken constitutional law yet. I'm just going to take 30 seconds on the division of war powers between the President and Congress and the constitution, I think a lot of us grew up thinking the President as sort of the king of war, well it's not really that way in the constitution as most of the war powers in the constitution are located in Article I of the Constitution they're Congress' powers, including the power to declare war, the power to raise support army, and the navy and the power to legislate rules and regulations for the armed forces.

The President is the Commander-in-Chief of the armed forces and what's happened over the years, so everyone, pretty much everyone, except John Hu, agrees that Congress is the entity that starts wars and the President is the guy who runs the wars, but over time as the world became more and more complex, the President started feeling they had to do a lot of things without authorization from Congress, like defend the united states from attacks so the doctrine of the defense of war power that the President has to repel, to take action to repel attacks against the united states grew up and was sort of blessed by the supreme court, ok, so with that introduction, let me start off with a simple question for the panel and that is the constitution talks about Congress declaring war, why don't we do that anymore? The last declaration of war by the united states was in world war ii and now we use, when we do anything, we do authorizations to use military force, I always tell my students in Common Law that from a constitutional standpoint the AUMF are the functional equivalent of a declaration of war, but is that really true, do you think and what's the historical reason for the switch, do you think? Who wants to go first on that? Laura.

LAURA DONAHUE: Great, thank you very much. So what I'd like to do for the students who haven't taken con law before is just quickly say a word about the actual language in the constitution because this matters for how we think about the AUMF. The constitutional convention actually initially considered using the phrase "to make war" and on August 17, 1777 in Madison's notes of the convention we read the colloquy that actually changed the wording to "to declare war"

for Congress to actually declare war. In this instance Mr. Pickney suggested that the authority to make war should rest with the senate with the idea that the senate is more acquainted with foreign affairs than the President or the executive branch would be. And it was actually James Madison who proposed, with Mr. Gerry seconding this, that the words be changed to “declare war” on the grounds that the executive could repel attack, but it’s only Congress that could move us affirmatively to a state of war. So Charmin agreed with this, Mr. Charmin agreed with this, the executive should be able to repel, not to commence wars, but only to repel attacks on the homeland and in fact Mr. Gerry then weighed in and said he would never expect to hear in a republic the suggestion that the executive alone should be able to declare war. So Ellsworth then put forth the suggestion that it should be hard to go to war, that should require Congress to act and we should place this power with one of our most bureaucratic entities, to make it difficult to move the country to this particular state of war, that that was very important. It should be easier to make peace than to go to war. Mason was against giving it to the Executive, because the Executive could not be trusted with this decision on where and when the United States was to be taken to war. So he also wanted to clog the pipeline. And on these grounds, it was then agreed that we would insert ‘declare’ instead of ‘make’ into the Constitution.

So the choice of wording that we have, was actually fought over, discussed and argued at the Constitutional Convention very carefully to ensure that the United States does not go to war unless Congress has weighed in. And we do have very clear instances—World War II for instance, after the bombing of Pearl Harbor, we have very clear declarations of war. But then in Korea, we have nothing other than what Simon had pointed to: appropriations, for instance, as being sufficient. This was also the heart of Vinson’s dissent in *Youngstown*- that appropriations could be taken as a blessing from Congress on this. This is partly why the War Powers Resolution subsequently addressed the question of appropriations. Then we have the 1964 Gulf of Tonkin Resolution, which again is not a declaration of war.

So with regard to Vietnam you have Congress coming forward and stopping short of declaring war, instead giving authorization to the President to actually take- here’s the language- “all necessary measures to repel any armed attack against the forces of the United States,” and then “to take all necessary steps including armed force to assist any member or protocol state of the South East Asia Collective Defense Treaty requesting assistance.”

And pretty much since the Gulf of Tonkin Resolution, what we’ve seen is a steady shift in terms of the verbiage employed, and we’ve moved away from a declaration of war to the authorization for the use of military force.

DAN MARCUS: Let me just follow up, and maybe Lou, or Shoon, or Sandy would like to talk about this. But why is the . . . your remarks, Laura, seem to suggest that an AUMF is something less than a declaration of war. And maybe it is for purposes of International Law, but domestically, if anything, it has more standing because it’s signed by the President.

A declaration of war, the President has nothing to do with. He usually asks for it, but it's an action . . . Congress has the power to declare war without the President. I guess it's never done that, although the Congress has pushed presidents into wars occasionally. But Lou, do you want to comment on that?

LOU FISHER: Yeah, what Laura brought up, that debate on August 17 was my birthday; that's why I can always remember it. But also, at that time, the Federalists papers, one that's overlooked a lot is John Jay's No. 4. John Jay was the specialist in foreign affairs. You might think he is more sympathetic to executive power, but he was not.

He explained that he and other framers looked out over the centuries as to how nations had gone to war, and what they found were that single executives- princes, kings, everyone else, they would go to war not for the national interests, they would go for personal interests, for family interests, for all kind of interests. And one after another, calamities for the country, in terms of deaths and fortunes squandered. So the framers, from their study of history, understood that you never let a single executive go to war.

And also, on this question of authorization versus declaration, the first war we got involved in— 1798- was not declared. That was a quasi-war against France. So from the start . . . and that got to the Supreme Court, and the Supreme Court said Congress can do either one- it can either authorize or declare, they're equivalent. One's not lesser than the other.

As we march on, I think the Constitution was pretty well protected up until what we've already mentioned- Harry Truman going to war on his own in June 1950. To me, it was flatly unconstitutional. He himself, when the Senate was debating the U.N. Charter, said, "I would never use U.S. troops in a U.N. action without getting approval from Congress first." So that's a presidential pledge.

But the U.N. Charter states that all the member states will give forces to the U.N. in accordance with their "constitutional processes," and each nation therefore had to decide, "What's our constitutional process? How do we go to war?" Congress debated that in December 1945, after the Senate approved the U.N. Charter, Congress passed the U.N. Participation Act. Section Six says anytime the President wants to U.S. forces in a U.N. action, you come to Congress first and get approval. And Truman signed it without any objections.

So to me, that was a huge step forward on unconstitutional wars and became a precedent. Clinton often went to the U.N. or to NATO to circumvent Congress. He never came to Congress once. Of course Obama, 2011, going to the Security Council for Libya. So I think in terms of stepping away from the Constitution, violating the basic principles, Korea was a huge step, and we've never recovered from it.

DAN MARCUS: Yes. Sandy.

SANDRA HODGKINSON: I have a little more of an executive branch perspective in a lot of the experiences that I've had. But I think you do need to take a distinction between the self-defense of the nation and this notion of just going off to war for private gain. So we have developed into an era where the Commander-in-Chief is viewed and considered to have, in these Article II powers, the ability to defend the nation, and to defend the nation from a repel or a foreign attack. And he needs to be able to do that.

I mean, I recognize that one of the constraints people view is it should be hard to make war. It shouldn't be hard to defend the nation. And Congress has flatly shown that it's incapable of responding in (a) a real-world timeframe, to actually declare war. It hasn't used that power to do so. It is frankly unable, generally, to even come up with a . . . whether you call it lesser included AUMF, they are not responsive. And as a third matter, the question is do you really want them to be, because throughout history, one of the great advantages of militaries is the ability to have some notion of a surprise attack.

It isn't always great to have every one of your tactics played out in the media, played out in debates, dragged on for months, brought from state to state to state to state, debated, put on YouTube, put on CNN, and then, "Look! Hey! Guess what? We're about to start an air attack." So there're some practicalities that develop from it. But I think you need to take a look at both the AUMF in its historical context from the Constitution, and what it's evolved in today.

And in today, in a post U.N. developed world, we look at legitimate bases for the use of armed force, and these legitimate bases include self-defense, and they include whether it's a U.N. Security Council Resolution that is agreed to by nation states to protect breaches to peace and security. So there is a method out there that looks at legitimate bases for going to war. A legitimate basis for going to war is not to go try to gain more territory or get rich or plunder, as it was in the old days. That's not even a lawful basis anymore.

So arguably, some of the very rights that were trying to be protected at the time the Constitution was there are no longer really existing in the modern world as legitimate bases for going to war. And so maybe the protection and the debate over AUMFs, and how much Congress should be involved, and how much the President should be involved, have evolved into a different environment. I know we're going to move on to other questions where we can talk about whether there is now a healthy tension there. I think an argument may be, to me, made there. I'm not arguing there isn't a rule from Congress, but I'm simply arguing that the times are different, and so that very debate, while enshrined importantly in history, may be slightly different in a post-UN world.

SHOON MURRAY: I just want to go back to the original question of why you no longer declare war, and is an authorization for the use of force the functional equivalent of a declaration of war? I don't think it always is. There have been authorizations for the use of force from the very beginning, as Lou suggested, with the quasi-war with France, and it was not to have a full-out war. It was to

limit war to the sea, and not to land. It was to engage with ships, and not to take on France, because the United States couldn't at the time, [laughs] not to take on a full-fledged war.

And there have been something short of three dozen authorizations over time, and they vary in scope. Some of them are quite minor. And some of them, like the authorization- the 2001- are quite broad. And if you have a declaration of war, doesn't that then trigger other powers that even bring the presidential authority domestically, where an authorization for the use of military force is short of that?

DAN MARCUS: That's a good point. Of course we did use AUMFs for what you might consider traditional wars, both in the Gulf War in 1991 and in the Iraq War in 2003, where we were sending hundreds of thousands of troops to invade a country, or to defend a country in the first instance. But it is an interesting point. But nobody talks and now maybe no one talks about declarations of war anymore, and I don't think other countries use them either very much since World War II. And I wonder if the declaration of war is sort of a- although it's enshrined in our Constitution, and we've always taken it very seriously, whether it's kind of a- not a relic, but of an earlier time when nation states regarded war, as Sandy indicated, as a choice and as a part of a formal established process. The AUMF, arguably, can be lesser, but it arguably provides some more flexibility, yeah.

LAURA DONAHUE: So, a few points. Your premise suggests that in a post-AUMF world, but it's actually historically back to the Gulf of Tonkin Resolution. So it's in a world of nation states in which we saw the demise from declare war, actually being perpetrated. And that's why the War Powers Resolution was introduced. So to your question as to why we now see this kind of action, the War Powers Resolution was introduced because of the Vietnam War and because of the extent of that conflict, and the blood and the treasure, and the risk that was posed to the United States in the course of that conflict.

So Congress introduced the War Powers Resolution to try to reign in the Executive Branch. Now, the War Powers Resolution is full of constitutional problems, if you read it. In fact, it's one of the most revisionist resolutions I think Congress has ever passed. It begins by saying that the President will apply armed forces into hostility. So it says that is the intent of the framers, is to prevent the President from introducing troops into hostilities. Nowhere in the notes of the Convention or in the Federalist papers, and John Jay's writings is it just about hostilities.

It is about warfare, as Shoon mentions, right? It is about moving the country to a state of war. So I'm somewhat perplexed at this concept that it's, "We don't want to reveal our battle plans," certainly not. But if we are going to attack another country, the idea that we want to vest in the executive the authority to surprise attack and to choose an enemy, and to go after anybody or any person or any group, any organization in the world, and to leave that decision to the Executive Branch, for the founding generation, that would have been the very definition of tyranny.

DAN MARCUS: Lou?

LOU FISHER: This funny issue, why we don't declare war any more. Actually, Alexander Hamilton, in one of the federalist papers, said that even declarations in Europe were going out of style. So he saw it early. The only explanation I've ever heard, which doesn't make any sense to me, was that the UN Charter was against aggressive war. That's why you don't want to declare war. But authorization is the same militarily as a declaration.

And the other thing on surprise attacks—yes, presidents are supposed to have authority to repel sudden attacks without getting initial authority from Congress. And yet, interestingly, World War II began with a surprise attack, and Roosevelt never said, “Therefore, I can go to war on my own.” He came to Congress, got a declaration. And 9/11 was another surprise attack, but Bush never claimed he could go to war on his own. He came and got- so I think there is, in addition to all the legalities . . .

DAN MARCUS: He never said he couldn't [chuckles].

LOU FISHER: Wait, let me finish my point. In addition to all the legalities, there's a practical example of when you go to war, that both branches have to be on board.

SANDRA HODGKINSON: But I would caveat by saying that no President in the history of the United States has actually said that it was lawful to require Congress, under the War Powers Act, that they would have to come to Congress in every case. They have consistently said that the Article II powers allow them, as the Commander-in-Chief, to make, on behalf of the country, the decisions to call into action the military to repel a sudden attack. So 9/11, while it had the support of Congress, did not at any time, did President Bush say that he required their Act in order for him to go to war. What's important about the debate- and you can argue back and forth on both sides as you see happening- the truth is that what I believe the War Powers Resolution does is it still instills a healthy dialogue between Congress and the Executive Branch, which is the most important part of it. Is it true to the original reading of the Constitution? No. In fact, I would say that history has moved us beyond where there aren't actually declarations of war anymore for practical purposes.

But what the AUMF does is it allows for there to continue to be a debate and a dialogue, and a role for Congress in letting the President know just how far the President should be looking as far as military action goes. Certainly the President will respond immediately and do what the President can. And they always argue that it's consistent with the War Powers Resolution. But they never say that they are acting and seeking Congress's support in accordance with, or in order to comply with. Because neither Republican nor Democratic presidents have said that they need to comply with the War Powers Resolution. So again, I think there is a very healthy role for Congress here. But you have to be careful between what you think is actually legally required, and whether or not Democrat or Republican presidents have complied with it, because in fact both Democratic and Republican presidents have not.

DAN MARCUS: Of course the War Powers Resolution doesn't and can't, as a constitutional matter, enlarge or restrict Congress's powers or the President's powers beyond what the Constitution does. And the War Powers Resolution has all these savings clauses reciting constitutional principles. But the great genius, if you will, of the War Powers Resolution- I'm going to use this to set up a discussion on the War Powers Resolution- what a lot of people think is that it's a de facto authorization by Congress for the President to commit U.S. troops, whether it's offensive, defensive, rescuing people, whatever, for up to 60 days, without Congress's approval, subject to consultation requirements including pre-consultation wherever possible, and reporting every ten minutes or so by the President, as to what he's doing.

And then of course the arguably unconstitutional provision that says he's got to stop after 60 days if Congress doesn't say it's okay. So let's start a discussion of how does the War Powers Resolution do it? Is it working pretty well in resetting the balance between Congress and the President as a practical matter? Is it a terrible thing one-way or the other? So go ahead, Laura.

LAURA DONAHUE: So I just want to bring out this idea that this is a brilliant solution. Successive administrations considered it unconstitutional. Nixon at the time vetoed it on those grounds. The Obama Administration, although it now accepts the constitutionality generally of the War Powers Resolution, it still objects, for instance, to 2C, one of the clauses in the War Powers Resolution, which states that, "The Constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities or situations where imminent involvement of hostilities is clearly indicated may only be exercised pursuant to three conditions."

"First, a declaration of war; second, specific statutory authorization; or third, a national emergency created by an attack upon the United States, its territories or possessions or its armed forces." The Obama Administration, as other administrations, objects to this, which is basically a policy statement. It's that congressional sense of what the Constitution requires, disagrees with this as a constitutional reading. The Nixon Administration also objected to another clause, and here's Section 5C, which requires the President to remove U.S. Armed Forces from a region.

They shall be removed if in fact all of the requirements have not been met in the War Powers Resolution. And you could argue that this interferes with the President's Commander-in-Chief's authorities, and that's why, for successive administrations, there were constitutional objections. Nixon found that it took away, it tried to take away the President's explicit Commander-in-Chief authorities that it undermined U.S. foreign policy, that it hurt our ability to act decisively and convincingly to respond to international crises, that it would hurt our relations with allies and make us look weak to our adversaries. It would make us unpredictable, because it depended on what Congress did or did not do.

It also fails to require congressional action. So while the President is required to jump through hoops, Congress can just sit back and do nothing, and in the process make foreign policy. And that

is problematic for a host of constitutional reasons, not least of which is the founders envisioned chambers that would actually engage in thoughtful debate and discussion, and subject policies to critical examination, in order to move forward in terms of our international relations.

Nixon also felt that this undermined executive and legislative branch cooperation. I have less trouble with this because that's exactly how the system was designed. It was for them not to get along, and this is precisely separation of powers. And the division of foreign affairs and war powers between the branches was supposed to be one of the ways to keep the genie in check in terms of this untrammelled power to take the country to war.

LOU FISHER: Yeah, Dan asked how the War Powers Resolution is doing. We wouldn't expect it to do very well, if you think of the history of it. The Senate had a bill that was fairly tight. The President could act unilaterally, only on certain prescribed areas.

The House never believed you could do that. The House didn't think you could look down the road and see what to be done. So the House could only think of certain reporting requirements, certain consultation requirements. So you had a very strong, from a congressional power standpoint, Senate bill and a weak House bill.

Now, most of the time, if the House and the Senate differ- one is at 100 and one is at 80- you can do a 90, and no constitutional violation. But what came out of Conference Committee on the War Powers Resolution was incoherent. Tom Eagleton was one of the champions on the Senate side. He voted against it. He called what came out of the Committee a bastard, a surrender.

And just take a look at Section 2A. "It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States, and insure that the collective judgment of both the Congress and the President will apply to the introduction of U.S. Armed Forces into hostilities." I think it would be hard for us to say that the framers intended to let the President use military force whenever he wanted to, for 60, 90 days, as far as ensuring collective judgment. No, you've already told the President, "You can do what you want by yourself." So it was from the start, I think, a dishonest statute, and no one should expect it to be effective.

DAN MARCUS: I think he doesn't like the War Powers Resolution.
[laughter]

Sandy, you want to defend it a little or . . . ?

SANDRA HODGKINSON: Sure.

LOU FISHER: There're no typos in it!

[laughter]

SANDRA HODGKINSON: No, I'm certainly not going to defend it in that way. I would caveat that what we do certainly the current administration has been probably the friendliest in its rhetoric and its policy. But in fact, it also didn't comply when it went into Libya. So even concluding that Libya wasn't actually armed action, because the narrowness of that bombing campaign ...

LOU FISHER: At least after the 59th day.

SANDRA HODGKINSON: Right.

DAN MARCUS: No hostilities. No hostilities.

SANDRA HODGKINSON: And ended up withdrawing before the 90 days, during the withdrawal period. I recognize that it's moving in a direction, but I don't candidly think that Republicans or Democrats alike are ever going to embrace it. But the question of whether or not it works is . . . and whether or not there's a healthy tension- certainly there is a meaningful role for Congress to play, through both the power of the purse and through this historical Constitutional requirement for them to declare war.

Since they don't actually declare war any more, it would be helpful if the Congress could be more responsible and more responsive when it comes to actual authorizations for the use of military force. You'll talk today about whether or not they're nimble enough and responsive enough for us to be able to adapt an AUMF from those existing from 2001 and 2002, from Iraq and from the broader AUMF for this current war against al Qaeda and the Taliban, than whether or not they are able to adapt and respond in a way for us to address ISIL in a timely manner.

I think that's very much a live debate right now, which we're going to see hearings, and hopefully see some action on. But the question is how long should it take? How much tension should there be? And if there's so much tension, do you at some point lose some of the ability and strength of our military to actually respond to real-world threats in a timely enough manner, to try to effectively counter a threat?

I think reasonable minds differ as far as that goes. So while there's a role for healthy tension, it may not be too healthy right now because it's just taking so long for the process to move forward. And candidly, neither the last administration or this administration has really wanted to work quickly with Congress to try to get new AUMFs, because the concern is that what you will get will be worse than what you already have. So why not use the old AUMF and contort it as much as you need to, to make it fit because that's easier than going back and actually getting something new.

DAN MARCUS: Shoon. Let's let Shoon have her innings first.

SHOON MURRAY: I think that it's hard to argue that it's not flawed. It would be very hard to

argue. It's never worked the way that it was meant to work. I'm sure that you all know that presidents do not consult generally, as they are supposed to, with the War Powers Resolution. Presidents report, but that report does not ... they say that they are not reporting that troops armed for combat are actually going into hostilities, and so they don't trigger the timetable. I think the timetable has been triggered or that the section of the War Powers Resolution 4A1 has only been actually triggered one time.

So it clearly doesn't work as it was meant to work. Presidents have used force for long periods of time, as Clinton did in Bosnia. All of that said though, I do think that the War Powers Resolution serves some function in that it gives a vehicle for the Congress to act against the President under certain circumstances, if they can get a majority to do so. And it gives the President incentive to restrict uses of force that have any intensity to 60 to 90 days. As you saw with Reagan in Grenada-out, he got out before it was over. Or Bush in Panama.

So that there is a way in which it does serve to constrain the President and give a vehicle to Congress. So imperfect, yes, but perhaps better than nothing.

DAN MARCUS: I'm going to call on you, Laura, but before that I'm going to cheat and comment a little myself, and say that I agree with Shoon. I think the War Powers Resolution is flawed; it has some Constitutional problems, but it has, I think, had an enormous and generally salutatory effect in sort of placing boundaries- vague and general boundaries- on what presidents can do, and constraining their actions as a political matter.

Because it's hard ... even if a President thinks in his heart of hearts that a statute is unconstitutional, it's been there for 50 years now or whatever, and it provides a framework where presidents are careful.

I think it's one of the reasons, among many, that the first President Bush, who didn't want to, went to Congress to get an AUMF for the Gulf War, and why the second President Bush went to Congress for the war on al Qaeda and the Taliban, and the Iraq war. So I think that it's ... it could be improved, I'm sure, and there are various proposals to tweak it. And maybe we'll talk about them a little.

But I think in general, yes, the framers may have thought there should be a complete separation between the War Powers of Congress and the War Powers of the President, but that doesn't work in the modern world. It creates a framework for the two bodies, the two branches to deal with each other that I think is very valuable. Now, Laura, your turn.

LAURA DONAHUE: I just don't buy "This is a totally new world, we should encourage the President to go to war, and not see the Congress hindering that as anything but a bad thing. Therefore we should twist the AUMF, or the 2001 AUMF. That we should facilitate going to war

because there are a lot of bad things out there, and we need to let the President do whatever the President wants to do.” There were arguments at the time of the founding that said that giving this power to the Executive branch was a bad idea, and it was a bad idea for reasons that persist today. Despite the fact that we have cars and digitalization and internet, in a different modern context, the same issues apply. Do we want all the power- the great might of the United States government, the most coercive powers available to us, to kill, to imprison, to hold people- do we want to give all that authority to one branch? And the answer is no, we do not, for the same reasons that the founders had at the time. They were aware, whether it was the beheading of Charles I, the restoration of William and Mary to the throne, whether it was George III.

George III, the beheading of Charles I was when William Penn was a child. They were well aware, the colonists and then the founders, of the issues that accompanied tyranny. This is what the Federalist papers are about, about how to constrain that power, not to make it easier to use that power at will whenever something arises.

I do want to also add that it’s not just about boots on the ground. So in Libya, the reason why the second part of the WPR was not submitted is because, at that time, three quarters of the sorties that were flown in Libya were by non-U.S. coalition partners, and all 20 ships were Canadian or European. So the White House issued a lengthy report saying that, “Even though we are not submitting a WPR to Congress, we want you to know that here’s why we’re not doing it.” The problem is that, that report basically represented a win by the State Department over the Department of Defense, and particularly Harold Koh, who was ill, and his arguments that the administration should not submit a second report in this particular context, because we didn’t have boots on the ground. The framers weren’t just worried about blood, they were also worried about treasure. They were also worried about drawing the United States into conflicts that would make us a target and threaten us here at home.

And so this interpretation of the WPR, the War Powers Resolution in the modern context, that says, “Well, it’s just about whether we have soldiers on the ground,” I think that is actually twisting the whole concept behind the division of war powers, and reasons why even though, yes, we live in a different age, yes, things are different, but the same rationale that gave birth to the constitutional compromise is one that remains as relevant today as it was in 1787.

DAN MARCUS: Yeah. One footnote- I haven’t read the Non-War Powers Report on Libya at the end of the 60-day period or near the end. But it wasn’t just that there weren’t boots on the ground; it was that we weren’t conducting any military operations ourselves, right? We weren’t bombing anyone.

LAURA DONAHUE: We were providing the intelligence, we provided logistics, we provided the supplies.

DAN MARCUS: Yes, I understand. I'm not disagreeing with you.

LAURA DONAHUE: No, it was that we did not have active soldiers engaged in combat.

DAN MARCUS: Right.

LAURA DONAHUE: But that is only half the story. It's also about treasure. It's about vulnerability. It's about the risk you present then to U.S. national security, for other countries to attack us under rights of self-defense, under Article 51 of the U.N. Charter. It's about a lot more than just whether we have soldiers on the ground, and that's why this power has to be very carefully regarded and constrained.

DAN MARCUS: Okay, Lou and then Sandy.

LOU FISHER: Yeah. War Powers Resolution, that is, in Section 8, two provisions, I think are in line with the Constitution. And one has to do with appropriations, because in the Vietnam War, part of the litigation was that appropriations were an authorization. A lot of judges believe that. And then you have a Don Wallace, attorney and Richard Fenno, a political scientist going to court and explaining to judges that Congress has two steps when it acts. And one is authorization, and after you authorize, then you appropriate.

And with that, a lot of those judges began to reverse, so the . . . what Section 8A says is that "Authority to introduce U.S. Forces . . . shall not be inferred from any provision of law, including any provision contained in any appropriation Act, unless such provision specifically authorizes" So that's a good procedure. And that secondly shall not be inferred "From any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing" So that's aiming at what happened in Korea, that the UN Charter does not authorize the President to act unilaterally.

And then on Libya, the OLC, there was this memo, and it concluded that there was no war, partly for the reason that this was considered to be of limited duration. It lasted seven months, but that was the OLC reasoning. And I'm wondering today as to legal analysis against the Islamic State, we have statements of legality from the Defense Department. We have it from unnamed senior administration officials, about legality.

We even have the White House Press Secretary talking about legality, and to my knowledge, we do not have one word from the Justice Department OLC. And I'm wondering if they're limited because of what they said about limited duration, because the administration has already said this is going to go out years, probably until the next administration. So I think it's extraordinary.

DAN MARCUS: Presumably.

LOU FISHER: No legal analysis from the Justice Department.

DAN MARCUS: I think you're right. If it's a war, it hasn't been authorized by Congress unless the 2001 AUMF or the 2002 AUMF authorizes it, and I assume if there's an OLC opinion, it relies on one or both of those as statutory authorizations for the war.

LOU FISHER: We don't have anything, do we?

DAN MARCUS: From OLC? Not that we've seen, no. No, we haven't, and we don't.

LAURA DONAHUE: The Administration also started out in August of this year saying it had Article II authority to do this. Then it backed down and in early September it said, "No, the 2001 AUMF is our authority." Two days later, they came out with another statement saying, "No, the 2002 AUMF." And now the President says, "Oh okay, I'll go to Congress." Like this kind of, "I'm going to do what I do and find a legal rationale later," that's not rule of law. Like that's not how it's set up.

SANDRA HODGKINSON: So this is where I kind of want to jump back in because nobody, I think, would argue that the President should have unfettered desires to go and plunder the world and use our treasure, and rape and pillage. But at the end of the day, when we're looking at whether or not this War Powers Resolution is working, I think the- we've all said categorically, "No." That doesn't mean that presidents don't see a tremendous value in getting AUMFs- authorization for the use of military force.

Having worked in both the last two administrations, I know that both administrations have sought to work with Congress to get authority for operations that they believed were in the self-defense interests of the United States. The question comes that when they can't, are they hamstrung? Or do they look to Article II to try to provide them with an opportunity to take those measures that they believe are necessary to defend and protect the nation?

And it gets a lot harder when you go to missions that arguably don't have that self-defense immediate nexus. When it comes to something that is more akin to a war of aggression, which people argued in many cases, maybe Iraq was moving that it was too aggressive on a view of self-defense. And some look at humanitarian missions. While they are not boots on the ground in the same way, they are humanitarian, we'll treat them separately. What if the UN looks at other things? But when it comes to this, the crux of the debate is, at the end of the day, if the President can use force in self-defense to protect the nation, even when the Congress fails to come through with a legitimate authority upon which the President can do so, what's the legality of that? And so that's where the debate generally hits home. And when you look at now at ISIS, I think almost anyone on both sides of this debate would argue that the authorities for 2001 and 2002 are not perfect. The Iraq authorization gives you some authority, potentially, to operate in Iraq; doesn't give you anything for Syria. You look at the AUMF of 2001, and you've got al Qaeda and the Taliban- great,

where's ISIL there? So it's not perfect, but they are going to cobble through a patchwork to try to do what they think is necessary.

The question is, it would be great on all fronts if Congress embraced their ability to work with the administrations on the AUMFs. And I think it's become harder and harder to bridge that gap, because it's just been difficult to get anything through in a timely enough manner. So I'm all for AUMFs bolstering the President's authority, but the question is, "Can we get them through?"

DAN MARCUS: And the problem is not only that presidents worry that they can't get from Congress what they want in an AUMF, but that Congress isn't all that anxious to get into the play of deciding what the dimensions of military action that it wants to authorize are, and they'd prefer not to take ownership of the military action. That's what's playing out right now, I think.

Just one word for the benefit of some of the students- there've been some references to the U.N. Charter and international law here, and it is very important, because the U.N. Charter, to which the United States is a party- it's a treaty of the United States; it's the law of the land- basically outlaws offensive war except when authorized by the Security Council.

I'm over simplifying, but that's basically right. But it does enshrine the traditional doctrine of the right of national self-defense. And what happened in the Iraq war, for example, was that the Bush Administration pushed- it's fair to say pushed- the concept of self-defense pretty far.

And they developed this doctrine, published a nice paper on it, of preemptive war and the notion that- which has some basis, I gather, in international law, which I don't know much about—that if somebody is about to attack you, the doctrine of self-defense permits you to preempt that attack. And that was the basic theory, I guess, under international law, for the Iraq war, that Saddam Hussein, we had reason to think, had weapons of mass destruction that he might use to threaten us or our allies, or friendly countries.

But the Bush administration, I think wisely decided that they . . . so I think their position, their legal position if you ask Dick Cheney or David Addington surely, would have been they didn't need any congressional authorization because this was preemptive self-defense. They just wisely decided they'd better get it.

LOU FISHER: Just talking about the first Iraq war in 2000, I mean 1990, the Bush Administration went to the Security Council and got a resolution and claimed that was sufficient. And they argued within the administration they don't have to come to Congress. Well, they eventually did.

And then you have this messy situation where they come to Congress in January 1991, and it says authorization, and then Bush, when he signs, says, "I didn't ask for authority, I asked for support." But you signed, it says authorization. So we've been playing a lot of games.

DAN MARCUS: Does everyone agree that Truman was wrong and Bush was wrong- that a Security Council resolution is enough? I think it's pretty clear that Lou is right on that, that it isn't enough under U.S. law.

SANDRA HODGKINSON: I have heard people argue against it.

DAN MARCUS: Under U.S. law. Yeah, it protects us under international law.

LAURA DONAHUE: But it's a matter of constitutional law. So I'm a little bit confused as to why Congress's decision not to authorize something means that there's a system failure. That's how it's designed, right? So if Congress says no, Congress says, "No. It's not." And then the President finds a way around it, right? That's the constitutional design.

DAN MARCUS: What if Congress says nothing?

LAURA DONAHUE: Well, okay, so now that's getting to another question. So the framers, as an historical matter, the idea was you want them to engage in debate. So Congress to say, "Oh yes, President Obama needs an AUMF, and we're going to go home and do reelection now." That's a failure of Congress. That's a failure to engage with the issues and debate it. But Congress, if engaging with the issues, decides not to pass an AUMF, that's not a failure of constitutional design or of Congress, that's exactly how the system is set up.

And the response is not, "Okay, well, then I'll find a way around this." The response is, "That's how it works. That's for better or worse. We can amend the Constitution, but that's how the Constitution works." On the former point, I have a question for Lou, actually. I'm curious, because you looked to the appropriations clause. We've never discussed this, but I'm actually interested in your view as an historian on this.

The appropriations clause- so Congress specifically put in the WPR that you cannot infer from appropriations that we agree with anything the administration is doing. But isn't that an abdication of congressional responsibility? Because isn't the purse strings one of the ways in which Congress is supposed to actually have a say in things? So isn't this irresponsible, in a sense, for Congress, as a policy matter, to say, "Well, we are going to vote money for your war effort, but don't read that as us supporting you in any way whatsoever."

LOU FISHER: Yeah, I think it's a copout by Congress, but there was a lot of litigation on that, and Congress was to make it clear. And I think it's constructive that it's written this way, that when we authorize war, we will say we authorize war, and not do it indirectly through funding. And then I was impressed, was it June or, this year, where the House voted 340 to 40 about the need for Congress to authorize what's going on with the Islamic State. And also, I read the House and the Senate debates on continued resolution.

And I thought it was a very constructive, bi-partisan- not a partisan debate. And I thought it was pretty clear that members of both parties felt that we don't want, again, to do another Gulf of Tonkin or one of these have it forever. We're going to do it on a short-term basis because we don't have enough information now to authorize in an informed manner. So we're going to do it on a short term. And I think that came out of the continued resolution debate.

DAN MARCUS: Yes, and then they became irresponsible. None of them are saying to the President, "You'd better stop, even though if the 60-day, if the War Powers Resolution applies, if it's not authorized by the earlier AUMFs, the war is illegal under the War Powers Resolution." And yet none of them is saying, "Send us an AUMF."

SANDRA HODGKINSON: Right. So practically, what is the President supposed to do? Is he supposed to wait until they give him an AUMF, even though they are going to approve the funding, they'll be sent to the Congress that you need to do something. There is a genuine threat that has been . . . that the President believes is a threat to Americans. Whether or not the Congress can actually get an AUMF written in a timely manner, the question is, "What should he do?" We can sit in this room and say it's a shame, the President can't be left alone to make these decisions, but if he's left alone to make these decisions, then he will be judged, and so will his party on what they have done. And no one has ever been held accountable for a violation of the War Powers Resolution, even in the next administration.

And so we can have this great debate, and Obama will act with or without Congress, depending on whether or not they get their act together, and give him what he needs. And my guess is, even if he went beyond what some might argue is his authority, I don't think he'll ever be held accountable for it.

DAN MARCUS: Shoon.

SHOON MURRAY: I think the honest thing to do would be to go to Congress with a very targeted AUMF, that he has written the first draft of, against ISIL. And I suspect if he did so, it would be passed. And that would solve the problem. I think there are pretty big, from my perspective, there are some pretty big stakes involved with using the 2001 AUMF going forward. It's what? Thirteen-years old now, if it's used for this conflict, there's no end in sight. And there are implications for the passage of that authorization that were unforeseen. It wasn't such an authorization obviously as for Afghanistan, it's an authorization for a shadow war that has been going on for a long time. There is lack of transparency about where troops are, when they are involved in conflict. There's lack of transparency even about the targeted groups involved that we're supposed to be at war with. So there are implications for Obama doing this reversal because he, himself, talked about wanting to repeal the 2001 AUMF and using this- this kind of- stretching the AUMF. So I guess what the President could do? He could write a targeted new authorization for ISIL in particular.

PROFESSOR MARCUS: Yeah, and I think- I would imagine- we're all in agreement, and we

don't want to get into the next panel, but that's what should happen and both the President and Congress are to blame for not having faced up to the need if we're going to do this, which apparently everyone in Congress wants to do, and the President wants to do. They haven't faced up to authorizing it in a rational way rather than making the President resort to a President who wants to be law abiding have to resort to these really strained arguments based on the 2001 and 2002 AUMFs. Sort of similar, just to come back to appropriations, this problem is similar to what happened in the Vietnam War, where Congress, for better or worse, did pass a statute authorizing military action to defend South Vietnam against North Vietnam. And then President Johnson and President Nixon ran with it to enlarge the war beyond what Congress contemplated although they didn't write the thing very well. And it was, I think, the expansion of the war. You mentioned the territorial issues, which I think is very important, it's a big issue with the 2001 [AUMF] too. When Obama was running for President he said some things that led people to think that he might construe the 2001 AUMF as limited to military action in Afghanistan and maybe the border areas of Pakistan. And he disappointed a lot of people by adopting the Bush—the world is a battlefield—with respect to these enemies' approach. But in Vietnam, it was only after Nixon expanded the war into Laos and Cambodia that Congress really went berserk, and the way they tried to end the war was appropriations. They, ironically- not ironically I guess- that's the only way under the constitution. I suppose you can argue the Declaration of War clause implies a power of Congress to say stop, to repeal the declaration and say stop. But It's not clear; it's the same issue about whether the President can withdraw us from a treaty without going to the Senate. But the Congress basically passed, as I recall, a law stopping appropriations for the Vietnam War as of a certain date, Nixon vetoed it, and then they made a deal where Nixon said oh, I'll end the damn war, give me six months, or something like that, and that was the deal. Is that right, Lou?

LOUIS FISCHER: That's the nice example on appropriations because they cut off funding and they didn't have a two-thirds in each house to override and Elizabeth Holtzman, in the House, had gone to court and she not only got standing, but she won in district court. But after her victory in court and the judge- I thought it was a very good language- said "it cannot be the meaning of the Constitution that the President can initiate a war in Cambodia and can continue it unless Congress can get a two-thirds in each house for an override." But then her victory was, of course, pushed to the side because as Dan said the two sides agreed on, okay you can bomb another forty five more days and that's it. But it was by appropriation battle.

SANDRA HODGKINSON: Sorry, I want to mention one more thing and, I apologize, I actually have to leave early. But I did want to say one thing about AUMFs and, I mean, I agree wholeheartedly that the right move is to get an AUMF, if they can get one. What the AUMF gives the President is: one, it gives the legitimacy; two, it gives him a lot of standing when he goes back to get funding from Congress for different aspects of the war, and you don't get caught up in the debate over whether it's lawful or not lawful; and it makes it a lot easier to accomplish a lot of objectives. It gives legitimacy at home, and it gives legitimacy abroad. And so there, absolutely, is an extremely powerful role of an AUMF, which is separate and apart from the question of whether or

not it is legally required when a President is exercising Article II powers. And so I wholeheartedly think that a new AUMF in this particular case would benefit the President in a number of ways.

SHOON MURRAY: While sun-setting the old ones.

SANDRA HODGKINSON: I'll let you take that one in the next panel.

LAURA DONOHUE: So there's a distinction between the foreign-

DAN MARCUS: Let me just say that Ms. Hodgkinson has to leave because something came up and a thank you very much for-

SANDRA HODGKINSON: It's not a vote on the AUMF- wish it was.

DAN MARCUS: Go ahead Laura-

LAURA DONOHUE: Yeah, so under a *Youngstown* analysis (*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)), foreign powers are divided. So from there you would look to whether you have a congressional authorization, whether Congress has not acted, or where Congress has explicitly forbidden something. For war powers, we're in a different situation with regard to the Constitution; war powers are more clearly demarcated so that you need to go to Congress if you want to have a declaration of war outside of repelling attack. You have to Congress for this. So the idea that you have to go to Congress for an AUMF- and it would be nice to have but we don't need it- precisely the point of the constitutional design, and I keep coming back to that.

The 2002 AUMF- I do want to say something about that- in Iraq, because a few months before this administration appealed the 2002 AUMF to supplement the 2001 AUMF to supplement the Article II claims for ISIS and ISIL, the National Security Advisor, Susan Rice, actually wrote a letter to House Speaker John Boehner urging the house to repeal the 2002 AUMF. So she actually wrote in her a letter: "With American combat troops having completed their withdrawal from Iraq on December 18, 2011, the Iraq AUMF is no longer used for any U.S. governmental activities and the administration fully supports its repeal. Such a repeal would go much further in giving the American people confidence that ground forces will not be sent into combat in Iraq." This was less than two months before turning to the 2002 AUMF as an explanation, or a [legitimization], for bombing Syria, ISIS and ISIL. So I find this somewhat ironic that now this is being used this same AUMF that the administration said, "oh we no longer use it, we don't need it, and it's no longer relevant." And now, robbed of another opportunity to use the 2001 AUMF for the Article II authorities, that they would turn to that, and justification for that, is concerning. So, I agree with Shoon that in order to get constitutional authorization they have to go to Congress, and if Congress says no, then the answer is, no. It was designed to prevent us from slipping into wars without us consciously moving to a state of war.

DAN MARCUS: Yeah, Lou, you want to say something?

LOUIS FISCHER: Yea, on the 2002 AUMF, I don't understand- maybe someone here does understand- why that should be any authorization for force against [the] Islamic State because the October 2002 Iraq resolution was passed because Iraq, according to the administration and according to Congress- they passed it- was a threat. That's the language, "Iraq was a threat to the United States." And it was a threat for reasons that we all know were bogus in terms of weapons of mass destruction, but I don't understand how that that can relate at all to conditions today. Iraq is not a threat to the United States unless it's badly dubbed into whatever it is, so what's the connection? I don't see any connection between the two.

DAN MARCUS: Well I don't either, but we're getting into the next panel; we probably shouldn't do that.

But I think weak as the arguments- whatever weaknesses the administration's argument has based on the 2001 AUMF- their arguments based on the 2002 are much, much weaker. Shoon, would you like to comment on the 2001 AUMF? Which was a very unusual document because it didn't specify who the enemy was except by inference and the wording of it was very unusual for an authorization for military action. But apart from the ISIS issues over the last decade or so, there has been all sorts of difficult issues about how, particularly as al Qaeda has morphed into a sort of franchising operation, and part of the problem is we don't have the information to judge the connectedness of various terrorist organizations we're now warring with to al Qaeda, and there's a geographic issue. What do you see as the major problems with the 2001 AUMF as it's been implemented?

SHOON MURRAY: Well, I'd have to divide that both historically and moving forward. Historically, what has been going so far, I see many problems with it; one, to look at how the two administrations interpreted it- they've interpreted it far beyond the intent the original intent. Bush interpreted it as equivalent to a declaration of war; the Bush administration essentially saw it as: if the Congress gives authority to use lethal force, then Congress has given the authority to do anything that has to do with fighting the war against al Qaeda- so interrogation, detention, surveillance, military commissions- and without going back to Congress. So the scope that the [Bush] administration interpreted it was very, very broad. And it got pushed back by the Supreme Court, of course, in terms of military commissions. And-

DAN MARCUS: Yes-

SHOON MURRAY: Yes, and also they used it to justify the NSA surveillance, the domestic surveillance, because surveying people is part of war. And so it was interpreted very broadly. The Obama administration has also interpreted it beyond intent, beyond the congressional intent, by interpreting it as applying to emergent movements, not just those with the nexus to 9/11

immediately. And that's been controversial. And now extending it to ISIS or ISIL when the Obama administration itself gave the criteria for what the associates of al Qaeda would be, and essentially disregarding their own definitions by extending it to ISIL, I think, has expanded the scope.

LOUIS FISHER: Yea ISIL is the interesting question because it's pretty clear since ISIL has been excommunicated by al Qaeda, by al Qaeda central, it's hard to argue that they are part of al Qaeda or even an associated force. And apparently the theory is that, well they have their origins in al Qaeda and that's enough, is that basically it?

SHOON MURRAY: Or that there has been past association, so it's not current association.

DAN MARCUS: Yes.

SHOON MURRAY: But I guess, to go back to something that Harvey said at the very beginning, just to have a sense of how far we have come and this isn't going to be popular in the current context, but the 2001 authorization gives the President an awesome power to be able to use lethal targeting anywhere in the world- if they can make some sort of connection to al Qaeda. So that, to me, is tremendous. I mean that's something that, over time, we need to rethink. We shouldn't just go forward [with that]. That [authorization] was designated because of a particular conflict, and if there is a need for using it in the future, it should be specified as the threats evolve, so you have new threats, you have new targets, and you have new authorizations if you need them, but don't just give this power carte blanche to the President for going forward. And that's certainly not what the Congress intended at the time; they intended it to have a specific nexus to the perpetrators of the attack to 9/11.

DAN MARCUS: Let me turn that to a broad question, which is: does the whole war paradigm work for the conflict with non-state terrorist organizations like al Qaeda? In other words, do we need to revisit the decision made by the Bush administration, and reinforced by the Obama administration, to treat our conflict with al Qaeda and other terrorist organizations that target Americans abroad, or here, as a war rather than as a criminal justice problem? The rest of the world has never really bought into that theory of ours. And does our experience with the AUMF show that the war metaphor, the war paradigm, for our conflict with terrorist organization just is the wrong one?

LOUIS FISHER: This is a bit of a stretch, but we did have our problems with the Barbary pirates, and you can connect them to various states along North Africa. But there's another good example where Jefferson went into the Mediterranean and there were military activities, but he came back to Congress in December 1801 and said this is what I did in the Mediterranean. And then he said, "Beyond the line of defense I cannot go." And anything of an offensive nature, I need authorization from Congress. And Congress passed ten statutes authorizing Jefferson and Madison to use force against the Barbary pirates. So in a way, we have the so-called tributes, the bribes of the Barbary pirates. That's not exactly current terrorism, but it's maybe a connection there.

DAN MARCUS: It's more of a one-shot thing, and the terrorist.

LOUIS FISHER: Gone on for long a long time.

DAN MARCUS: Well that's true, Laura did you want to add something?

LAURA DONONHUE: Yes. So I don't think it's entirely true that nobody in the world has ever treated terrorism in a military context—so if you think of the L.T.T.E., the Tamil Tigers, Sri Lanka, if you think of the Algerians, separatists and French actions in Algeria, if you think of various national separatists, religious or political, like the anarchists movement the turn of the last century, you know there are various ways in which terrorism has been treated. Even Clinton sent missiles to the Al-Shifa Pharmaceutical Plant following the World Trade Center. So this idea that it's entirely new, it's unprecedented, nobody's ever done this—yes, other people do this. In fact, the same five techniques that we used in Guantanamo Bay, [that] have come under fire, were used against the nationalists in Northern Ireland in the early nineteen seventies. And the case went to the European Court of Human Rights, called *Ireland v. United Kingdom* (*Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. H.R. Rep. 25 (1980)), where hooding, wall-standing, sleep deprivation, and food and water deprivation came under fire. And in that case, Britain said, look we don't want to give these individuals prisoner of war status we don't want to treat this as a war because it legitimates their cause. But in that case, they did dispense with these five techniques when they were brought up on it, and the Gardner commission later reported. So this idea that, ok, we never treat terrorists in a military context, we do. But to the extent that by doing so we lose our ability to use our criminal justice system I think that's where we really suffer. So the idea that, for instance, we can't use Article III courts to try terrorists when we've had over nine-hundred successful convictions or merge our way when Southern District of New York successfully prosecuted twenty-six out of twenty-six jihad conspirators prior to 9/11. The idea that we can't use the criminal justice system, I think, that's where we become particularly hampered; I do want to respond to one point that Shoon raised, which is surveillance in the AUMF. So the terrorism surveillance program that President Bush put in to place, as it became public by 2005-2006 there was an effort to move it into the Foreign Intelligence Surveillance Act and end certain aspects of that program. So while the 2001 AUMF was initially used to justify the surveillance programs, it subsequently transferred to FISA and then with the FISA Amendments Act in 2008 Section 702, dealing with international communications, it now is being treated under the Foreign Intelligence Surveillance Act, and not under the 2001 AUMF. So, just an addendum to your point.

DAN MARCUS: Yes, and while the Supreme Court has brought up the Bush administration up short on military commissions, and while the Bush administration's position on the NSA program was clearly wrong, the Supreme Court did bless the idea that the AUMF did authorize the President to do the kinds of things you do in a war in the *Hamdi* case (*Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004)), where they upheld detention, not surveillance, of enemy

combatants. They would not come out the same way on surveillance because of the FISA statute

LAURA DONONHUE: Where Congress said this is the only way intelligence could be collected.

DAN MARCUS: Right, I think you're right about your examples about terrorism, although most of those would fit more easily into international law conception of internal rebellions or civil wars. What's unique about the current war that began in 2001 with the AUMF, as its since been interpreted, is that we are sort of following this enemy, this stateless enemy, that is not operating within just one country, they're operating all over the world, and we're asserting the right to go after them wherever they are, and defining them in a pretty broad way. Yes, Lou?

LOUIS FISHER: This is an appropriation question again, I don't see any mention of what I am going to say in newspapers or online- maybe it is out there. But when you look at the continuing resolution, the last section has to do with the equipping and training vetted elements from Syria. And it's interesting how their funded because there is no appropriation. The Defense Department has to get unobligated money that it has and, interestingly, foreign governments can give money to the Defense Department. And then the Defense Department comes back- the continuing resolution explains- it comes back to certain designated committees for notification and approval. And I think it is a very strange operation. That same issue came up in 1990 where the Bush administration did go abroad and got huge commitments. And about 80% of the Iraq war in 1990-91 was paid by other countries- Japan and Germany and so forth. But that money, according to the Bush administration, was going to go to the Defense Department, and Senator Byrd said no, no, no, it's not going to the Defense Department; it's going to go to the Treasury Department to be appropriated out by Congress. So there was that battle back in 1990 on Congress protecting itself and the appropriation process. And then we have this very strange language, I think, in the Continuing Resolution that became law in September 19, and it will expire December 2011. I think it's a very unconstitutional process of letting other countries give money to the Defense Department, and then you go certain committees and spend it.

DAN MARCUS: Yeah, it's a new kind of legislative authority. I do want to open it up to questions from the audience, but one last question to the panel about war powers resolution, which I seem to like better than most of the panelists, but . . .

LOUIS FISHER: You gave it a five?

DAN MARCUS: Yeah, I give it a five; you can give it a minus two. The War Powers Resolution has proven, despite the skepticism of presidents, remarkably resilient. It's still there and, as one of the panelists mentioned, Obama purports to be a big supporter of it and purports to want to comply with it, even if he has to twist himself into a pretzel to do so. But if the War Powers Resolution is, is it really just a bad idea because we ought to just stick with the constitution? Or, if it's not working as well as it should, how should it be fixed up? How would you improve it? Are there some ways in

which it could be made to work better? Yes, Shoon?

SHOON MURRAY: The ideas on how to improve it, I think, are pretty clear and lot of people have given them before. You have to have some sort of consultative body set up in Congress that the President can go. Have the leadership of Congress stand-by to be consulted in times before the use of force. You've have to define hostilities; you would have to, perhaps, have a way to have forced Congress to act, rather than rely upon inaction. So there are clear ways to make this a better law, I think. The problem is that it was passed in a very unusual circumstance when there was a lot of anger at the executive branch, which would allow the Congress to pass the legislation over veto. And I don't think you have the circumstances to amend it. I don't think, politically, you could get anything passed. And so you have an imperfect law that I suspect we'll have to live with because there is no way to change it, so you just acknowledge the imperfections and go forward.

DAN MARCUS: Lou and then we'll go forward

LOUIS FISHER: The Center had a proposal for a committee and a Senator McCain has a similar bill on it. I don't like that process because the way it would work is you would give confidential information to a twenty-person committee. And it would come on the floor and the people, all of the members of Congress, wouldn't have access to such information. So I don't like that at all. I think the War Powers Resolution, if it were ever amended, I think Section 8, there's very constructive material there. I think the incoherence and dishonesty, Section 2(a), could be removed because I don't think this has anything to do with protecting the intent of the framers or insisting on collective action.

DAN MARCUS: Laura.

LAURA DONONHUE: Yeah, so I agree completely on the historical point with regard to 2(a), it's just inconsistent, it's just its own revisionist history, which has no basis in any historical document whatsoever. So I would also say 2(c) as an unconstitutional infringement and statement of the President's Commander-in-Chief authorities, as well as Section 5. I think Section 5 infringes in some ways on the Commander-in-Chief authority. For instance, it forces the Commander-in-Chief, even when repelling attack, to stop the attack after ninety days. If we are repelling an attack and Congress has not actually blessed it but with a name, as they say, in The Prize Cases, the President can still repel that attack, right? So I think these are fairly significant constitutional grabs at power by the legislature over the executive.

With that said, what we're seeing and what happens is it goes the other way too. This is the back in forth that we see with regard to war powers and foreign affairs powers. So this consultative process is my concern as well as one of deference to them because we saw this with the NSA, with the 2008 FAA, which was the FISA Amendments Act, amending FIDA to include Section 702, 703, and 704. What happened was the rest of Congress deferred to the intelligence committees and said that they

know what's going on. So when they came up for renewal, everybody voted for it without actually walking down the hall, going inside a SCIF (Sensitive Compartmented Information Facility) and look at how content in PRISM was being collected upstream of data collection. Because it is pretty clear, at this point, the DNI (Director of National Intelligence) made this information available to all of Congress, and they simply did not live up to their responsibilities. And I am seeing this increasingly in Congress. That's why that appropriations question- ways in which Congress is not fulfilling the role that it was envisioned it would fulfill at the time of the founding.

I don't know the fix for that because all of this, that scheme you present, you suggest, we know that this is something that has been proposed, it relies on congressional members doing what they're supposed to do when they're elected. And it relies on a system where political party overrides don't occur in the legislature. You know it's as Federalist 51, James Madison, where ambition must be made to counter ambition, you have to actually lodge significant power and have individuals willing to act on that power in those positions. And I think that's a bigger question and of really deeper concern for the constitutional design.

DAN MARCUS: Yeah, I think that our history shows that while an ideal world, every congressman would be fully informed on everything and vote instead of spending all day raising money and so on, that the realities of modern Congress and, not just the last few years but the last 50, 75 years show that the full Congress has to delegate to committees, and to smaller groups, certain functions as a matter of being effective.

Now whether it works- in the covert action area, Congress did, by statute, establish a system where the President was made accountable and was required to approve all covert action by the CIA and other intelligence agencies. And he also was required to report to the House and Senate Intelligence Committees or, in sensitive things, the so-called "Gang of 8" before he does it. If it's practical, and if not, right afterwards. And that system hasn't worked perfectly by any means, but it's, I think it is perhaps a model for the kind of thing that might make consultation under the War Powers Resolution work more effectively and might push presidents to do more consultation.

Supposedly, Ronald Reagan, I think it was when he was bombing Libya actually, some of you in the room are too young to remember that, but after there was an attack on a nightclub in Berlin frequented by U.S. service men and women and several were killed, I think- Ronald Reagan launched attacks on Libya, and he complied with the War Powers Resolution consultation requirement by inviting a few congressional leaders into the Oval Office the night he was launching the plane and not letting them out of the oval office until the planes were on their way. But I do think there might be some room for strengthening consultation mechanisms. The other interesting thing- that repelling attacks point that the War Powers Resolution, perhaps unconstitutionally, prevents a President from repelling, or continuing to repel the attack after the sixtieth day unless Congress says okay, but one of the difficult questions under war powers is presumably the inherent authority of the President, as blessed by the framers, to repel sudden attacks on the United States doesn't last forever. For

example, if during the Cold War, Soviet missiles had been launched against the United States, no one would have said that the President had to go to Congress before he sent our missiles up to intercept the Russian missiles. On the other hand, if that resulted in a full-fledged war, you couldn't use the repelling attacks authority forever. And one thing, I guess, there is no answer to is: at what point does a President who has lawfully constitutionally responded to an attack on the United States lose that authority and has to go to Congress? And I don't know. I don't think there's any answer to that but if anyone has thoughts on that.

LOUIS FISHER: We talked about that earlier that both Franklin Roosevelt and George W. Bush could have argued there has been a sudden attack and I can respond, but they both had the judgment to come and had to be a joint exercise of power.

SHOON MURRAY: This question is different; this question is when do you lose the ability? When does it end? And just to add to that, when do AUMFs end?

DAN MARCUS: Yes, that's right, when does an AUMF or a declaration of war end?

SHOON MURRAY: Does it end when the conflict is over? Or can they continue on forever?

DAN MARCUS: Yeah, that's right. Well, in the old days, war has an end with surrender and/or a peace treaty- wars and nation states- today, when will the war against al Qaeda end?

SHOON MURRAY: Or the 2002-

DAN MARCUS: Well yeah, that, we thought, was over, right? Okay, let's open up to questions or comments from the floor. And go to one of the microphones and tell us who you are, and then say your piece. Hopefully a question-

QUESTION: Hi, my name is Cynthia Anderson, and I actually had a question for Professor Donohue. In response to the question you answered, Professor Marcus, about whether we should be using military or criminal means to deal with the terrorist threat, you mentioned that there is historical precedence for using military force, but that we've also had success with using criminal prosecutions to deal with the terrorists as well. And I was wondering if you have any thoughts on whether this is, or how much complexity, that adds to the constitutional question of surveillance when you add in criminal prosecutions in regards to the Foreign Intelligence Surveillance Act and the use of that in the prosecution.

LAURA DONONHUE: Okay, so great. Thanks, great question. So actually, I have a two-part series on Harvard Journal of Law and Public Policy, on Sections 215 and 702 that address the constitutional questions. And one of them is 180 pages and one is 210 pages. So the short answer is that there are a lot of constitutional complications, and one of the reasons for this is—I

actually think a Youngstown analysis is relevant in the foreign affairs capacity. So when you're collecting intelligence for foreign affairs purposes, whether Congress has spoken on that, has some constitutional meaning under Jackson's concurrence in Youngstown. That is if Congress has actively said you have permission to do "X" then and this comports with the Fourth Amendment then you have permission to do "X" and it comports. So to the extent that, for instance, in Section 702, programmatic collection was anticipated by Congress [and] the words support it, then that looks like a congressional grant of authority to collect that foreign intelligence.

Now the question is, is at what point (as opposed to Section 215, which is the collection of telephony metadata, where the statute requires that there be reasonable grounds to believe that the information is relevant to an authorized investigation and the argument is, actually, that all telephony metadata is relevant to terrorism investigations; therefore, we're going to collect everybody's telephony metadata). Okay, that's just a bastardization of the statutes' true language; that is not within what Congress very clearly said. The FAA, the 2008 FAA—it looks pretty clear from the language that, in fact, in the debates, congressional members stood up and said, "this is a problem; this allows for programmatic collection." Okay, so now the question is so what if you want to use this for criminal prosecutions? What has come out lately, the Privacy and Civil Liberties Oversight Board has issued two reports: one on 215 and one on 702. In the 702 report, they revealed for the first time that the FBI takes data accumulated through foreign intelligence gathering (so both 702 and 215), puts it into one database, and then for totally unrelated criminal activity, queries that database to see if they can get any information that would be helpful. Now, at no point is there a warrant for 702 data. You haven't gone before a court, you don't go before a FISC (Foreign Intelligence Surveillance Court) for everybody, there's no probable cause if the individual is a foreign power or [an] agent of a foreign power, as there is for traditional FISA. There's no probable cause that could use the facilities to be placed under surveillance; instead, it is the broad collection of information on citizens, generally, that's being collected. So, as a criminal matter, you can raise a Fourth Amendment use challenge and say "look the Fourth Amendment is supposed to protect people and you have a reasonable expectation that the government is not going to go around and collect all your information and then look for possible evidence of criminal activity and then bring criminal prosecution."

So you can't use foreign intelligence to do an end-run around Fourth Amendment criminal protections that one would otherwise have. And what supports this, historically, is general warrants, at the time of the founding, were condemned— that this is what the British government was using against the colonists. William Pitt directed that the colonial governors to use general warrants against U.S. colonists, the colonist objected, James Otis, in one of the most famous orations, said that, "This is the very instrument of tyranny." And then and there, John Adams later wrote that then and there the child of liberty was born. That's when the revolution really started, objecting to the warrants. So when it came time to write the Bill of Rights, the reason that Virginia and New York wouldn't actually sign the Constitution was that it didn't include a bill of rights. And it was on the condition that this clause would be included, in part, that they actually joined the Constitution— putting it to effect. So the Fourth Amendment, the reasonable expectation of privacy, is precisely, or the right

of the people to be secured in their person's, papers, and effects against unreasonable search and seizure shall not be violated. That's the language of the Fourth Amendment; that right is referring to the concept of general warrants. So the idea that we could use foreign intelligence, to have a general warrant, that allows for the collection of all this information and looking for potential criminal activity, and then use it in the criminal context- that, to me, raises very serious constitutional concerns.

DAN MARCUS: I would just add, that still, the Supreme Court has never ruled on any of this stuff- the constitutional question. So even the basic question of whether evidence obtained through a classic FISA warrant from the FISA court for foreign intelligence purposes can be can be used in a criminal trial has not been answered by the Supreme Court. The FISA court of review has said it's okay, in dictum I guess, am I wrong?

LAURA DONONHUE: So the courts have repeatedly upheld the constitutionality of traditional FISA.

DAN MARCUS: Of getting the data, yes. But the Supreme Court hasn't said whether you can use evidence obtained in a FISA, from a FISA warrant based on probable cause to think a guy is an agent of a foreign power, which is a different, lesser, probable cause. It's not probable cause to think he's committed a crime. [The] Supreme Court has never answered the question of whether even the classic FISA warrant evidence can be used in a criminal trial. Yeah.

QUESTION: Yes, my name is Mark Nevit, I am a Navy attorney. Professor Dononhue, I very much share your concerns about Congress' role in all this. I guess my question for the panel is- the courts have been reluctant to get involved in the President's authority. I believe in 2000, Congressman Campbell challenged the President over Clinton's actions. I believe the District Court of the District of Columbia refused to take the case- for, I think, either political pressure or something- I forget exactly what it was. But they haven't been involved in sort of adjudicating these matters that define the outer contours of the AUMF. And these are critically important matters that are facing us. So if the courts don't get involved it seems like the tie goes to the President. President Clinton is able to do what he wants to do. Would you like to see more of a role for the courts in deciding this? And what would that role be? It seems these are really fundamental problems and I'm worried about the tie being in the President's hands with the courts not engaging.

LOUIS FISHER: Well let me, you know, sometimes the court gets involved in national security matters- *Hirabayashi* (*Hirabayashi v. United States*, 320 U.S. 81 (1943)) and *Korematsu* (*Toyosaburo Korematsu v. United States*, 323 U.S. 214 (1944))- and we regret it. I am surprised after 9/11 how quickly the courts did push back against the administration. And I think a part of that: April 2004 Paul Clemente from the solicitor general's office was arguing the two *Padilla* (*Rumsfeld v. Padilla*, 542 U.S. 426, 427 (2004)), *Hamdi* cases. And throughout that day, justices asked him,

“How do you treat detainees?” “Do you torture them?”

“No, we don’t torture them. That would be against the law; we have a treaty against that.”

“Do you torture them?”

“No, you don’t get good information that way.”

“Do you torture them?”

“No if anyone did that, we’d prosecute them.”

“Do you torture them?”

All throughout the day- so that evening, I suppose a lot of you know what went around the world- photographs of Abu Ghraib. So I think, not that Paul Clemente lied or deceived the Court, he didn’t know what’s going on in the Justice Department. And I think that made the court much more assertive both in *Hamdi* and *Rasul* (*Rasul v. Bush*, 542 U.S. 466 (2004)) and eventually in *Hamdan* (*Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012)).

DAN MARCUS: Lauren?

LAURA DONONHUE: Yeah, so I’d like to take a shot at that too. So, it’s funny because the cases you mentioned, what comes to my mind are *Ex parte Milligan* (*Ex parte Milligan*, 71 U.S. 2 (1866)), *Youngstown*, *New York Times* (*New York Times v. United States*, 403 U.S. 713 (1971)), the Pentagon Papers case. There are plenty of times where the courts have stepped forward and had a stance and said something when national security matters were on the line. So why the reluctance now to deal with either substance or due process or procedural questions; why the reluctance to deal with this point in time of some of the - well actually, the surveillance issues can explained partially by statutory change and there are two cases that are working their way through the courts right now. There are many, many cases but two in particular that are now at appellate court level where the courts below us come out differently, so I think the court will be forced to, at least, take on at least some of the surveillance issues and deal, particularly if there is a split between the circuits once it goes to the appellate level.

As far as politics question doctrine, I also want to mention state secrets doctrine. And particular because you are a military JAG (Judge Advocate General). So, I have been very surprised, one of the big concerns during the earlier years of the Bush administration was that the administration was using state secrets differently from other administrations with regard to national security cases coming up in the context of the AUMF and the war against al Qaeda, post 9/11. And one of my concerns at the time was that everyone was looking at these five to seven published judicial opinions and drawing conclusions about how the executive branch is actually using them. They’re not actually looking at the executive branch, which you know, is not rocket science. It’s kind of an obvious thing, why don’t you look at how it’s actually being used. And when I looked at state secrets, what I found by looking at totally unusual documents that aren’t usually used in research; instead, I just went to see how many times state secrets privileges had been claimed as an affirmative defense and how many times the government had stepped in to support this claim.

I found more than 250 cases and that same intervening period that had involved state secrets and what was happening was that state secrets had become a form of private indemnity to contractors and particularly military contractors that were using state secrets to get out of patent disputes, personal injury and wrongful death suits, against soldiers to get out of environmental matters, to out of all sorts of things and the courts, as soon as the government said state secrets, they would back off without even looking at the information to the point where tens of thousands of pages would overnight be called state secrets. And the courts would not look at any of the evidence. They'd just say, "Okay, as long as you're claiming state secrets." So what I saw was this pattern of the judiciary being unwilling to engage when national security matters were on the line and I saw it in state secrets. You see it in political questions, [and] this is concerning. That is their role and we might be seeing more of that now; now there are a lot more cases coming through the courts, and I hope there will be because we can point to many examples in history, *Ex parte Milligan*. You can point to Youngstown, you can point to Pentagon Papers, where the courts have had an important role to play and really must perform that function.

DAN MARCUS: Yeah.

LOUIS FISHER: Very quickly, on state secrets, that's a terrible decision, *Reynolds* (*United States v. Reynolds*, 345 U.S. 1 (1953)), absolutely incoherent decision saying- we'll never abdicate to executive caprice." Which is exactly what they did—they decided the case without looking at the accident report.

When the Obama administration came in, I think the message was that the Bush administration had mislead the state secrets privilege, so in September 2009, the Justice Department put out a new procedure to be scrubbed a little bit more. But I'm not sure there's any difference between the two administrations and you even have cases that Lauren knows all about. There's a woman put on the "no-fly list" and been in [court for] ten-years, and it turned out she got put on the no fly list because an FBI agent marked the wrong box and you found that out in court. So it's amazing that Eric Holder will sign declarations to stop those cases from going forward. So it is a nightmare for executive abuse and very few courts [are] pushing back.

DAN MARCUS: Let me just say one quick thing on that and that is while I think the courts and the Supreme Court will continue to defer to executive branch judgments as to when the national security is threatened and so on- I think this court, the Supreme Court, is a very confident court, and I think they will have shown an increasing willingness to wade into disputes between Congress and the President. And this current case in the Supreme Court, the Zivotofsky case, on the status of Jerusalem in U.S. passport policy- the D.C. Circuit said, "we're not going to get into it; let Congress and the President fight it out; it's a political question." And the Supreme Court said, "No, Congress said this and the President said that; we got to decide it."

QUESTION: Is this working?

DAN MARCUS: Yes.

QUESTION: Okay, so I have one last question, and I am afraid it's probably going to be the last one for this panel so we can transition to our 4:30 panel. So my apologies on that one, everyone's been wonderful so far.

So it was said before, and I forget by who, that the War Powers Resolution somewhat undermines—so at least this is the administration's policy— that it undermines the Commander-in-Chief's powers of the executive branch. And I have a bit of a hard time understanding that because if anybody takes a look at Article II, you see clearly that the President is not endowed with any specific war powers whatsoever. And I think, if anything, the War Powers Resolution grants the President war powers. It's not specifically telling him how to run his Army and Navy as Commander-in-Chief, but it certainly tells him when he can and cannot use it. So taken in that context, I am just wondering what the response is to anybody who would pose that argument might be? Thank you.

LOUIS FISHER: Oh, I would agree. Just briefly, it does expand presidential power if there's no one who would believe before that presidents could go to war anytime they want for sixty, ninety days for any reason.

LAURA DONONHUE: So I agree with that, on the other side of it, can Congress tell the President in the middle of repelling the attack, you have to stop when you're Commander-in-Chief and it's very clear is that this was the design. If we're under attack if, our actual territory is under attack, and the President is repelling that attack, this comes up in prize; this comes up in many contexts. The President has the inherent authority as Commander-in-Chief to repel that attack. So can Congress then come in and say, "No you don't have that authority; you have to stop using it even if we don't have to do anything, but after 60 days you have to stop." So that's where there is this unconstitutional abridgement, one could argue, of the President's authorities. At the same time, that the idea he would have sixty days to start an attack anywhere in the world is a radical expansion of the concepts, so both can be true.

DAN MARCUS: Well, with that let me thank our distinguished panel for a very interesting discussion.

FALL AUMF SYMPOSIUM PANEL 2: THE AUMF'S RELEVANCE TO THE CURRENT MILITARY OPERATIONS AGAINST ISIS

STEPHEN VLADECK: Ok. So we are going to get started with panel number two. The second and last panel of the symposium. So as you have probably figured out by now, the focus of this panel is more specifically on the current threat posed by the Islamic State in Iraq and the Levant. I am going to try to commandeer the ISIL, instead of ISIS, for our panel, but we'll see if people, you know, slip away from that.

So basically, the threat posed by ISIL, the current and existing legal authorities for the U.S. to use force against ISIL, and what Congress could, should, and will do, in the coming days, weeks, months, and years when it comes to ISIL and AUMF's more generally. And to answer these questions, among others, we've really assembled a fantastic panel, that includes, I'll just introduce them briefly, you have their full information in your lovely packets, but in alphabetical order starting to my immediate right, is Andrew Borene, who is a counselor at Steptoe and Johnson, who is an adjunct professorial lecturer here at AU, a former Associate Deputy General Counsel for the Department of Defense, a Marine Intelligence Officer from Iraq, his J.D. is from the University of Minnesota Law School, his B.A. is from Macalester, so cold weather to him, is you know, nothing. So Andrew thank you for coming.

To his right is Andrew Carswell, who is the Senior Delegate to the Canadian and U.S. Armed Forces for the International Committee of the Red Cross. Prior to his tenure at ICRC, Andrew was an officer in the Canadian Armed Forces Office of the Judge Advocate General. And before that, a criminal prosecutor in Calgary- go Flames- also I guess, cold weather, so I guess, that's the moral of the story is relatively small colleges and cold weather enthusiast. That's our panel. Andrew has a master's degree from the University of Geneva in the Graduate Institute of International Studies, his law degree is from Cardiff University, and his undergraduate degree is from McGill- more cold weather- so thank you, Andrew, for coming.

To Andrew's right is Daphne Eviatar, who's Senior Counsel for National Security at Human Rights First. She is also an award-winning journalist who has written widely about law, national security, and human rights. And she is one of the founding editors of the Just Security blog, but I am biased. Daphne is a graduate of the Columbia University Graduate School of Journalism, the NYU School of Law, and Dartmouth College- more cold weather- and clerked for the Honorable Dolores Sloviter on the U.S. Court of Appeals for the Third Circuit. Actually Judge Sloviter, also happens to often hire one of our alums to clerk, so very cool.

And finally, last but not least, is my good friend Charles "Cully" Stimson. Cully is the manager of the National Security Law Program and is a Senior Legal Fellow at the Heritage Foundation. He served as the Deputy Assistant Secretary of Defense- DASD- for detainee affairs during the Bush Administration. He is a trial lawyer, and civilian and military prosecutor, and still a military trial

judge today, with a ton of experience on these questions. Cully's law degree is from George Mason University School of Law, and he graduated from Kenyon College undergrad- not quite as cold weather, but, you know, not balmy- so Cully, thank you for coming. And let me also just note: we were also supposed to be joined by Ms. Karen Corrington, who works for Senator Tim Kaine, but apparently the Senate is actually working today. Who knew? Something new and different for the 113th Congress. So Karen sends her regrets, and we'll try to project, I guess, on her behalf. Anyways, to the four of you, thank you all so much for coming. And our format is going to be much like the first panel: I am going to ask a bunch of loaded, sometimes rhetorical questions of our panelists, and we'll see how that goes. So, Andrew Borene, I am going to start with you. Before we get to the legal fight, and the legal debate about ISIL, can you say a bit about ISIL, about why this seemed to come out of nowhere, about what the threat is, what we know and what we don't know.

ANDREW BORENE: Sure, well unfortunately right now, there remain a lot of unknowns—known unknowns—about ISIL, ISIS, Islamic State, Daesh, whatever we are choosing to call them, or they are trying to identify themselves as. I'll start with the history, and how there's a nexus with al Qaeda, because I think it is relevant to this AUMF debate. So prior to 9/11, a fellow named Abu Musab al-Zarkawi was busy starting a unity in jihad terrorist group in the Middle East. After 9/11, after the U.S. invasion of Iraq, he saw an opportunity to expand his operations and oppose the crusader army in Iraq; started a group called al Qaeda in Iraq—self affiliated with Al Qaeda—and starting attracting recruits and conducting a lot of very horrific, violent bombings, creating a lot of problems for U.S. and Allied forces, and the newly-forming Iraqi Government.

In 2006, Zarkawi was killed by a U.S. airstrike. His successor is a fellow named Abu Bakr al-Baghdadi. If any of you have seen ISIS videos, raise your hands if you have watched either *Flames of War*, or any of the ISIS promotional material. They have a very sophisticated media campaign. Ok, so most of you actually haven't. They are very clearly articulate what their goals are, and what their end-state is. Baghdadi has taken a lot of mergers and acquisitions-type activity, he is a very entrepreneurial terrorist, and he rebranded initially as the Islamic State in Iraq- pulling together the former al Qaeda in Iraq, with other number of terrorist groups, and created an expanded franchise to do more violence in the region.

During the surge of U.S. forces, his kind of whack-a-mole, squeeze out an infection, he moved into Syria. And as the civil unrest in Syria turned into a civil war in Syria, he rebranded again from the Islamic State in Iraq, to the Islamic State in the Levant, or, Islamic State in Iraq and Syria, depending upon, kind of the semantics, of how you want to interpret the language. And was much more active in Syria; made a temporary alliance with another terrorist group called the Al Nusra Front to fight the Bashar al-Assad regime. Now, he gains a lot of force by collaborating with Al Nusra, generating recruits, being the, kind of creating, an NFL Super Bowl, Pro Bowl team of terrorist globally.

STEPHEN VLADECK: Probably the Super Bowl more than Pro Bowl.

ANDREW BORENE: And I hate to say that. But became so vicious that al Qaeda adherence, even watched to disavow relationships with ISIS/ISIL because they found that they were simply too violent. And that they were killing too many Muslims, in addition to what they saw as kafir, or Zionists, or Christians, or anyone who didn't align with their very specific view of radical Islam. They gained a lot of steam, and after the U.S. forces withdrew from Iraq, trainers and advisors left, the Iraqi Army was on its own, I think really, the only way we can say this, that we learned this year, just how aggressive and how quickly this Islamic State army could move. And they took over vast swaths of western Iraq that were previously held by U.S. forces, handed over to the Iraqi Army. Iraqi general fled; the Iraqi forces essentially evaporated. So now, I think we just have to accept the pragmatic reality that there has ceased to exist a Syria state in the east of Syria; there has ceased to exist an Iraqi state in the western parts of Iraq. And although we do not recognize this outlaw group as a government, they are effectively holding and administering a lot of real estate on that border between Iraq and Syria. That was a long answer, but was that sufficient?

STEPHEN VLADECK: No, that was fantastic. So at the risk of asking us to talk for about thirty more seconds, I think, so at what point does this cross over into, now this become a question of U.S. military force. That is, to say, what exactly changed this summer, that moved ISIL/ISIS/Islamic State, from a, you know, pain in Syria and Iraq's back, but whatever, to something that the U.S. actually needed to have an interest in responding to?

ANDREW BORENE: Well again, any of you can watch *Flames of War*, if you find it on the internet, it's about a 55 minute, self-produced documentary, makes very clear their intent to bring about an apocalyptic battle with crusader armies in Dabiq that will result in a global caliphate under their strict interpretation of radical Islam. So they have made overt statements they are going to make blood flow in the streets of America, they call out President Obama by name regularly, and the danger—I think there is actually part of, a responsibility to protect humanitarian concern. They pushed so quickly, so fast, displaced millions of people; threatened to take over a dam in northern Iraq that could have caused flooding resulting in millions of deaths. And made very clear that was on their list of things to do. So really, I think they are a super terrorist-type organization, with clearly-stated designs on striking our homeland, striking our partners, and you know, in many ways, it's like a cancer that emerged much quicker than any of us saw coming.

STEPHEN VLADECK: Great, thanks. So Cully and Daphne, let me sort of Segway this down the table a little bit. So Andrew gave us the setup, the background, how we got to this summer. We know from the first panel, we probably know from our own experience, we have heard at different points from the Obama Administration, that the authority, the existing authorities to deal with ISIL, to use the force that's been used, come from a combinations of the President's self-defense authority under Article II, the 2001 AUMF, and maybe even the 2002 AUMF. If that's true, what is wrong with the status quo, that is to say, why are we having this panel? Other than its fun, and we all get dressed up, and get these cool mugs, why is this a question that we should actually be talking about, as opposed to just saying: "President Obama is doing fine, all is well, nothing to see here."

DAPHNE EVIATAR: I think that really . . .

STEPHEN VLADECK: Could you turn on your mic, Daphne, sorry. The button in the middle.

DAPHNE EVIATAR: That says push? Thank you. And I want to say I do like the cups a lot. I think it's really important because of a combination of the facts that you just explained, and also the facts that the current authorizations for the use of military force have nothing to do with that conflict. So, you know, as we heard of the last panel, the 2001 AUMF, the 2002 AUMF, had very specific intentions in mind. Congress had very specific intentions. 2001 obviously was to go after the people, you know, who were involved in perpetrating—or harboring the people involved in perpetrating the 9/11 attacks. 2002 was the supposed threat from, in Iraq. Both of those have now—well, we could argue over whether the 2001 is still relevant. 2002: very strong case to be made that once Obama pulled out the last troops from Iraq, that war was over. I think it's very hard to make the argument plausibly that ISIL is part of the al Qaeda or Taliban that existed in 2001 that Congress authorized the war against.

So in a sense we are kind of operating under a fraud, it is a bit fraudulent situation where you have, Article II doesn't make sense here because this is not a direct threat here to the United States. Yes, ISIL is a horrible, brutal group, no doubt about it, presents a big threat to that area, they might have said in a video, I know I haven't watched it, that they want to make blood run in the streets, here in Washington, D.C. for all I know, but that doesn't mean that they have the capability to do that. And there's been no evidence that I've seen that they do have the capability to do that, or to attack the United States at all. And a lot of national security experts who have studied this very carefully say that they're much less dangerous to the United States than al Qaeda is. And they really don't have the capability to attack us.

And I think that's why this matter now needs to go to Congress. Maybe there is a reason that we should be bombing or otherwise using our troops to attack ISIL- and it might be a humanitarian concern for example- but I think Congress and the American people need to have that debate. What is exactly the U.S. interest? Do we want to be authorizing the use of our troops, whether you call them “boots on the ground” or whether they are in the air, or whether they may eventually end up on the ground? It is a lot of U.S. military power going towards this fight. And Congress and the American people should be involved in debating whether that's appropriate, and setting out the outlines for that war. Because if you don't have any limits, as we learned in the last panel, you end up having a kind of perpetual, vague, poorly-defined war that could just go on forever. There are always going to be terrorists, in these groups, can continue to morph into one or another thing in another part of the world. And we really need to clarify where it is we're fighting, who it is we're fighting, and why.

STEPHEN VLADECK: Daphne before I turn to Cully, can I ask one follow up question? So you said, when we pulled out of Iraq, that conflict was over, and I guess I'm wondering if that's actually necessarily true. Right? So I guess the question is, what was that conflict? If that conflict

was a conflict between the U.S. and the sovereign nation of Iraq, that conflict was over long before we pulled out of Iraq, right? If that conflict was the non-international armed conflict, between the sovereign state of Iraq and armed belligerent groups who resisted state authority in Iraq, isn't there an argument that that conflict actually never ended, and in fact this is just a re-flare-up of a conflict that the U.S. was a co-belligerent in, but that it actually is the same conflict that U.S. troops were sent to Iraq for in 2002?

DAPHNE EVIATAR: You could make that argument, but the fact that the United States withdrew its troops, and said that it was withdrawing, and made quite a public statement about that; Obama made quite a public statement about that. You're right, that wasn't the end of the conflict in Iraq; it was the end of the U.S. role in the conflict. So I think to go back into Iraq, the U.S. need to—Congress need to—reauthorize a U.S. role in that conflict. The U.S. has to judge: is this a conflict we want to be involved in? Because it's not the same conflict.

STEPHEN VLADECK: Sure. Cully?

CHARLES "CULLY" STIMSON: Thanks for having me Steve, it's always great to be with you, and all the panelists here. Let me go back to the first question you put to Daphne and me. And I think it requires us to actually look at the statutory language of the AUMF so you understand what the 2001 AUMF actually says. Because that's when you can then bounce from there as to whether or not the Administration's reliance on the 2001 AUMF makes sense- given not only what Andrew says about the historical development and creation of ISIS, but also Matt Olson's longer comments- he was the head of NCTC- he gave comments on September the 3rd of this year at Brookings, and really described at length who ISIS is.

But the 2001 AUMF says, and I think this strengthens Daphne's first point, that the President is authorized to use, "All necessary force against those nations, organizations, or persons, he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11th, 2001, or aided the attacks that occurred on September 11th, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons."

And so the argument that you hear often is that ISIS didn't exist when that statute was passed. Therefore, that statute can't apply to ISIS. The contrary argument that you hear from some conservatives, like Steve Bradbury and others, is: Look: this is an interfamilial fight within al Qaeda. The fact that they are an amoeba and they keep replicating themselves; ISIS is al Qaeda and al Qaeda is ISIS. You don't need a new statute.

Now, on the day that the Administration, the President gave his speech back in September, a senior administration official on background gave this legal justification for the 2001 AUMF acting as the domestic law statutory basis for using force against ISIS. And they said, and by the way you're going to use glasses like this someday when you get to be my age, I found these about a month ago, they

work, so I like them.

STEPHEN VLADECK: You were able to see well enough to find the glasses?

CHARLES “CULLY” STIMSON: I was at- I was judging a court marshal- and I was looking for a pen in the desk, and I opened up the drawer and there was no pen, but there were these glasses, and I thought, “Oh, I’ve never worn glasses.” And so I tried them and said, “Hey, these work.” So that’s why I use them.

Here is what the senior administration official said: “Based on ISIL’s longstanding relationship with al Qaeda and Osama Bin Laden”- longstanding relationship; notice the contrast between that and the actual language from the statute. “Its long history of conducting, and continued desire to conduct attacks against U.S. persons and interests, the extensive history of U.S. combat operations against ISIL dating back to the time the group first affiliated with al Qaeda in 2004, and ISIL’s position, supported by some individual members and factions of al Qaeda-aligned groups, that it is the true inheritor of Osama Bin Laden’s legacy. The President may rely on the 2001 AUMF as statutory authority for the use of force against ISIL, notwithstanding the recent public split between al Qaeda’s senior leadership and ISIL. In other words, hey, they got a divorce, but they’re still part of the same family.

Here’s the reason the debate matters, and this was really to Steve’s main part of his question: this war, according to senior administration officials and those who were in the administration, is going to take a long time. President Obama said, “It takes time to eradicate a cancer like ISIL.” Panetta says it will be a thirty-year war. Petraeus says, “We are talking about years, many years.” And Clinton, Hillary Clinton, says, “We are talking about a long-term struggle.” And so I think, legally speaking, you can make the argument that ISIS fits neatly within the 2001 AUMF, or doesn’t fit neatly within the 2001 AUMF. But the fact is that, if it’s going to be a long struggle- and these people would know- it certainly puts it on firmer political grounds to include ISIS in an AUMF.

STEPHEN VLADECK: Great. So Andrew Carswell, let me come to you with the next question, and let me sort of set it up first.

So, one of the things were heard a bit of in the first panel, and that I think has complicated this entire discussion, is the expansion of the 9/11 AUMF to encompass this idea of associated forces. And the statute of course says nothing, the term “associated forces” does not show up in the 9/11 AUMF, it has been sort of added by the Administration in speeches, and then sort of codified, kind of, with regard to detention in the 2012 Defense Authorization Act. But I guess the idea is most analogous in international with the idea of co-belligerency. That these are groups are basically aligned with a party of the conflict and fighting against the opposite party.

The problem of course is that there hasn’t necessarily been transparency about which groups the United States believes are associated forces of al Qaeda in this conflict. And it’s not even to what

extent transparency would solve the problem, what the substantive criteria should be. So I wonder, could you say a bit about how international law in general looks at this problem? And to what extent you think it's complicating the current debate in the United States.

ANDREW CARSWELL: Yeah, thanks a lot, and thanks very much for having me in the first place. I just wanted to maybe, I heard that there were some 1Ls here, and maybe it's time to give a little bit of international law 101, in terms of the definition of an armed conflict. You have international armed conflict, which is very straightforward, it's between two states and it happens immediately when there's a disagreement between states leading to the intervention of their armed forces. We can talk about a non-international armed conflict, which is a little more complicated. There you're talking about issues of organization of the parties and also the intensity of the hostilities. And that comes out of the Tadic decision of the Yugoslav tribunal, which is now accepted to be the definition of armed conflict.

So in an armed conflict, you've got—so let's talk about NIAC: Non-International Armed Conflict—you've got two defined parties, and on the side of the state armed forces, if they're involved in a non-international armed conflict, it is quite clear who can be targeted and who cannot under international law. Domestic law might prohibit it at the same time, but international law does not objectively prohibit it. And so when you're looking at it from that perspective of two parties like that, the question is how are you members—how can you become a member—of an armed group? And that is a question that has been very, very difficult to define over the years.

In 2009 the ICRC, so my organization came out with an interpretative guidance document on direct participation in hostilities. And it looked at the issue of membership, and it said there are a couple of ways you can do that, but effectively it came down to a term called continuous combat function. And that is a very controversial term amongst academics, amongst practitioners. The concept is that you become a member by virtue of your function. And your function can be shown overtly; it means you're carrying your weapons overtly. It could be that you're wearing an emblem, and so on. But that's quite rare. Often it's going to be that someone is directly participating in hostilities on a recurring basis. And so that's already difficult to decide who is a member of the group. But the important thing, the law of armed conflict, or IHL, I use them interchangeably, International Humanitarian Law, only applies in relation to these two parties.

So when we're talking about the conduct of hostilities and the ability to use lethal force in the first resort, that's only between the parties. So what happens when someone is vaguely associated with a group? So that is to say, let's take a look at the London Underground bombers, going back a few years now. Here we have people who are in England, who are certainly affiliated in a loose sense with al Qaeda. They are individuals who subscribed to their dogma and so on. At the same time they were not part and parcel, they did not have the consent of the leadership of Osama Bin Laden or anybody else. So these were individuals who really were a group of individuals. So going back to the definition of armed conflict, you ask yourself, okay, within the United Kingdom, have they together formed an organized armed group which can be considered a party to an armed conflict?

Well no, they have not. So I think the British Government rightfully treated these people as a law enforcement issue.

So that's, to say, the laws of armed conflict- of IHL- don't apply to those individuals in relation to the type of force being used. So you can be associated in a loose sense with a group, without actually falling under that conduct of hostilities paradigm and being subject to lethal force in the first resort. However, does that mean that the hands of the government are tied, does that mean you can't get them off- it's not the battlefield- but you can't get them away from being a threat to you. And the answer to that question is clearly you can, that's why you have the whole law enforcement context. When people think law enforcement, they're thinking about a bobby swinging a baton, but it's not the case. Here, we're talking more like a SWAT team. We're talking about the ability to use lethal force, but only in the case of imminent threat of death to a human being. So it's a self-defense paradigm whereas you cannot take that first shot like you can in the wartime paradigm. So this issue of associated forces in the AUMF, really I think it has to be defined. Again, I am not an expert in the U.S. law, and I don't purport to be. But at the same time, if you're going to call it an associated force, you'd have to define exactly whether you're talking about someone who is associated, and is at the same time is considered to be a member of that force, in which case by status they can be targeted. Or whether it's somebody who is more loosely affiliated, in which case they cannot be target. So I know that all sounded like a little bit of a 101 lecture on international law, but I couldn't get to the conclusion without going there.

STEPHEN VLADECK: So let me follow up a bit, though. So the whole- Cully put this quite well, and so did Andrew- that the media's fascinating with the ISIS/ISIL story is the purported break, right? The schism. Between senior leaders of ISIS/ISIL and senior leaders of al Qaeda. If that is factually correct, what significance, if any, does it have to an international law analysis of whether they could be treated as—of whether CCF would apply? Right? Of whether you could treat them as co-belligerents.

ANDREW CARSWELL: Well, from a purely international law perspective, and moving away from an AUMF, it makes no difference whatsoever because ISIL, ISIS, whatever you want to call them, are already engaged in an armed conflict both in Syria and in Iraq. You've already got the prerequisites, from the Tatic decision, for the definition of an armed conflict in those two contexts. They are parties to each of those conflicts, they can be targeted using lethal force in the first resort. I a member of ISIS leaves the battlefield, then that is a different issue but we can get into that perhaps later.

STEPHEN VLADECK: And we'll save Libya for a little bit down the road. Alright? So Andrew Borene let me come back to you. I may be putting words into both of your mouths, I hope I'm not. But I heard Daphne to be saying a new statute is not just politically expedient but perhaps even necessary given the shortcomings of the arguments for existing authorities. I heard Cully to at least endorsing at least the first part of that premise that a new statute is certainly politically expedient, it

would be very helpful.

I guess I want to ask you: do you think it's necessary? Do you think, I suspect we could all agree that it would be nice if Congress did its job that is an easy thing in this town to have defined consensus on. Harder to ask whether it actually must. And I guess I'd love to hear your thoughts on that.

ANDREW BORENE: Yeah. It's a great question, and I think, you know, the absolute bottom line on this is a new authorization for the use of military force against ISIL is not legally necessary. Any need for it has become overcome by events, we have been engaged actively in combat with them for a very long time, but in the near-term, this air campaign I think is closing in on the 60-90 day window shortly. It goes back to August. So overcome by events. Unless Congress is going to sue the President to stop, to take him to the Supreme Court, I don't see that happening.

STEPHEN VLADECK: At least not on war powers.

ANDREW BORENE: Not on war powers, no. And the War Powers Resolution is on such desperately shady footing that the true check on the Executive by Congress that has never been disputed by the Supreme Court, is on appropriations and funding. That's it. It's in Article I, Section IX, as opposed to Section XVIII. That's how they stopped the Vietnam War, that's how the Boland Amendment is enforced. And that's how ultimately, if Congress disagrees with military operations against ISIL, that's how they're going to have to stop them.

In the near-term, there is an upcoming vote on overseas contingency operations budget amendments. So very soon, we will get a sense of Congress, at least it will be a silent approval if they approve the \$5 billion in funding that has been requested by the White House and the Pentagon to run specific operations against ISIL and they're named right in there Operation Inherent Resolve, there's going to be an Iraqi training and equipping force, they're going to put more boots on the ground in Iraq. They will continue to replenish the supplies of armaments that are dropped on targets in Syria and in Iraq. There will be an expanded capabilities enhancement program for Jordanian forces and for Lebanese Forces to counter the threat.

And so if you really want to get into the nuts of the granular level, what needs to be legally approved, it's in here in the appropriations and the budgeting plan language. That said, I certainly think it would be very, very helpful, on a political basis, my firm advice to the White House and to Congress and to every American voter would be: please re-approve something so that we can maintain the moral high ground in this truly important struggle against very dangerous international terrorists, who have an ideology and a commitment to either hurt us badly or die trying. That has not changed since 2001. The groups have morphed a bit, but the ideology hasn't changed, and I think that in some ways the unknowns about ISIL in terms of their size, how many adherents they have, how many people traveling on U.S. passports, United Kingdom passports, other EU passports, are in the mix over there, we don't actually know.

Just this week it was confirmed a couple of French citizens were self-radicalized, and have joined in the fight and participated in beheading videos. So I think there's a lot of questions to get answered. Political helpfulness will help the fight, internationally and the moral high-ground piece, for optics. Domestically, I think it sends a clear message that there is a joint effort, and it's in a non-partisan way. That in this struggle against this extremist-type of ideology, with a commitment to harm civilians, that we are united as a government, as political parties, for really and I would say beyond military force, to use all the elements of the national power. Because if that sense of Congress were moved into it, I think then you would see more effort on things like capacity building, things like security partnerships. And I do want to bring up here, the piece, that I haven't seen in a lot of these draft-language AUMFs, whether it was yours (Stephen), or any of the bills, I think only one of them has an 'in order to' statement. But anyone with military experience knows that in mission-type orders, which are what we adhere to in the United States, and most of our allies, it's most effective to state the mission, the commander's intent, if you will, of what the objective is.

The 2001 AUMF has a very clear 'in order to' statement. It says, "In order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons." So I think that any AUMF should absolutely include an 'in order to' statement to clearly articulate what's the strategic objective of the effort. But I don't know if that answers your question clearly- I think it's a political question- I think it's important, not legally necessary today.

STEPHEN VLADECK: I just want to ask for one clarification, right? So you said it's a struggle against an ideology. I assume you mean it's a struggle against an ideology held by a specific group. Right? That this is not the, you know we're not looking for statute against violent Islamic extremism, we're looking for a statute about ISIL.

ANDREW BORENE: I think the challenge is you end up with all kinds of peripheral, very difficult to answer, soft-ground questions if you try to define it as violent Muslim extremism. Because then you've moved into a religious conversation and a theological debate.

STEPHEN VLADECK: But also a conversation about groups that maybe have no capability or capacity to attack the U.S. in the present form, as opposed to ISIL.

ANDREW BORENE: Absolutely. And so I think if you are going to name names, you may need to name more than just ISIL. You may need to name Boko Haram, you may need to name AQAP, or whatever they peripherally spin into, but I think without some mechanism to adapt to whatever they rebrand themselves as, or where these other future alliances lie, there is no question that there is a nexus between these groups, that there is a shared ideology, and so I think it is important to identify what the mission is; which is really at the end of the day, to prevent another attack of international terrorism on a massive scale on civilians in the homeland.

STEPHEN VLADECK: So Daphne let me ask you. I wonder if it's also possible that a new statute would have a salutary effect, that folks who maybe don't necessarily share Andrew Borene's view of

the threat, might still support. Right? Which is to say, one way to look at the current situation is that the 9/11 AUMF has created an unstable legal climate. Right? That's what Cully was alluding to in his opening comments. And that its open-endedness, its lack of specificity, its lack of clarity about associated forces, its lack of geographic constraint. It's basically, its ability to morph into whatever the President wants it to be, is actually a real problem from a democratic accountability standpoint. A new statute at the very least, right, allows for renewed conversation and renewed debate. Do you think that's a fair view?

DAPHNE EVIATAR: Yes, absolutely. I mean and again, whether you think it's legally-required or not, it seems like there's pretty strong agreement here that it's politically really advisable. And for a lot of reasons, and I would add that- I think it also- one reason it's advisable is because I think it would require Congress to consider who exactly we're at war against. And not just Muslim extremists, wherever they are. But ISIL, and if there are other groups, to name them very specifically. And Congress does have to consider what's their—what is the actual threat they pose to the United States. And each group might be different. Boko Haram isn't the same as ISIL, AQAP isn't the same as ISIL, they may or may not pose a threat that rises to the level of justifying a war against them. And this is where you get into the international law question as well. We don't have the right to just kill people because we think they might, in the future, have the ability to attack us. But they don't now. That's not an actual threat to the United States and international law does not allow the United States to simply initiate aggression against parties that might say they want to attack the United States but actually have no intention to do so anytime soon. So I think one of the important purposes of a new law would be to specify who it is that we're at war against with, and I agree completely, what is the objective? What is the mission? What exactly are we trying to accomplish? Because without making that clear, you do, you can end up in a very long-term situation where it's not clear, and it's not clear to the military perhaps, even what they're authorized to do. It raises the question a bit about ground troops as well, which I think is, I don't think it makes sense if Congress is going to authorize a war, I don't think it makes sense for Congress to say: "But you can't use ground troops." Like, either there is a threat that is strong enough that we are going to use our military, or there's not. I don't think that it's Congress' position to tell the military how to fight its war.

STEPHEN VLADECK: So I guess, I mean, it seems to me that there's at least some degree of consensus among at least most of the panelists, that a new statute would be politically-expedient. So what I would like to do is, shift our focus a bit to: what the statute should say. As opposed to the old academic, just sort of, howling at the moon, what's wrong with everything? You know, let's think out loud about how this statute should be designed. And so, with that in mind, let me start with, before we get to boots on the ground, let me start with the geography question. Should a new statute be geographically-constrained? Right, that is to say, should Congress, whatever else it provides in the statute, actually specify the countries in which it is authorizing force? As a matter of law, policy, practice, whatever you think. And Cully, can I start with you on that one?

CHARLES "CULLY" STIMSON: Sure. First off, it's important- all of us here are burdened with a

law degree or about to be burdened with a law degree, so we have a law centric view of the world- a lawyer centric, rose colored glass view of the world. So I think it goes without saying, but I'll say it anyway, but an AUMF is not a substitute for a strategy. A strategy proceeds and necessarily is then followed by the legal authorization to carry out the strategy. And so, in our sort of lawyer 101 view of the world, we are focusing on the AUMF when in fact, as you heard from the previous panel, there have been dozens of AUMF's that this country has used and this the vast majority of those AUMFs, the President, has penned the draft and sent it over to Congress. And so I find it very odd that newspapers and the rest are saying, "Oh Congress isn't doing anything!" Well, it's the President's duty to lead, it's the President's duty to lay out the vision, it's the President's duty to lay out the strategy, and then it's the President's typical practice to lay out the AUMF. And the reason that hasn't happened is because of Syria last year. It's a true statement. He got burned when he asked for something he didn't get. And the elections took place and no one wanted to do any work on Congress or the White House except get themselves and the people in their party reelected.

STEPHEN VLADECK: You're not suggesting that the Congress is unable to go first?

CHARLES "CULLY" STIMSON: No. In fact, the Congress is perfectly able to go first and there have been instances where the Congress has gone first.

STEPHEN VLADECK: And indeed there are now thirteen different bills that have been introduced in Congress, including, perhaps most prominently, the one by Sen. Cain.

CHARLES "CULLY" STIMSON: Yes and that's why I'm sorry that our other co-panelist wasn't able to join us because there was an excellent CRS report laying out a table of all the major proposals out there. Congress can and has done this in the past. You have the President saying that he wants to engage Congress in this, that he's going to engage Congress in this, and Congress is sitting back saying, "okay go ahead." And you have other members of Congress who have done the hard work of putting together a draft proposal to get the discussion going.

To the geography question, notice that the 2001 AUMF did not have any geographical limits. In fact, this administration took the position, most notably in a speech by Eric Holder at Northwestern University last year where he said, "Our legal authority is not limited to the battlefields in Afghanistan and indeed Congress nor the federal courts have limited the geographic scope of our ability to use force in the current conflict in Afghanistan." And I don't think that's surprising. With al Qaeda, the Afghan Taliban, and now ISIS, you find them where you can find them.

If an AUMF were to either be proposed by the President, or eventually crafted by Congress with the help of the administration, as to the geography question, I think if you were going to limit it all you would say that, "Armed force can only be used in places consistent with applicable international law." And concerning the sovereignty or use of force, that's in the [Ben] Wittes proposal. That's a wise way to do it.

STEPHEN VLADECK: So if I understand, you're saying that an express incorporation of international humanitarian law would do the work—that an express geographic limitation might be at least aimed at achieving.

CHARLES "CULLY" STIMSON: Yes. And to those who would say that would be a cheap way to do whatever you want and that won't have any substantive restraints, I don't think that's true. Having worked as a JAG, having worked in the administration on the executive side, you have these discussions within the executive branch are cabined by not only the statute in front of you, but by international law principles and law of armed conflict principles. And so I think it is a constraining principle.

STEPHEN VLADECK: Andrew Carswell, can I ask you to weigh in on Cully's latest point? Which is to say, without expressing an opinion on the merits of it, do you think that an express incorporation of IHL would in fact effectuate meaningful geographic constraints that are consistent with the principles you've suggested before.

ANDREW CARSWELL: It's certainly a good start. I think the problem is that we can't always see the use of force when the military is involved through the lens of IHL or LOAC. In fact, there are cases in which it's going to be a self-defense type of paradigm. Now I want to give the example, the hypothetical. Say we have a member of ISIS and he walks off the battlefield. So he's certainly a member of an armed group, he's certainly targetable *ab initio* in so far as the territory of Syria or Iraq are concerned. But if he walks off the battlefield, say he's going to somewhere in North Africa to see his family, and that particular country does not have an armed conflict. Under the AUMF structure, certainly the 2001 AUMF type of structure parallel to that, this individual carries the battlefield with him. So, he's walked away from- I've talked about the Tadic definition of an armed conflict- he's walked away from that armed conflict and now he's gone to somewhere in North West Africa, and in that particular peaceful country he's now created a warzone by being there. So in other words, a targeting party can use the conduct of hostilities, means and methods of warfare. They can throw the big stuff at him and cause acceptable collateral damage to the civilian population of that country.

So one of the big issues that the ICRC is addressing now, and it's a very difficult issue, is whether in fact there is an ability to use extraterritorial force in this fashion. And right now it's definitely in the balance and I'll try to explain why. The individual who walks off the battlefield, is indeed still as a matter of status- he's still got that umbilical cord leading back to the conflict, but he now finds himself in a country where there is no armed conflict.

If you look at the laws of armed conflict and you look at the structure of Common Article 3 for non-international armed conflict and you look at the law of international armed conflict and bring some of that in, and I won't get into that analysis here, most of the law of armed conflict is built around the structure of territory and the Tadic decision confirmed that. It said that laws of armed conflict applies where there is this level of violence and organization of the parties and applies to

the full territory. It was also determined after the fact that this is also applicable to a spillover conflict and this is uncontroversial. But once you leave the battlefield, the question is whether it still applies there. Everything I've seen so far in the arguments on the blogs and so on and on the academic level have not actually brought this factor into it, and I think it's an important factor to bring in. Are you entitled to use lethal force as a first resort when somebody is away from the battlefield? By ICRC's read, it's not. It's maybe more of a policy issue now. We don't have enough state practice to drive it. There's a bit of a void there a bit of a vacuum, so ICRC is trying to persuade people that this is in fact the way to go, that once you're in a country that is not in an armed conflict, you're able to snatch that individual. Arguably you're able to hold them under the laws of war, that shouldn't be an issue. But you don't need to use lethal force at first resort because you're not in a wartime context. Laws of war were designed for that very specific and unusual context of warfare, so let's not turn every use of military force against an armed group into a wartime power.

STEPHEN VLADECK: So I appreciate that point I want to bring Cully back in, I just have one clarification point of I may. Which is—so if I'm hearing you correctly, a statute that simply took a step of saying "Such force must be consistent with existing international law"—?

ANDREW CARSWELL: No problem. It's consistent with existing law as applicable. You can always determine when it's applicable or when it's not applicable. Bringing it in is always going to be a positive from our prospective.

STEPHEN VLADECK: What I'm saying, is that the absence of clear state practice might mean that is less of a constraint. In other words, in your hypothetical, where we might want international law to not allow the use of legal force in that context, the absence of clearly developed state practice might not mean that international law would pose a clear constraint if that were the only statutory trigger. Do you see what I'm saying?

ANDREW CARSWELL: I see what you're saying. The U.S. government was going through this exact thinking a short time ago when you had the al-Libi snatch operation. Special Forces went in and picked him up out of Libya and took him away. Now, it was also stated at the time that this was not a function of *opinio juris*. We're doing this because it's a matter of policy. We want to have this guy.

But it's the kind of thing- I shouldn't say this because the ICRC doesn't have this public position- but you can see that argument that I just laid out is moving towards that position. You've got an ability to snatch the guy and you should because he's outside the direct hostility zone. This was a time when Libya was not in an armed conflict.

STEPHEN VLADECK: Cully, I know you want to jump in.

CHARLES "CULLY" STIMSON: I just want to ask a question. Maybe I didn't hear you correctly

and it's an awkward question but I'll try to frame it, Andrew. Did you just say, with respect to your hypothetical of a terrorist who drops his pack to go visit his family in North Africa, that because there is no mechanism for him to expressly disavow his association (like in a criminal law case where you disavow a conspiracy that you were engaged in), you could nevertheless detain him, but you couldn't target him?

ANDREW CARSWELL: "Target" is, as we all know in the military, a loaded term. What you can do- I'm not saying that at all. I'm saying this guy is a live threat. He's left the battlefield. He's gone to a new place. The question is whether you can use lethal force in the first resort. So talking in terms of ROE, whether you can use status based force against him or conduct based. What I'm saying is that the ICRC is moving to the conduct based argument because there's no requirement to use lethal force in the first resort in that situation. The laws of war were never designed- and human rights law for that matter- none of them were ever designed to tie the hands of the state in that situation. There's still a nexus to the armed conflict, and that's why I say that the detention piece is arguably still flowing from the armed conflict. Arguably you can hold him under the laws of war. Which means you don't have to prosecute him necessarily, you can intern him and so on. That's something the ICRC has always acknowledged.

The only discrepancy between him being in theater and him being out of theater is that you're not allowed, according to this read, to fire a bullet from the beginning. You have to go in there and get him out, it doesn't mean you're not going to use lethal force. You can in fact, as you know very well under the law enforcement paradigm- security operations paradigm, whatever you want to call it. It's derived from human rights law but the U.S. sees it coming from the general principles of international law. Whatever you want to call it, self-defense, it's not use of lethal force in the first resort. You can resort to your SWAT team type of tactics. Pick him up and take him away and hold him under the laws of war. If you subscribe to the notion that detention authority flows with it, which is not uncontroversial.

STEPHEN VLADECK: So let me pivot this away from geography and international law, which I think we've teed up pretty well, to the question of associated forces. Andrew let me start with you. It seems with regard to associated forces there are three possible approaches Congress could take. The first is, what I'll call the classic congressional approach, which is "do nothing." That is to say, to not address the issue at all in the statute, to say that the statute is specifically about ISIL and we're not saying anything about anybody else. The second is to expressly allow whatever force is authorized to actually have the statute say, "We are expressly allowing force against groups that aren't ISIL that meet these criteria." The third is a variation on a proposal that was put forth on a Hoover Institution white paper last year, which is to instead delegate the authority to the President going forward, to simply certify that groups become associated forces on the condition that the President then publicize that certification so that it's at least known who these groups are. And I guess, Andrew, I'm curious which of those you think is the best—or least worst.

ANDREW BORENE: Wow. I don't think this is a legal question. I think this is really an ethical question and an operational question. I think you lose surprise depending on what type of notice requirement you put in.

STEPHEN VLADECK: Surprise we're at war?

ANDREW BORENE: Well surprising that if yeah, I think that's interesting. The previous AUMF allows the President to determine who was associated. And it moves into all kinds of interesting areas with state secrets and protection of sources and methods and protection of operational plans. Maybe there's a mechanism, and I hate to say this, maybe there's a mechanism to preserve both the very important interest in Congress being notified what groups, individuals, or nations are being targeted, and maintain the element of surprise through a similar mechanism to briefing.

STEPHEN VLADECK: Like a Gang of 8 notification?

ANDREW BORENE: Or they can brief the full committees. That's always a decision that the agencies themselves can make.

STEPHEN VLADECK: So if I'm hearing you right, you're suggesting that the associated use of forces mechanism that you prefer to be in the new statute is one where the American people would be clueless?

ANDREW BORENE: I didn't say that. Okay I'll get fun now. There is very clear legal and legislative and congressional and executive practice precedent that the Permanent Select Committee on Intelligence and the Senate Committee on Intelligence are the people's representatives on matters that involve sources and methods of intelligence collection. The Armed Services Committees have oversight for military operations and planning. So I think by using those specialized committees as the vehicle, there is very long, established practice for that being a viable method. And that does not constitute keeping the American people in the dark about important elements to the operation.

STEPHEN VLADECK: Surveillance- you know, surveillance authorities or anything like that.

ANDREW BORENE: But yes, absolutely yes. And I realize I'm in the minority at-

STEPHEN VLADECK: No, no, no, so putting aside the surveillance- I mean we could have a whole fight about the House Intelligence Committee and surveillance oversight, which would allow me to bring up my great exchange with Mike Rogers- leaving that aside. But there's no precedent for, historically, for that kind of classified oversight of *jus ad bellum* questions. That is to say, to go to war with a group with which we were not previously at war. Would you at least agree with that?

ANDREW BORENE: Or an individual. I mean I think that this type of conflict that we are engaged in- I mean there has been so much written about this conflict being somehow different than

others because we do end up with ethical dilemmas as a nation where we have to make a decision based on intelligence evidence whether or not we're going to launch a drone strike with a hellfire missile to kill a U.S. citizen who is on foreign soil. Not in an area of active hostilities as defined by any declaration of war or AUMF. So the ethical dilemmas get very complicated. They're probably not best served with mass 350 to 400 million people's public consumption, at least not until after the fact when they can be revisited forensically for the political value. But yeah, I think that we have to look at conventional mechanisms that are approved for very sensitive government operations in this particular realm of counterterrorism as it stands today when you think about what are the effects of missing on the defense. It's like being a goalie in soccer. They got to be successful once; the government must be successful every time. The numbers of people that have to be involved in these conspiracies doesn't have to be huge. 9/11 was nineteen people, one of whom got kind of apprehended. I realize I kind of got on my soapbox here, but recognize that it's not as simple as "Hey the founders in 1787 August had this discussion about 'make' versus 'declare' war." It's hundreds of years later. The macro threats posed by very small groups of individuals to the global economy, to our homeland, to the lives of innocent civilians, is not insignificant and I think you have to take that into consideration into how you allow the government to run counterterrorism operations.

STEPHEN VLADECK: So just to take your soccer metaphor to the last point. In effect, the American people can know there is a soccer game going on, but don't get to see the ball.

ANDREW BORENE: The American people will see the ball. And I think there are ways, again—forensically where, in advance, the committees can be briefed, they are briefed, they do have oversight. There's another structural factor here. For instance, regulation of anything. In any regulatory regime, sometimes the more you regulate, the more things move into the black market. If you enhance taxes too much, if you prohibit alcohol, it moves the black market, now organized crime is running. For the government example, I think the thing is if you squeeze too hard on demanding full public accountability for all intelligence operations, for instance, you will end up with very very secretive secret government intelligence operations. Similarly, if force everything- if you're going to mandate reporting for everything under Title 10 or conventional defense authorities, what will start to happen to maintain secrecy and operational security effectiveness is that a lot of that stuff will move into covert operations or clandestine service operations because that's how they will be able to fulfill those requirements for secrecy. It's a tough balancing act, it's as old as the republic or any other nation, but you have to allow some level of appropriate secrecy for government operations, particularly in areas of war and security.

STEPHEN VLADECK: I agree with that completely. I guess I've taken the 'moderate' out of moderator. I agree with that completely- all I'm trying to suggest is, it seems to be a difference between individual operational details, where you and I are in complete agreement about the need for secrecy, and the larger question of the identity of the groups that we think, in general, we have the legal authority to use force against. That strikes me as a relevant and material distinction, but you and I may have to just agree to disagree on that.

Daphne, can I ask you about the associated forces problem and how you would want the statute to reflect that?

DAPHNE EVIATAR: First I have to say that when you're talking about the soccer analogy, it seems to me that it's not hiding the ball. It's hiding who's the other team that we're playing against. And I think that's kind of outrageous to say that the U.S. government should be able to go to war and not say who we're fighting. I completely agree and understand that a lot of intelligence operations need to be secret. It's more like, okay, the coach gets to keep his strategy for winning the game secret, okay that's understandable. But you can't not say who the game is against. So I think that with the associated forces, it's really important to name exactly who those associated forces are. You don't have to name any particular individual, but they generally know who they are anyway because they know they're fighting and they know they're a member of this organization. That's really not a big secret. That's very different than saying, we're going to use this particular strategy, we're going to snatch this person at this time, we're going to use a drone at this particular time.

The other I just want to say- I guess this is going back to the geography point, but it relates to the associates forces- which is that I think it's really important to incorporate the international law limitations, but that in itself doesn't tend to stop Congress from much or this administration from much. So I think, both as a matter of geography and as a matter of who is the enemy, the 2001 AUMF, by failing to identify those things became this amorphous law that has been used for thirteen years now to justify a war that has changed very much in different locations. And it has also been used to justify covert targeted killing operations in countries that we've never declared war against, for example Yemen and Somalia. And it's not clear that those would fall under the definition of a war under international law—very likely they would not. War between the United States and terrorists operating in those countries probably does not rise to the level of a non-international armed conflict. So I think that it's really important that any new AUMF specify both who exactly the enemy is, including the associated forces, and if that changes over time, come back to Congress and tell Congress that, and the geography of where we're fighting the war.

STEPHEN VLADECK: So I wanted to get to sunsets, but I know Cully and Andrew Carswell both want to respond, so Cully why don't I come to you first, then Andrew.

CHARLES "CULLY" STIMSON: May 16, 2013, which was last year, the Senate Armed Services Committee held a full hearing on the law of war and the law of armed conflict and the AUMF. The first panel were senior administration officials. I was on the second panel with Jack Goldsmith among other people, Geoff Corn, etc. It was very clear to us in the second panel, as we were sitting there listening to the administration officials speak, that the practical application of the 2001 statute had gone well beyond what any of us had thought up until that point. We've declared war only five times in our nation's history. As the previous panel pointed out, we've had dozens and dozens of AUMFs. Many of which—well, in our declarations of war, we named the enemy. In the AUMFs, sometimes we named the enemy, sometimes we didn't. In the 2001 AUMF, we did not name the enemy. But at least insofar as the detention part of the law of armed conflict of AUMF goes, the

enemy came to be known as al Qaeda and the Afghan Taliban. So if you look at the habeas cases that came out of Guantanamo and the court decisions, it was pretty clear that the court has sort of filled in the gaps of who these associated forces are. Whether you fall into status as a belligerent or whether you don't and your habeas petition is granted. And so, between the three options that Steve gave do nothing to put in the statute or the Hoover proposal, which if you haven't read it, you should read it, it's very interesting. The benefit of putting it in the statute, is that not only do you put it on firmer political grounds, domestically and internationally, the fact that you are targeting ISIL, or ISIS as I prefer to say, but you give the administration—the Commander-in-Chief—the flexibility to make those real time determinations of whether they are indeed true associated forces engaged in hostilities against American forces. And then you put on top of that strict oversight, so that you can see whether they're straying too far away from the farm, which is the tendency of the executive to do regardless of who is in power.

STEPHEN VLADECK: Andrew-

ANDREW CARSWELL: Daphne you had some very good points. I just wanted to give you maybe the ICRC perspective on Yemen or Somalia because you mentioned those two. In both of those cases, the ICRC would say that you have a pre-existing non-international armed conflict. So in Yemen, you already have the Yemeni government fighting against al-Shabaab- excuse me, AQAP. In Somalia you have the Transitional Federal Government fighting against al-Shabaab. Those are pre-existing conflicts. So when the U.S. comes in and joins the government in that fight against a non-state armed group they've effectively joined the conduct of hostilities paradigm. They've joined the whole armed conflict construct, and by ICRC's read, they're entitled to use distinction, proportionality, and precaution, all the basic principles of targeting in armed conflict in those countries. So the fact that maybe the force between the U.S. and that particular group doesn't rise to that level, it doesn't have to in those cases because they're joining in a preexisting NIAC.

And from that perspective- I just want to make it clear that when I talk about geography of war, to my knowledge we haven't seen a strike anywhere in the world that's not in a defined armed conflict.

STEPHEN VLADECK: So far as we know.

ANDREW CARSWELL: So far as we know, yeah. What we're trying to do right now is preemptive in a sense.

STEPHEN VLADECK: The allegation, I think, that has never been verified that comes the closest is Mali and whether the U.S. was engaged in any active operations in Mali. But I may be getting to-

So Andrew, really quickly let me ask, how relevant to your last point is the host sovereign's consent? One of the issues that has come up in this conversation is the importance or not as a matter of U.S. or international law of the consent of Pakistan, Yemen, or Somalia to uses of force on their soil by the United States. Can you say a word about that?

ANDREW CARSWELL: I can but I'm giving caveats here, there, and everywhere, I can't speak to domestic law, and I can't actually get into detail about *jus ad bellum* politics because we don't go there, but I can give a couple of fundamentals. You've got three levels of law that are working at the same time from an international perspective. You've got the *jus ad bellum*, the U.N. charter type of law, whether you can use force against a sovereign country; you've got the IHL level coverage which talks about the protection of those who are no longer participating in hostilities; and then you've got this human rights law which arguably applies, and the U.S. government disagrees that it applies extraterritorially. So all these three things are happening in concert at the same time. So whether a state consents or does not consent is going to affect the top test, of the *jus ad bellum*. If the country doesn't consent and you go ahead and do it anyway, you violate the *jus ad bellum*, that doesn't affect the fact that you still have to abide by the *jus in bello*. So we can get into—if there is consent then you're good to go. If you've got Chapter 7 authority from the Security Council, you're good to go. If there's an armed attack under Article 51 of the U.N. charter, you're good to go, but what constitutes an armed attack is very controversial, pre-emptive versus anticipatory self-defense is controversial, but we need to take a step back because when we get political we start to lose our humanitarian focus.

STEPHEN VLADECK: So, I have two more sort of buckets of questions before we turn it over to your questions. The first, I have to say I am pleasantly surprised by the commonality in the proposals of some kind of sunset. That is actually not a common element of most AUMFs historically. There are only one or two examples of Congress putting an express sunset provision into a prior use of force authorization, but it seems to be, sort of, a point in which there seems to be consensus that there should be a sunset in any new ISIL-specific statute. I'm curious for the reactions of the panelists to both whether there should be a sunset? And if so, how long? Andrew-

ANDREW BORENE: Back to my 'in order to' statement, I think if you look at the requests and the statements from the White House and I think several members of Congress, both parties, the "in order to" statement starts to look like "in order to degrade and destroy ISIL or ISIS." Right? So I am not sure how we are going to define the destruction of the Islamic state in Iraq and Levant or Daesh. I guess if you say Daesh it is offensive to them somehow so we are supposed to say that now, according to some politicians. Some policy people in E.U. came up with that one too, I think. Apparently it means a bigot who imposes their will on other people in the local vernacular; so, if you want to offend them we call them sissies or Daesh; but, in reality if the intent is more akin to a declaration of war against a non-state. I think it is very important to remember also that these people are not privileged combatants. They are not people operating within the construct of international humanitarian law. It's very- I think domestic jurisprudence- we should have agreement here from the former these are not privileged combatants by any construct of international law. They don't get, unless they have fit themselves into the box of bearing arms openly, wearing uniforms, and none of them do to my knowledge, swearing bayat to your terrorist group of choice does not constitute sufficient privilege to get the protection of international law.

STEPHEN VLADECK: But separate from these jus in bello questions because I really do not want to get into the law, I do not think we will have time if we start talking about jus in bello.

ANDREW BORENE: So the question is how do you define the destruction of a non-state to say in order to degrade and destroy ISIL if that is the endpoint, which I think is a logical endpoint, but at what point is that? Is that when Iraq is under the control of the Iraqi government as we support it and Syria is back under the control-

STEPHEN VLADECK: But does that need to be the question? Because what I hear in your response is that you view a sunset as an expiration provision and of course as you know that in the national security context it actually hasn't typically been true. So, if you look for example the FISA Amendment of 2008 where there was a sunset entirely because Congress was like well we're not sure if we are going to like this and so the administration says put a sunset in it, you can come back to it. Congress has now reauthorized that twice without blinking. So, do you need to have the answer to the when is ISIL destroyed question in order to answer the sunset question?

ANDREW BORENE: No, but what I am saying is, was the strategic objective is important? And how long may it take? And if it is on the order of years then I think the sunset should also be on the order of multiple years, perhaps five to ten. I think any AUMF where you start looking at one to two year type renewals, it turns into the same problems the Pentagon faces right now on the Budget Control Act. It is tough to make a strategic plan when you are constantly looking for a continuing resolution for how to do your budget planning. Similarly, for operational planning for successful campaign to destroy ISIL, I think looking at it on a one to two year recurring basis makes it too tight, so at least five to ten years.

STEPHEN VLADECK: Five to ten years. Alright. So we have five to ten years on the floor. Panelists?

CHARLES "CULLY" STIMSON: You sound like an auctioneer.

STEPHEN VLADECK: I was just thinking that.

CHARLES "CULLY" STIMSON: Do I have a five, do I have five? Can I hear a ten?!

STEPHEN VLADECK: I don't think we are necessarily going in one direction or the other.

CHARLES "CULLY" STIMSON: I don't think you can answer the question. I hate to do a copout. You have to have a strategy first, you got to hear from the President what the goal is. We have heard degrade and defeat. If they amplify that and say destroy, eradicate, from the face of this Earth, you've heard from the four senior administration or former administration officials how long they think it's going to take. Ultimately it is a political question, not a legal question; and then there is the

subtle point that you made Steve, and that is, you know, is it an end date or is it simply a come back to us and we will take another look, date. And so I think that if they are dead serious about actually destroying them, then you don't have a sunset. If they don't think they have the political will for a long struggle to ultimately crush them, then you have either an end date or you have a "come back to us." But whatever it is going to be, it can't be before the next President takes office; it's just not politically sustainable.

STEPHEN VLADECK: So I think that the most common proposal, right, is somewhere around the order of two to three years. So that would be on the far end of the 2016 presidential and congressional elections, so it would be a new Congress. Daphne, do you have any thoughts?

DAPHNE EVIATAR: Yeah, I mean I think- I agree it's tied to what the mission is. I have always been pretty confused on whether it is degrade and destroy I mean, isn't it one or the other-

STEPHEN VLADECK: You mean like compare and contrast?

DAPHNE EVIATAR: Yeah, if you're just going to try to hurt them so they are less likely able to hurt us, that's one thing. Destroy is really different. I think that's one reason Congress needs to decide what the objective is that they'll support. Then I think that again what we've seen from the 2001 AUMF is when there is no sunset, it threatens to go on and on and on. Although I hesitate to say a specific time period because I am not in the military and I understand completely that there are very practical reasons you need to be able to plan for a certain time period. I think that there should be some sunset, I would say less than five to ten years more on the order of two to three years. But that it does have to part of the discussion in Congress about what should be the objective and it should be tied to that. It's not to say that the President loses his authority then it just means Congress has to re-decide whether or not we want to continue to be in this war.

STEPHEN VLADECK: So it's degrade or destroy?

DAPHNE EVIATAR: Yeah they have to figure that out.

STEPHEN VLADECK: This is actually my old line about big and tall stories, as a big and tall person. So big and tall stores are not really big and tall, it's more a big or tall store.

CHARLES "CULLY" STIMSON: I've never been to one of those.

STEPHEN VLADECK: You have something to aspire to over there, Cully. So my last question before we turn to you guys and I encourage folks who have questions of their own to make their way to the microphones. Let me start with a quote, and this is from Justice Kennedy's majority opinion in *Boumediene* (*Boumediene v. Bush*, 553 U.S. 723, 723 (2008)) in 2008. At the very end of his opinion about why the Guantanamo detainees are protected by the suspension clause, Kennedy went on a very strange tangent. And what he said is, "because our nation's past military conflicts

have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If as some fear, terrorism continues to pose dangerous threats to us for years to come, the court might not have this luxury. This result is not inevitable, however, the political branches consistent with their independent obligations to interpret and uphold the constitution can engage in a genuine debate about how best to preserve Constitutional values while protecting the nation from terrorism.” So, I read this language from Kennedy as saying dear political branches, get your stuff together. This is your job, it has now been seven years, it has been another six years since you cast AUMF and you’ve done nothing meaningful to actually clarify these authorities. And if you don’t do anything meaningful, we will. Am I overly optimistic about Justice Kennedy or do you guys actually share the view that the courts may eventually find their hands forced if, notwithstanding our consensus, Congress does nothing in this arena . . . Oh I finally stumped you! Andrew.

ANDREW BORENE: I’m just going to answer. The courts, particularly the Supreme Court, tend to be extremely deferential to national security. I hate to say this because in many ways it is embarrassing for Americans to admit it, but *Korematsu* may actually be good law, right?

STEPHEN VLADECK: Depends on what you mean by good law.

ANDREW BORENE: Well, I don’t mean good law.

STEPHEN VLADECK: The *Korematsu* decision has been vacated, right? Anyways, I’m sorry.

ANDREW BORENE: Well, I’m just saying, there is not a firm ruling contravening it yet. Right, I think we would all argue that that’s likely to change in future time. However, the courts are traditionally very deferential to national security. So, for that reason, and I think- we can’t predict the future, but politics matters, and what would happen to the public mood, right now I think 90% of Americans are afraid that ISIS can attack us here in the homeland. I think more than two thirds-

STEPHEN VLADECK: 90%?

ANDREW BORENE: That was the last number I just read.

DAPHNE EVIATAR: Something crazy.

ANDREW BORENE: Yes, that is a crazy number. 67% support military action against them. So, that’s a far cry than it was in February, 2003 when I was in the deserts of Kuwait contemplating, being part of the- I wasn’t contemplating being part of the force, that wasn’t by choice anymore- but as the Presidents in the Clinton administration were debating whether to invade Iraq to pursue WMDs that might or might not have been there. And so I think, we can’t know-

STEPHEN VLADECK: We’re still going off might or might not have been there?

ANDREW BORENE: I'll go with not there. But nobody was more grateful for that than me. Having driven in a Humvee with no doors through Baghdad. But my point is that we don't want to fight the last war, and right now, kind of like there was a hangover Vietnam that results in the War Powers Resolution which everybody on both panels both agreed that that was not a perfect piece of legislation. Right now we are concerned because there is a very serious hangover for many of, us myself included, that the WMD argument to invade Iraq for preemptive reasons was a bad one. It was not related directly to 9/11 and, there is- it created some bad blood around the world for America. Now, does that mean that right now because ISIS is emerging in the same geographical region and we do need this sustain counter-terrorism operations that we need to throw the bathwater out with the baby and start restricting the President his executive authority or her executive authority as Commander-in-Chief because we're afraid that they might do a do-over of 2003 Iraq? And I think we need to be careful because the courts will be deferential to executive judgment in matters of national security. I think frequently more so than they are to Congress, with the rare exception of that budgetary appropriations argument, which I don't think it has ever- there are probably smarter law professors than me- I don't think that's ever been defeated or argued that Article 1, Section 9 Appropriations Authority is not an appropriate measure for Congress to stop the executive from doing activity . . . you name it.

STEPHEN VLADECK: Anybody else on the courts? Cully?

CHARLES "CULLY" STIMSON: You have to remember, and you know this, Steve and Daphne, and Andrew quite well, that Kennedy has for some time, occupied a unique position on the court. It has given him the ability to be on the soapbox and call balls and strikes and push cases one way or the other. Boumediene was the last in a long series of cases before the court that Lou touched on starting in Rasul, Hamdi, Hamdan. And my sense of that quote is not that they're eager to get back in the game; but that, they were getting tired of having to weigh in on these matters and that he was encouraging, which is perhaps his role, perhaps not, Congress to make sure that knowing that this conflict was going to last a long period of time, that they needed to have more clarification and more debate and more clarity in statutes with respect to legal authorization for various aspects in the long war.

STEPHEN VLADECK: And I'll just add, to my mind, one of the most interesting opinions to come out of the Supreme Court this year was an opinion concurring with the denial of certiorari in a case called Hussein v. Obama (Hussain v. Obama, 134 S. Ct. 1621, 1622 (2014)) where Justice Breyer who has not been a particularly active voice on these questions, goes out of his way to say there are actually some really big questions about the 9/11 AUMF that we still haven't answered. For example, does it apply outside of Afghanistan at all? And does it really allow for potentially indefinite detention of someone who is not necessarily engaged in armed conflict the time he was captured. Now Breyer says Hussein wasn't the case to resolve that but if he's right that there are multiple justices who believe these are questions that aren't answered by them- maybe by the D.C. Circuit they are- I wonder if it might be sooner rather than later on that front, especially since we have 143 men at Guantanamo.

ANDREW BORENE: 148.

STEPHEN VLADECK: 143. They released five this morning. BOOM current events! That's why you got to be on Twitter. So with that, I learned that during the first panel so I was cheating. Let's turn to questions from the audience.

PAUL SCHWEN (Question 1): In 2010, Obama said that Congress didn't intend for the AUMF to be limited by international law, and I know that statement was supposed to be dictum, but considering that the international law to authorize force that comes out of post-World War II and state-on-state regime, was Judge Brown right since the enemy today is a non-state actor, that's irregular combatant and any military force or statute that authorizes that force to effectively go after this combatant would necessarily either violate international law or operate outside of it? What can we do about that, moving forward with the international law?

ANDREW CARSWELL: Excellent question. There is nothing in international law which is going to prohibit you from going after non state-armed group in the regular course. There are some situations where you can't go after them. It might be the *jus ad bellum*, it might be the UN Charter type of issue where you can't get through the sovereignty issues, you got a country that is unable to deal with the threat but they don't want to let you in. That gets into the *jus ad bellum* issue. In terms of actually prosecuting a war against these individuals, you've got all the construct, and this is where I have to disagree with my esteemed colleague, who is very persuasive, but when it comes to the issue of non-state armed groups, it's not an issue of whether they follow a chain of command and so on, it all comes down to separate tests; whether they're organized and whether the intensity has reached a particular level. So if they've reached those two things then the case law of the international criminal courts has said that in fact IHL applies to both sides, to both parties. So from an ICRC perspective we go out and actively talk to these groups. I've done it myself in some groups in Southern Syria for example, we actually talked to them about their obligations under the laws of war. I'm not saying spoken that I spoke to ISIS, but it's extremely important that we remember the notion of equivalency of belligerence and that the laws of war apply to all parties of an armed conflict and that we try to persuade all the parties to go down that road. Now, when will we reach that point with ISIS? If ever, I don't know, but I can tell you that for example we were able to move convoys in these countries, talking about Iraq and Syria. We were able to somehow get the word out, might be indirectly, that these convoys are going through please don't attack. That's a successful framework we have now. Can we get to the next stage of actually saying by the way now you're now a formed party to an armed conflict and can we have discussion of the laws of war. That's a very delicate issue and I'm not going to be overly optimistic, you don't give up hope because there have been cases where for example, in Afghanistan we were able to talk to the Taliban with their leadership, about their obligations and getting them code of conduct, and so on. I'm kind of drifting off from the center of your question, I just wanted to answer that part of it. The international law does not in any way, inhibit a state from prosecuting a war against these individuals. There will be cases where it does get in the way like *jus ad bellum*. But even if that does happen, you still have laws of conflict applicable.

STEPHEN VLADECK: One of the things, as a matter of domestic law, one of the ironies I always found with Judge Brown's opinion is that if you actually go back to Hamdi. Hamdi is a 2004 case where the Supreme Court says the AUMF does include detention authority, even though the 9/11 AUMF is silent to detention. Justice O'Connor was quite clear that the reason why she believed that AUMF brought with it detention authority was because it should be interpreted consistent with the law of armed conflict, and that it was a necessary incident of the law of armed conflict that you detain as part of an armed conflict, especially because detention is preferable to unnecessary killing. The irony to me of Judge Brown's reasoning was if the AUMF's was not constrained by international law, then the AUMF presumably is not also incorporating international law and therefore there isn't any obvious detention authority in the AUMF. I mean, that was always one of the things that struck me in her opinion, but maybe that's just me. Anyways, next question.

MARK DAVID: Mark David, I'm a Navy JAG. I'm just curious. It seems like there is a consensus on the panel, if I heard everyone correctly, that AUMF is imperfect for this current conflict-

STEPHEN VLADECK: The 9/11 AUMF

MARK DAVID: The 9/11 AUMF is imperfect for military force in ISIS. I'm just curious, independent of the AUMF, any panelist can answer this question. What are your opinions? ISIS has beheaded three American citizens, claims a war, seems like they want to suggest doing more horrible things against American citizens. Independent of the AUMF, does the President have authority to use military force against ISIS?

STEPHEN VLADECK: So this is for the self-defense question.

ANDREW BORENE: I would say absolutely. I think without a doubt that the first duty of the President of the United States is the security of the nation as Commander-in-Chief. Article 2 Section 2. He doesn't need to wait for congressional approval to defend. Then you have to enter into a calculus of what's the capability level, the intent, capability, and the imminence of the threat. I think that then becomes more of a political question in some ways about how you make that assessment. I mean if you're a JAG you get it. Similar principles common to all international humanitarian law apply: proportionality, imminence, reducing civilian casualties.

STEPHEN VLADECK: But Andrew, you're not suggesting that the threat ISIS poses and the three attacks provided general warrant for uses of force against ISIS wherever they are? I mean presumably if it is a self-defense argument it has to be tied to something more specific. Right?

ANDREW BORENE: Does it? I'm asking the same question you are. Under Article 51, internationally, U.N. charter, now I'm under Chapter 7, Article 51 self-defense, as determined by the nation itself, and the President has the authority to be the Commander-in-Chief and defend the homeland, and the national counterterrorism center and the CIA counterterrorism center get

together and write a big report and say “hey these five people are going to come cut off heads in Manhattan next week,” to me, it seems pretty clear the President has the authority to use lethal force.

STEPHEN VLADECK: So the analogy I always use in my class. Let’s go after Pearl Harbor. I think we would all agree that FDR, had he known anything or had acted on apparently what he might have known, would clearly have the authority to shoot down the Japanese planes once they’re in U.S. airspace before they drop the bomb on Pearl Harbor. So then back that up. Can you shoot down Japanese planes while they’re over the international or Pacific Ocean? Can you attack the aircraft carrier before the Japanese planes can take off? Can you attack the Japanese aircraft carriers when they’re still in port in November in Japan? Surely there is a point going backwards on that chain where you can no longer use force in self-defense.

ANDREW BORENE: That’s what makes this particular conflict with this particular enemy very difficult. Because they make an overstatement that they want to hurt you or die trying. That makes it very difficult I think. In a way if you want to use a WWII analogy, you take the worst of the Nazi S.S. with their genocidal, no respect for humanitarian law designs for global domination, and you mix it with the worst of the worst of kamikaze culture. You put those two together in a very horrible enemy. So I think that yeah, those factors have to weigh in to the decision.

STEPHEN VLADECK: I don’t disagree with that. All I have to say is that I think that’s only a further argument for Congress. To avoid pushing the President to rely too aggressively on authorities that are best I think exercise in the breach. Maybe that’s only a further argument why we need a statute.

ANDREW CARSWELL: Just really quickly, only Article 51 governs situations where you’re worried about getting through the sovereignty of a country. In the case here when you have consent from the Iraqi government or you’ve made an argument to get into Syria through self-defense of Iraq. In either case, you’ve got a way to get there. I think what you’re talking about is relevant to Syria, it’s not relevant to Iraq because of the consent issue.

STEPHEN VLADECK: So I guess the honor of the last question goes to our Editor-in-Chief, Caitlin Marchand.

QUESTION: So with the 2001 AUMF, it kind of laid out a little bit, and we kind of relied on it for our detention policies, if we were to have our ISIS AUMF what if the President tried to claim robust detention authority, would you think he is able to do that since he is kind of right now using the self defense argument of why we are going after ISIS? Do you think detention policies are really even necessary since we are using air instead of boots on the ground?

ANDREW BORENE: I don’t know if it’s especially decided if we will ever use boots on the ground either.

CHARLES “CULLY” STIMSON: Think of it a different way. If, and I think it's going to happen, we capture an ISIS person, and there is no statute, ISIS specific AUMF, would it be more or less difficult for the government in court precedes, assuming let's say they took him to Gitmo, which they won't do, to justify their detention? The answer is it's harder. So I think by including ISIS or having an ISIS specific AUMF for merging the substantive groups in a new statute, like al Qaeda, Afghan Taliban, and ISIS into a new statute and repealing the 2001 or 2002. I don't think there is any doubt that if an ISIS detainee was detained and that authority to detain was challenged then they would be on much stronger legal ground then they are now.

STEPHEN VLADECK: I would just like to say two things. First, I think practically this isn't going to matter. What I mean by that is we may pick up people but I don't see this administration subjecting any new individuals to long-term military detention whether at Guantanamo or elsewhere. Perhaps we might try to get the Iraqi government to detain these individuals or others. So practically I don't think this is an issue. But if we do end up re-detaining, starting from scratch, the law now is fairly well settled in ways that it wasn't when we started Guantanamo, and it is well settled in two respects. First, there is a far-wider panoply of criminal offenses that clearly applied extra territorial conduct. So you won't have the problem we have with Guantanamo with detainees who aren't chargeable with any offense. But second, the jurisdictional question is settled, and so it won't take seven or eight years to litigate the power of the federal courts to hear their habeas cases, they'll go straight to the merits. I think that more than anything else, is the reason why there won't be much of an incentive to have these cases, lest you give the courts the very in to decide these questions about the scope of the war powers they've historically resisted. Wow I didn't mean to talk that much. So with that why don't you guys join me in thanking our panel for a really helpful, lively discussion? We have solved everything. And on behalf of Jesse, Caitlin, and the National Security Law Brief) let me invite everyone except you people watching on the livestream to food and beverages out on the foyer. Thank you very much.