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The Use of Military Force,
And the 2001 Authorization for Use of Military Force***

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The authority for, scope of, and means used to prosecute the armed conflict with al Qaeda are all critically important questions for our nation, our armed forces, and elected officials responsible for establishing U.S. national security policy. As in the prosecution of any armed conflict, each of these issues is impacted by complex considerations of law, policy, strategy, intelligence, and diplomacy. The Authorization for the Use of Military Force (AUMF) enacted by Congress in response to the attacks of September 11, 2001 has served and continues to serve as the key source of constitutional authority for the conduct of military operations directed against these belligerent opponents. This Joint Resolution expressly manifests the combined will of our nation's political branches to include the full might of the U.S. Armed Forces within the range of available options for addressing this threat. It does not, however, explicitly define the scope of such military operations, nor limitations on the methods or means of warfare utilized during the course of such operations. This is consistent with past practice of providing similar authorizations for the conduct of armed hostilities, and is therefore unsurprising.

The undefined scope does not, however, suggest an unlimited grant of authority, or what some have characterized as a "blank check" to wage war anywhere in the world against any group (or perhaps individual) deemed by the President to present a threat of future terrorist attacks. Instead, as I will explain in more detail below, the scope, methods, and means are all rationally framed by both the authorization's language and its implicit incorporation of the law of armed conflict. Because I do not believe there is sufficient indication of any inconsistency between the nature of U.S. military operations conducted pursuant to the AUMF and these inherent limitations, I respectfully oppose any effort to modify the Joint Resolution. Instead, I believe that Congress should work with both the Executive and the Department of Defense to remain fully apprised of the strategic, operational, and at times tactical decision-making process that results in the employment of U.S. combat power pursuant to the AUMF. This will enable Congress to ensure that these operations continue to fall within the scope of an authorization targeted at al Qaeda, the specific terrorist belligerent group assessed as responsible for the September 11th terrorist attacks, and that these operations reflect unquestioned commitment to the principles of international law that regulate the use of military force, namely the law of armed conflict.

In support of this opinion, I will address the questions provided by the Committee, although I note that in some cases I have paraphrased these questions. I am also attaching a copy of my curriculum vitae to provide members of the Committee with greater insight into the basis for this opinion.

1. What persons and organizations are by the existing AUMF and does it cover al Qaeda and associated forces that may have had nothing to do with the terrorist attacks of September 11th, 2001

I believe the AUMF, properly interpreted, covers al Qaeda as a belligerent

organization, including offshoots of what is generally understood to be the “original” al Qaeda. Determining enemy “order of battle” (identifying the enemy organization) is a complex endeavor in any armed conflict, but is an essential foundation for effective threat identification. In the current conflict, this process has apparently resulted in the determination that al Qaeda, as an organization, has evolved since the enactment of the AUMF. In reaction to this evolution, the United States has employed combat power against new iterations of al Qaeda, and also against “associated forces,” or cobelligerents, of al Qaeda – belligerent groups that adhere to the overall terrorist objectives of the organization and engage in hostilities “alongside” al Qaeda [quoting Jeh Johnson] intended to further these objectives (including threats directed against the United States, its armed forces, and its interests abroad) – in Pakistan, the Arabian peninsula, and the Horn of Africa. I believe this is both operationally logical and consistent with the AUMF. By providing authority to use all “necessary and appropriate” force against those groups responsible for the 9/11 attacks in order to prevent future attacks, the AUMF provided the President with the necessary flexibility to tailor U.S. operations to the evolving nature of this unconventional threat. In this asymmetric struggle, the authority in the AUMF provided a logical method to ensure that the efforts of al Qaeda both to morph in response to the overwhelming U.S. combat capability and to seek sanctuary in locations that they believe provide the freedom of action they possessed in Afghanistan prior to Operation Enduring Freedom would not hinder the efficacy of the U.S. response. In short, just as the nature of the threat has evolved, the scope of military operations conducted pursuant to the AUMF must also evolve.

Identifying a group as a “co-belligerent” with al Qaeda is therefore the critical intelligence determination that justifies subjecting that group (and its belligerent operative members) to operations pursuant to the AUMF. In my opinion, the Executive has acted rationally and in good faith in making these assessments. While I am not privy to this decision-making process, open source information indicates that the al Qaeda co-belligerent determination has been limited to groups seeking sanctuary in Afghanistan/Pakistan border areas, Yemen, and Somalia. It should be obvious that this co-belligerent determination cannot be based on traditional indicia of co-belligerency applicable in inter-state hostilities, such as mutual defense treaties or involvement in hostilities of regular armed forces. The focus on shared ideology, tactics, and indicia of connection between high-level group leaders therefore seems to emphasize both logical and legitimate intelligence indicators of which offshoots of al Qaeda fall into the category of co-belligerent, and therefore within the scope of the AUMF. For example, in prosecuting Somali terrorist Ahmed Warsame, federal prosecutors stated in court papers that leaders of the Shabab group in Somali had sent Warsame to Yemen for training with the “core” al Qaeda offshoot, al Qaeda in the Arabian Peninsula. This is an example of reliance on indicia of collaboration in training and operational tactics as factors that would demonstrate co-belligerent status.

Finally, I do not believe the AUMF should be amended to incorporate either a list of defined co-belligerent groups or the co-belligerent assessment criteria. This

would undermine the efficacy of U.S. threat identification efforts by signaling to this unconventional enemy exactly where to seek sanctuary and how to avoid the consequence of falling within the scope of the AUMF. In so doing, it would unnecessarily provide a windfall to al Qaeda and enhance enemy freedom of action, a consequence that would be fundamentally inconsistent with the strategic and operational military objective of keeping this enemy constantly off balance and retaining initiative for U.S. forces.

2. Does the AUMF appropriately cover current threats against the United States, and should it be expanded to cover terrorist groups that are not associated with al Qaeda?

Based on publically available information, and the fact that President Obama has not publically asserted a need to expand the scope of the AUMF, I believe the AUMF does currently address the *belligerent* threat against the United States posed by terrorist groups. I emphasize the term *belligerent* for an important reason. It is obvious that the AUMF is a grant of authority to use the nation's combat power against threats falling within its scope. As such, it should be limited to only those organizations that, as the result of both the organization and intensity of their threat capabilities, justify crossing the threshold from law enforcement response to armed hostilities. I do not believe that the existence of a terrorist threat to the United States alone justifies crossing this threshold. The U.S. has for decades confronted terrorist threats that fall below this threshold, and will certainly continue to confront such threats in the future. Expanding the AUMF to include such threats would be inconsistent with the fundamental structure of the law of armed conflict, which seeks to limit situations of armed conflict to those that indicate a level of intensity that indicates a *de facto* departure from peacetime law enforcement response authorities. I emphasize, however, that this opinion is based on publically available information. If classified information were to indicate that other terrorist groups represent a threat of analogous magnitude to that of al Qaeda, including them within the scope of the AUMF would be legitimate.

From the inception of the military response against al Qaeda, even the inclusion of this group within the scope of the AUMF created substantial legal controversy, controversy that continues to this day. Many legal scholars, and some of our closest allies, reject the U.S. position that a nation may properly claim to be engaged in an armed conflict against a transnational terrorist group like al Qaeda. While I disagree with this interpretation of international law, and believe that for the United States this is no longer subject to debate, I do not believe that there is a legitimate justification to characterize the response to all terrorist threats – existing or emerging – as armed conflicts.

Accordingly, while it is almost certain that there are indeed some terrorist threats that do not fall within the scope of the AUMF (because they are not properly characterized as members of the Taliban, al Qaeda, or co-belligerents), this does not

mean the AUMF is either under-inclusive or that it should be amended to include all such groups within its scope. If these groups are not considered by the commander-in-chief to be co-belligerents, they are properly excluded from the scope of the authorization. Nor should the AUMF be amended to include within its scope any jihadist motivated terrorist group. First, no terrorist group should be considered for incorporation into the authority provided by the AUMF unless and until it poses a threat of analogous magnitude as that associated with al Qaeda – considerations that, as noted above, would justify incorporating them within the scope of the AUMF (assuming also that such groups posed a threat of sufficient magnitude and imminence to trigger the inherent right of self-defense pursuant to the *jus ad bellum*). Second, if at some point either the President and/or Congress believes that although not affiliated with al Qaeda, a terrorist group manifest a level of organization and risk that justifies subjecting it to this authority, then at that point they can address through a distinct authorization for the use of force, assuming the use of such force would satisfy international law requirements. Such a response would be equally applicable if and when the threat to an ally posed by such a group was considered of such significance as to necessitate a U.S. military response.

Finally, responses to this question must also incorporate the President's authority to always act to defend the nation from an actual or imminent threat of armed attack against the nation or its armed forces overseas (and to rescue Americans threatened overseas). This authority extends to threats posed by non-state groups, including terrorist organizations that are not considered al Qaeda co-belligerents. The conclusion that "other" terrorist threats do not fall within the scope of the AUMF therefore does not subject the nation to any type of risk that has not existed for decades. On the contrary, the consensus government view that a terrorist threat may trigger this inherent defensive authority (an interpretation that while not unprecedented, was not nearly as clear before the terrorist attacks of September 11th) suggests that this risk is less substantial today than before enactment of the AUMF.

3. What is the geographic scope of the AUMF and under what circumstances may the United States attack belligerent targets in the territory of another country?

In my opinion, there is no need to amend the AUMF to define the geographic scope of military operations it authorizes. On the contrary, I believe doing so would fundamentally undermine the efficacy of U.S. counter-terror military operations by overtly signaling to the enemy exactly where to pursue safe-haven and de facto immunity from the reach of U.S. power. This concern is similar to that associated with explicitly defining co-belligerents subject to the AUMF, although I believe it is substantially more significant. It is an operational and tactical axiom that insurgent and non-state threats rarely seek the proverbial "toe to toe" confrontation with clearly superior military forces. Al Qaeda is no different. Indeed, their attempts to engage in such tactics in the initial phases of Operation Enduring Freedom proved disastrous, and ostensibly caused the dispersion of operational capabilities that then

necessitated the co-belligerent assessment. Imposing an arbitrary geographic limitation of the scope of military operations against this threat would therefore be inconsistent with the strategic objective of preventing future terrorist attacks against the United States.

I believe much of the momentum for asserting some arbitrary geographic limitation on the scope of operations conducted to disrupt or disable al Qaeda belligerent capabilities is the result of the commonly used term “hot battlefield.” This notion of a “hot” battlefield is, in my opinion, an operational and legal fiction. Nothing in the law of armed conflict or military doctrine defines the meaning of “battlefield.” Contrary to the erroneous assertions that the use of combat power is restricted to defined geographic locations such as Afghanistan (and previously Iraq), the geographic scope of armed conflict must be dictated by a totality assessment of a variety of factors, ultimately driven by the strategic end state the nation seeks to achieve. The nature and dynamics of the threat –including key vulnerabilities – is a vital factor in this analysis. These threat dynamics properly influence the assessment of enemy capabilities and vulnerabilities, which in turn drive the formulation of national strategy, which includes determining when, where, and how to leverage national power (including military power) to achieve desired operational effects. Thus, threat dynamics, and not some geographic “box”, have historically driven and must continue to drive the scope of armed hostilities. The logic of this premise is validated by (in my opinion) the inability to identify an armed conflict in modern history where the scope of operations was legally restricted by a conception of a “hot” battlefield. Instead, threat dynamics coupled with policy, diplomatic considerations and, in certain armed conflicts the international law of neutrality, dictate such scope. Ultimately, battlefields become “hot” when persons, places, or things assessed as lawful military objectives pursuant to the law of armed conflict are subjected to attack.

I do not, however, intend to suggest that it is proper to view the entire globe as a battlefield in the military component of our struggle against al Qaeda, or that threat dynamics are the only considerations in assessing the scope of military operations. Instead, complex considerations of policy and diplomacy have and must continue to influence this assessment. However, suggesting that the proper scope of combat operations is dictated by a legal conception of “hot” battlefield is operationally irrational and legally unsound. Accordingly, placing policy limits on the scope of combat operations conducted pursuant to the legal authority provided by the AUMF is both logical and appropriate, and in my view has been a cornerstone of U.S. use of force policy since the enactment of the AUMF. In contrast, interpreting the law of armed conflict to place legal limits on the scope of such operations to “hot” battlefields, or imposing such a legal limitation in the terms of the AUMF, creates a perverse incentive for the belligerent enemy by allowing him to dictate when and where he will be subject to lawful attack.

I believe this balance between legal authority and policy and diplomatic considerations is reflected in what is commonly termed the “unable or unwilling”

test for assessing when attacking an enemy belligerent capability in the territory of another country is permissible. First, it should be noted that the legality of an attack against an enemy belligerent is determined exclusively by the law of armed conflict when the country where he is located provides consent for such action (is the target lawful within the meaning of the law and will attack of the target comply with the targeting principles of distinction, proportionality and precautions in the attack). In the unusual circumstance where a lawful object of attack associated with al Qaeda and therefore falling within the scope of the AUMF is identified in the territory of another country not providing consent for U.S. military action, policy and diplomacy play a decisive role in the attack decision-making process. Only when the U.S. concludes that the country is unable or unwilling to address the threat will attack be authorized, which presupposes that the nature of the target is determined to be sufficiently significant to warrant a non-consensual military action in that territory. I believe the Executive is best positioned to make these judgments, and that to date they have been made judiciously. I also believe that imposing a statutory scope limitation would vest terrorist belligerent operatives with the benefits of the sovereignty of the state they exploit for sanctuary. It strikes me as far more logical to continue to allow the President to address these sovereignty concerns through diplomacy, focused on the strategic interests of the nation.

4. What role should Congress play in the designation of organizations against which – and countries in which – lethal force may be used? Should there be a formal requirement to notify Congress of new designations and should such designations be subject to congressional approval or disapproval?

I believe Congress plays an essential constitutional role in authorizing the use of U.S. military force. When confronting a conventional state threat, it is obvious that in exercising this role, Congress will designate the object of such an authorization. However, even in this situation, Congress has not designated the “groups” falling within the scope of the authorization. Instead, that determination is left to the President in his capacity as commander-in-chief. Nor would Congress ordinarily dictate the scope of such operations, but rather, as noted above, allows the President to respond appropriately to threat dynamics. This authorization modality is obviously more complicated when the object is a non-state transnational organization. However, I believe that the nature of such a threat in no way justifies deviation from this modality. The AUMF did not identify any single group or location as the object of the U.S. military response to the terror attacks of September 11th, 2001, instead leaving to the Executive the responsibility to “take care that the law be faithfully executed” by assessing the intelligence related to those attacks and rendering judgments as to what type of response was “necessary and appropriate.” I believe that process continues in full force to this day, and has provided the necessary strategic and operational flexibility to meet the threat effectively and efficiently.

I do believe Congress, in exercising its authorization function, does have both a right and a responsibility to remain seized of the nature of operations conducted

pursuant to the AUMF. In so doing, Congress will be better able to continually assess whether the link between the objectives of the authorization and the nature of U.S. operations conducted pursuant thereto remains sufficient. In this regard, Congress always retains an “approval/disapproval” process through its ability to amend or even repeal the AUMF. Thus, while I encourage continued efforts to inform Congress of such operations, I believe that altering the current statutory framework should only be considered if and when Congress believes this link has become unjustifiably attenuated.

5. What is the duration of the AUMF and how will we know when this conflict is over?

As long as the AUMF is in force, and the Executive determines that al Qaeda and/or al Qaeda co-belligerents continue to represent viable threats to the nation, the AUMF will provide legal authority for military operations executed to disable and/or disrupt such threats. When this conflict will be over is a far more complex question. Ultimately, I believe the answer must be dictated by the assessment – ideally made cooperatively between the President and Congress – that the nature of the threat falling within the scope of the AUMF has been degraded to such an extent that there is no longer a legitimate necessity to utilize U.S. combat power as a responsive measure. Lacking the insight into the threat dynamics that I believe are essential to make this assessment, I cannot opine as to the appropriate indicia to justify this conclusion.

6. Has the AUMF lost its legal force, is it still relevant to the current conflict, or would it be better to modify or repeal it?

It is evident from my prior answers that I believe the AUMF has not lost its legal force and that it is indeed still relevant to the current conflict. The use of U.S. military capability in a manner that implicitly relies on the law of armed conflict to justify the methods and means of operations can be justified only pursuant to such an authorization or in the exercise of self-defense against an actual or imminent attack against the nation or its armed forces. Accordingly, the AUMF continues to provide the principal source of authority to attack enemy belligerent operatives and their capabilities, to detain them upon capture, and to subject them to trial by military commission for violations of the laws and customs of war.

It is equally evident from my answers above that I do not believe that it is necessary or logical to repeal or amend the AUMF.

7. Detention authority and the AUMF.

I believe that the enactment of Section 1021 of the FY 2012 NDAA is relevant to the limited extent that it reaffirmed congressional support for both the AUMF and the need to utilize authority derived from the law of armed conflict to address the al Qaeda threat. Would military detention authority be affected if Congress were to

enact a new AUMF? The answer must be yes, but the nature of the authorization would dictate how. First, should such an authorization expand the scope of groups subject to the use of force, then captured members of these groups would arguably fall within the scope of military detention authority as this expansion would presumably indicate a U.S. determination that armed conflict exists with these additional groups (unless Congress chose to restrict detention, which seems illogical and improbable). Second, such authorization might also explicitly authorize detention of captured members of groups within its scope. While I do not believe such express authority would be necessary to justify such detention, it would certainly strengthen the requisite legal basis. Finally, such authorization might include actual detention criteria, which could either expand or constrict existing military detention authority separately from an express authorization or limitation on that authority.

Assuming that Congress chooses not to modify the existing AUMF, the question of enhanced process for individuals subjected to long-term preventive detention seems especially significant. Although this detention is based on in large measure on the unquestioned authority of belligerents to prevent captive enemy operatives from returning to hostilities, the unconventional nature of this conflict does raise troubling questions about the legitimacy of extending this authority to a functionally indefinite conflict. It should, however, be recognized that the existing detention authorization and review process has incorporated a level of procedural protection against arbitrary detention that is truly unprecedented in any prior armed conflict in U.S. history. Should more process be incorporated? If doing so would facilitate a more effective assessment of continued detention necessity, and enhance the perception of legitimacy, I believe the answer is yes. What that additional process should be is a much more difficult question. One idea might be to adopt a presumptive detention termination point, requiring the government to rebut a presumption of termination in an adversary proceeding by an appropriately weighty burden of proof. In my view, if such a process were adopted, the tribunal should be composed primarily of military officers, presided over by a judicial officer — although inclusion of several civilian legal or judicial experts might also be logical — and should provide detainees with a right to appellate review.

8. Remotely piloted vehicles and controlling legal authority.

Despite the substantial controversy surrounding the increased use of RPVs to attack belligerent operatives, I believe that this weapon system need not be analyzed or critiqued differently from any other weapon system. Simply stated, RPVs are just weapons, and good ones. The way they are employed must be dictated by the type of careful targeting analysis that is required for any deliberate attack against a lawful object of attack during an armed conflict. To that end, *all* the principles of the law of armed conflict are applicable to their use: they must only be used to attack lawful military objectives; such attacks must be cancelled when the commander anticipates that the collateral damage or incidental injury (to non-combatants) will be *excessive* in relation to the concrete and direct military

advantage anticipated (the so called proportionality principle); they must not be otherwise indiscriminate (an unlikely risk considering the precision of such weapons) or cause unnecessary suffering; and commanders must take all feasible precautions to mitigate the risk to civilians and civilian property (including making best efforts to confirm the nature of the nominated target).

In my opinion, these principles do in fact guide our targeting process, irrespective of the weapon systems employed. It is no exaggeration to state that at no time in history have legal advisors been more integrated into this process than today. If anything, use of RPVs, because they are normally utilized in a deliberate (as opposed to time sensitive) targeting process, will almost inevitably involve multiple layers of operational and legal review. Commanders ultimately make targeting judgments, but these judgments are guided consistently by the legal principles summarized above in order to ensure, as best as possible under the conditions prevailing at the time of decision, that employing deadly combat power is operationally and legally justified.

This process should not be modified if the target is not in an area of active combat operations involving U.S. ground forces. As noted above, I reject the idea that the notion of a “hot” battlefield limits belligerent targeting authority against lawful objects of attack during armed conflict. Once the strategic decision is made to address a target in that armed conflict with combat power outside of such an area, these principles provide the appropriate and logical measure of attack authority. The location of the nominated target is irrelevant in this process, however. Certainly, relative proximity to ongoing combat operations is a relevant factor in the target analysis process. Accordingly, while I am not privy to the target decision-making process currently utilized by the United States, I believe it is fair to assume that when a potential target is located outside an area of ongoing active combat operations, compliance with these principles almost certainly demands a greater degree of certitude that the individual in fact qualifies as a lawful target. Ultimately, however, once an individual is assessed as an enemy belligerent operative, his location may influence the decision to utilize the full scope of armed conflict targeting authority, but that authority is in no way altered as a result. Rather, targeting authority is dictated by this status determination, and not by location.

9. How should we decide who is an appropriate military target outside an area of active combat operations, and should “imminence” be an aspect of this determination?

As evidenced by my answer to the prior question, I believe the answer is clear: the decision that an individual qualifies as “an appropriate military target” should be re-characterized: does the individual qualify as a lawful object of attack pursuant to the law of armed conflict? If the answer is yes, that individual’s proximity to an area of “active combat operations” in no way alters the legal authority to attack (although as noted above it may result in self-imposed limitations based on policy and/or diplomatic considerations). Proximity to such an area of operations is better

understood as just one of a range of threat identification criteria that impact a totality analysis of lawful target.

Imminence is simply not an element of this target decision-making legal equation. Instead, when attacking an individual, the key analytical focal point is whether that individual is properly identified as a member of an enemy belligerent group. If so, that status alone triggers lawful attack authority. This is perhaps the most fundamental difference between peacetime and armed conflict use of force authority. In peacetime, the use of deadly force is limited to a measure of last resort, and justified only when the individual's conduct manifests an actual threat that necessitates that use of force. Thus, employing deadly force is justified only when the individual poses an "imminent" threat of death or grievous bodily harm. In contrast, once an individual is identified as a member of an enemy belligerent group in armed conflict, that individual is presumed to represent a threat justifying attack by virtue of that status alone. Thus, unless and until that individual is removed from the control of enemy belligerent leadership (either by capture or physical incapacitation), attack with combat power creating a high probability of causing death is legally justified.

This target validation process obviously involves a complex and at times challenging analysis of a variety of factors that indicate an individual is in fact a belligerent operative of al Qaeda or other enemy forces. Because of the unconventional and dispersed nature of al Qaeda operations, this threat identification process must, by necessity, focus on indicia that are less obvious than those relied on to positively identify enemy belligerent operatives in the context of more conventional inter-state hostilities. It is, however, erroneous to suggest that threat identification, even in the conventional conflict context, is "easy." On the contrary, the intensity and pace of modern warfare make threat identification challenging in any type of armed conflict. It is, however, obvious that the complexity of threat identification is magnified in an armed conflict with an unconventional and highly dispersed enemy belligerent group. It is therefore logical and appropriate to rely on multiple factors to guide threat identification of this enemy. These factors will almost certainly include patterns of activity, association, location, signals and human intelligence indicating activities and intentions, and the nature of the individual's contribution to the belligerent objectives of al Qaeda.

While reliance on such factors may appear to be a significant departure from "traditional" threat identification methodology, this is not the case. Similar methodologies and indicia have been used in prior conflicts involving unconventional enemy opponents. Indeed, having begun my military career as a tactical intelligence officer in Panama in the mid 1980s, I can personally attest to the reliance on such indicia in other contexts. Assigned to one of the few Army commands focused almost exclusively on what is today called counter-insurgency operations (at that time called low intensity conflict), our forces routinely trained to engage unconventional enemies in low to mid intensity hostilities. Unable to rely on traditional threat identification criteria such as uniforms or obvious military

equipment, threat identification instead focused on similar indicia as those ostensibly used today. Ultimately, whether engaged in armed conflict with a conventional or unconventional belligerent opponent, the process for and legal authority resulting from positive threat identification identical: a determination of enemy belligerent status triggering the authority derived from the law of armed conflict to attack such individuals based solely on this belligerent status. Even when the threat identification criteria rely heavily, by necessity, on an individual's conduct, the ultimate question was and remains a determination of status.

The nature of this question seems to reflect what has been an increasingly vocal aversion to exercising belligerent attack authority outside of the so-called "hot" battlefield. Indeed, I believe this aversion has been a driving force behind the creation of the "geography of war" fiction discussed above. This aversion is fundamentally flawed as a matter of law. Although, as noted above, the threat identification process may be more complex due to the individual's attenuation from an area of active combat operations, that attenuation in no way modifies or restricts the attack authority resulting from this determination.

I believe it is important to bear in mind that U.S. forces involved in hostilities against an unconventional enemy engage in this complex threat identification process on a daily basis in Afghanistan, a process that is not constrained by a requirement to assess the imminence of the threat. It seems somewhat ironic that proponents of an "imminence" requirement outside the so-called "hot" battlefield seem untroubled by reliance on the same threat identification criteria they consider insufficient to justify attack when it is utilized to make difficult targeting decisions in the "hot" battlefield. This irony is magnified because the extent of deliberation and layers of review associated with attacks outside the "hot" battlefield might actually produce increased certainty as to the nature of the target. If we trust our commanders to make complex targeting judgments in the context of a "hot" battlefield, I find it perplexing that we would impose an additional attack criteria – one drawn from the peacetime use of force legal framework and never intended to limit belligerent attack authority – on analogous decisions simply because the nominated target is geographically attenuated from that battle space.

10. What is our obligation to ensure lethal military force is directed only at appropriate military targets, and do we need to legislate or codify the principles that guide these decisions?

My prior answers clearly indicate that I believe it is the law of armed conflict, brought into force as the result of the armed conflict between the United States and al Qaeda, that provides the authority to attack persons, places, or things as a measure of first resort. Accordingly, as noted above, this attack authority is triggered by determinations that a proposed target qualifies as a lawful military objective pursuant to that law. The law of armed conflict mandates compliance with the obligations of distinction, proportionality and precautions, as explained above.

I see no value in attempting to codify the principles of the law of armed conflict in an amended or new AUMF. The President is obligated to ensure respect for this law once the United States is engaged in an armed conflict, as are all subordinate officers of the Department of Defense, each military department, and all other government agencies. Department of Defense Directive, incorporated into the Chairman of the Joint Chiefs of Staff Standing Rules of Engagement, mandates compliance with these principles during *all* military operations, which is reinforced by military doctrinal manuals related to the targeting process, and professional military education. Legal advisors at every echelon of command are educated in this law and fully integrated into the targeting process. Even during the initial phase of U.S. belligerent detention operations, when the Executive took the position that the detainees did not fall within the scope of the humane treatment obligation of Common Article 3 to the Geneva Conventions of 1949, there was never any assertion that targeting operations were exempt from compliance with these LOAC principles.

Finally, in my view the *obligation* to comply with the LOAC is already inherent in the AUMF authorization to use “appropriate” force. This, coupled with the fact that the U.S. considers itself engaged in an armed conflict not of an international character (a situation that triggers customary LOAC principles as a matter of law), leads me to reject the question’s assertion that these principles have heretofore been applied only as a matter of policy. To the contrary, from the inception of this armed conflict, I believe they have applied (and have been understood to apply) as a matter of law.

11. Who should sign off on such targeting decisions? What degree of confidence should be required? Should judicial or some other independent review be required for these decisions?

I believe that once the U.S. is engaged in an armed conflict, target decision-making is a quintessential commander-in-chief function. This function is applicable in an armed conflict authorized by Congress, or when responding to an attack thrust upon the nation pursuant to the President’s inherent constitutional authority to defend the nation. Accordingly, I believe that it is the President, acting in his own capacity or through subordinate officers, who is responsible for making decisions to attack a nominated target during armed conflict.

Accordingly, I believe any attempt to subject this decision-making process to judicial or some other type of external review would represent a genuine and unjustified intrusion into the President’s express Article II powers. Nor do I believe there is any legitimate justification for such review. The obligation to “take care that the law be faithfully executed” includes, by implication, ensuring compliance with the law of armed conflict when engaged in hostilities. Every subordinate officer in the chain of command is sworn to uphold and defend the Constitution, which by implication also requires compliance with the law of armed conflict during hostilities. As noted in several prior questions, the level of commitment to ensuring

such compliance – in structure, process, education, training, and internal oversight – is more significant today than at any time in our history. As one intimately familiar with all of these aspects of the compliance process, I am perplexed at the common assertion that there is insufficient oversight for targeting decisions.

Even a cursory review of the deliberate target decision-making process indicated multiple levels of review. Furthermore, Department of Defense Directives mandate investigation into any credible indication of a violation of the law of armed conflict, and the Uniform Code of Military Justice provides a highly credible mechanism for holding individuals accountable for such violations. This mosaic of process, training, and accountability is more than sufficient to mitigate any risk of abuse of power. Furthermore, the obligation imposed by the law of armed conflict both to attack only military objectives (which includes enemy belligerents) *and* to make all feasible efforts to mitigate the risk to civilians by implication imposes an obligation to limit attack to only individuals reasonably assessed to qualify as enemy belligerents. While the law does not include an express articulation of a “burden of proof” that must be satisfied to justify attack, it is relatively clear that to qualify as reasonable, the decision must be made on the best available information and must at least render it more likely than not that the individual is *not* a civilian.

I certainly understand why there may be those who question the efficacy of this process, and who call for some external review and/or authorization mechanism. There are no more momentous decisions than those resulting in the taking of human life, and those who worry about abuse of authority understandably demand greater transparency and oversight. However, our division of constitutional authority entrusts the Executive branch with these decisions, and transparency will always present increased risk of disclosing sensitive information. It strikes me that vesting trust to leverage the nation’s combat power wisely and lawfully in those trained and devoted to the process of leading military forces represents a logical balance of interests.

I also recognize how the undisputed evidence that innocent civilians are killed during attacks on belligerent targets may seem to many to be inconsistent with the law. This, however, is not the case. The law of armed conflict regulates armed hostilities, an endeavor that involves the use of highly destructive combat power and the inevitable suffering associated with such use. While the law obligates parties to a conflict to take all feasible measures to mitigate this suffering, especially when civilians are the potential victims, it also includes a necessary recognition that when unavoidable and justified pursuant to proportionality analysis, such suffering may occur. Likewise, the consternation that it is too “easy” to decide who is a lawful target is, in my view, fundamentally flawed. I would suggest that few people who have not experienced the human cost of armed conflict better understand the immense moral burden associated with a decision to order a lethal attack than experienced military leaders. These are the individuals who must live with these difficult decisions, and to suggest that they take this responsibility lightly is unfortunately ill informed.

In this regard, I find it particularly ironic that our nation entrusts these same leaders with the judgment to make decisions to place our own sons and daughters into harm's way. Yet there is no suggestion that these decisions must be subject to some external review process. If our trust in their judgment to make sound military decisions is sufficient enough to entrust our sons and daughters to them, how is it insufficient when the potential consequence is an attack on an enemy belligerent? These leaders spend their entire professional careers immersed in the operational, moral, ethical and legal aspects of employing combat power to "fight and win" the nation's wars. They also rise through the ranks, demonstrating the expertise and judgment necessary to achieve selection for the highest levels of authority, including Senate confirmation. How a federal judge, or some external oversight mechanism, could be more competent to make these difficult decisions than these leaders is perplexing.

I do not question the ability of those tasked with such external oversight to master the complexities of the law of armed conflict. However, I believe that these individuals could rarely (if ever) match the type of contextual understanding – namely expertise in the planning and execution of military operations for the purpose of achieving strategic, operational, and tactical objectives – essential for truly understanding the proper application of this law. Ultimately, it should be those whom our nation trains and prepares to command the execution of military operations that are entrusted with the awesome responsibility of target selection and engagement.

12. What is the legal authority for targeting a U.S. person and should a different legal standard or process apply to such targeting?

I do not believe that citizenship is a relevant factor in assessing the legality of attacking a nominated target in the context of an armed conflict. Instead, like any other individual, the law of armed conflict dictates when a U.S. citizen is the lawful object of attack. It is certainly not unprecedented for U.S. citizens to join the ranks of enemy belligerent forces, and when they do so they become subject to lawful attack pursuant to the identical legal criteria applicable to their belligerent comrades. Thus, when a U.S. citizen who has been properly identified as such a member is subject to attack with lethal combat power, that citizen has received the process he is due.

Of course, there may be compelling policy considerations that warrant narrowing the scope of this targeting authority. There is nothing unusual about imposing such policy restrictions on otherwise lawful belligerent targeting. Rules of engagement are utilized routinely to impose such restrictions where the President or subordinate commanders determine that the cost/benefit equation justifies such restriction. Accordingly, requiring satisfaction of an additional layer of policy-based considerations – such as a requirement to exhaust all feasible less harmful means to subdue the individual - as a precondition to targeting known U.S. citizens with lethal

combat power is certainly not inconsistent with the law of armed conflict. It is not, however, legally mandated, and therefore should be left to the realm of policy.

13. Should use of RPVs and other methods and means of employing combat power be restricted to Department of Defense operations, and if not, should the same legal authorities apply to such operations?

In my opinion, the law of armed conflict establishes the controlling legal framework for “lethal targeting” regardless of which entity employs combat power on behalf of the United States. No individual should be subject to attack with potentially deadly combat power unless that individual is legitimately determined to be an enemy belligerent operative or a civilian taking a direct part in hostilities in the context of an armed conflict. In all other contexts, I do not believe that domestic law, policy, or international law permit government agents to resort to deadly force as a measure of first resort.

It is also my opinion that the conduct of such operations should be restricted to the Department of Defense. However, I do not believe that I, or anyone else lacking access to highly classified information, can legitimately claim to know with certainty the nature of ongoing operations involving other U.S. government agencies. Although there is what I consider to be substantial speculation on the nature of these operations, there may be aspects of them (for example, joint target analysis and selection, or integration of DoD assets into the operational capabilities of other agencies) that ensure significant DoD involvement in the targeting process.

Nor do I feel competent to comment on potentially sensitive and complex issues of diplomacy and policy that may necessitate utilization of other government agencies to conduct such operations. However, I strongly believe that if this is in fact occurring, those agencies and the President bear a legal obligation to ensure the use of a targeting process that fully complies with the law of armed conflict. Ultimately, my opinion that these operations are best left in the hands of the Department of Defense is based on the same considerations that lead me to object to calls for external review or oversight of targeting decisions – namely my inherent confidence in the culture and processes embedded within DoD to ensure that such operations comply with the law of armed conflict. While I have the greatest respect for the professionalism and valor of the devoted patriots who serve in other government agencies – service that often involves equal if not greater personal risk than their DoD counterparts – I simply do not believe that these organizations are built on the type of warfighting culture that exists in the military. From the inception of a military officer’s professional career, he or she is immersed in a culture that focuses on developing morally grounded warriors – individuals who understand the unfortunate necessity to employ combat power on behalf of the nation but also understand that doing so in a manner that is legally compliant and morally sound is essential to strategic success. I believe leaders developed in this culture are best suited to make use of force decisions on behalf of our nation.

14. Under what circumstances could lethal military force be used in the United States and is such use authorized by the AUMF?

I believe this question is largely hypothetical in nature. To my knowledge, there has been no indication by the Executive branch of an intent to employ, or even consideration of employing, combat power within the territory of the United States. Even during the Bush administration, during oral argument in the case of Jose Padilla, when Justice Kennedy challenged the acting Solicitor General on whether Padilla could have been shot while exiting a commercial aircraft in Chicago airport, the response emphatically disavowed any such consideration.

Is it conceivable that a situation of extremis might lead a President to determine that it was necessary to utilize such force to protect the nation from a threat within our territory? Although I believe the answer is yes, I also believe that no President would resort to such a response unless it was a genuine option of last resort. I believe the immediate response to the September 11th terrorist attacks provides a useful example of such a situation of extremis. In response to the uncertainty regarding the potential for further aviation-borne suicide attacks, military aircraft were ordered to shoot down, if necessary, commercial aircraft flying in restricted airspace above New York or Washington, D.C. In my view, this was a lawful order, based on the fact that the Executive assessed that the nation was under attack (which indicated the existence of an armed conflict), and that such aircraft would have qualified as lawful objects of attack pursuant to the law of armed conflict. In no other situation has there been any suggestion of resorting to combat power to respond to a terrorist threat within U.S. territory, which I believe indicates that while such use is theoretically possible, situations triggering such use are highly unlikely to arise. Nonetheless, were the nation subject to an attack of a sufficient magnitude to render a law enforcement response ineffective, conducted by members of al Qaeda or co-belligerent forces, I believe the AUMF would authorize a military response to defend the nation.

15. What is the role of Congress in overseeing the use of lethal force pursuant to the AUMF, and can the process be made more transparent without compromising operational security?

As noted in several prior questions, I believe Congress has an essential role in ensuring that ongoing military operations fall within the proper scope of the AUMF. Central to this role is the need to ensure consistency between the scope of authority provided by the AUMF and principles of international law related to the use of military force to protect vital U.S. national interests, principles that have guided such uses of force by our nation from inception. Accordingly, Congress must respond cautiously and judiciously to any call for expanding the scope of the AUMF, and must be animated by analogous prudence in response to calls to revoke this statute. Furthermore, Congress must ensure that any expansion to the scope of the AUMF is consistent with principles of international law, and therefore only consider

such expansion to cover terrorist groups that present a level threat sufficient to reasonably justify characterizing the U.S. response as an armed conflict.

I also believe Congress, through close coordination and collaboration with the Executive, must contribute to dialogue regarding when the nature of the al Qaeda threat has been degraded sufficiently to justify reversion back to a pure law enforcement modality for addressing this threat. However, I do not believe that Congressional oversight extends to review of specific targeting decisions or imposing any type of oversight mechanism that would require congressional endorsement of these decisions. In short, Congress should allow the Executive, acting principally through the Department of Defense, to continue to plan and execute operations for the purpose of disrupting and/or disabling the al Qaeda threat, but should also periodically review such operations, and the process associated with them, to ensure the AUMF is being faithfully executed.

In terms of increased transparency, it is my opinion that Congress should be extremely cautious in demanding public disclosure of aspects of the targeting process beyond those that have already been disclosed by the Executive. To that end, I believe it is important to note that the Executive has disclosed substantial aspects of this process. In fact, in my thirty years of military and academic service, I cannot recall a period of time where Executive officials have been anywhere as open in disclosing strategic and operational decision-making processes than during this conflict. I believe demanding more transparency poses significant operational risk, and is, at this point in time, unjustified and unnecessary.

While calls for greater transparency are certainly understandable, I believe each additional layer of disclosure risks compromising the effectiveness of U.S. operations. Ultimately, it is this effectiveness that must remain the priority interest in the transparency debate. It must also be noted that this risk is exacerbated by the nature of the threat and the threat identification methodology. Disclosing target identification methodology to a conventional enemy poses little risk – that enemy knows exactly what indicia of threat identification friendly forces will rely on, and cannot modify that indicia. With an unconventional enemy, this is not the case. Instead, disclosure of these indicia will enable the enemy to alter patterns of behavior in order to avoid attack. In my view, Congress certainly has a legitimate interest in being made aware of such indicia in a forum that ensures operational security. However, like so many wartime decisions, the public appetite for greater insight into these processes must yield to considerations of operational success.