AUMF: Reasserting the Role of Congress

Jane Harman:
Good afternoon, and welcome to the Wilson Center. I'm Jane Harman, the president and CEO of the Wilson Center and a recovering politician who is very pleased that we are addressing today's topic with NPR as part of what we call a "National Conversation." Our hope is that these forums will give the public new opportunities to engage in much-needed civil discourse in the safe political space that the Wilson Center provides. Today in the audience are many of our supporters and friends, but I'd like to recognize a special guest, John Emerson, a dear friend and former law partner from Los Angeles and the nominee to be U.S. ambassador to Germany.

Here's a newsflash: war powers are divided in the United States Constitution. Congress has the power to declare war, raise and support the armed forces, and allocate war funding. That's Article One, Section Eight. While the President is Commander-in-Chief of the military, Article Two, Section Two. For 200 years, Congress and the President respected this balance, but following World War II tension escalated when America became involved in the Korean and Vietnam conflicts without a declaration of war. Many members of Congress were upset about an erosion of Congressional authority, and so in 1973 Congress passed the War Powers Resolution by a two-thirds majority over President Nixon's veto. That resolution has been ignored more than followed, but it was certainly an example of Congress reasserting its role.

So, segue to today's conversation entitled, "The AUMF Reasserting the Role of Congress." To remind, three days after 9/11 Congress passed the authorization for the use of military force with five hours of debate in the House and even less in the Senate. The Senate vote was 98 to zip. The House vote was 420 to one. I was one of the 420. One member voted against it, and sadly Barbara -- Congresswoman Barbara Lee was planning to be here today to explain her vote and her views, but is delayed by the House debate on the Farm Bill. For myself, as a former nine-term member of Congress whose served on all the major security committees, I never imagined that the AUMF would still be in effect today. Over time, some would assert, and I agree, that it has taken on a life of its own, and the Executive Branch

has used it in ways that no one who voted for it envisioned in 2001.

Since 9/11, we've changed a great deal, and the threats we face have evolved. So does the law, as passed in 2001, apply to these new threats? Should it be ended or amended? Here to frame the discussion today is my friend, Senator Bob Corker of Tennessee, who won reelection to his second term last November. Ranking member on the Senate Foreign Relations Committee, Senator Corker is a serious independent thinker, and said in a full committee hearing earlier this year in which I was testifying that his committee should take the lead in revising the AUMF. He's also just back from his fourth trip to Afghanistan and Pakistan. Following his comments, he will join a panel moderated by Rachel Martin, who until recently was NPR's national security correspondent and now hosts Weekend Edition. That means she has to get up early fewer days a week.

[laughter]

But she's just as smart as she ever was. We will be joined shortly, we hope, by Sarah Chayes, a senior associate at the Carnegie Endowment, who is on the Hill testifying before Senator Corker's committee. She previously was special advisor to the Chairman of the Joint Chiefs of Staff, authored a marvelous book called "The Punishment of Virtue: Inside Afghanistan After the Taliban," was a former NPR reporter, and is part of an extraordinary family. Also joining us, and here, is Neal Katyal, currently professor at Georgetown University Law Center, and Neal served as acting Solicitor General of the United States in the Obama Administration. I mentioned that we had invited Barbara Lee. We're sorry to miss her. I do want to praise, however, her singular act of courage. It ain't easy to be the sole vote at a time when everyone, I'm sure including her, thought the country might be under further attack, but she questioned why we needed this form of law.

So now please welcome for some key note remarks a good friend of Wilson Center and a wonderful member of the United States Senate, Bob Corker.

[applause]

Bob Corker:

Jane, thank you very much. I thank you for your leadership on national security issues, your broadmindedness, and your friendship, and I really appreciate being here today. You're right, I'm missing the last part of a committee meeting today that Sarah is testifying in. I will say I've met with her, and I've already had her testimony and met with her prior to being in Afghanistan and Pakistan this weekend, but I knew that being late for something Jane had organized was not going to be good for my health.

[laughter]

So I'm glad to be here today, and I'm glad to be here with such esteemed panelists. And I've always learned, especially in this job, that when you have people like this here to contribute it's best to hear from them and to hear from you. So I'm going to make some very brief comments, but, as Jane very articulately laid out, and she did this in our committee, as she mentioned, some time ago, the AUMF that we're operating under right now is 60 words long and was passed in September of 2011 -- excuse -- 2001. And on a recent trip through Northern Africa with our staff to Senegal and Mali and Algeria and Tunisia, when you look at not only the activities that we have to some degree underway now, but the activities you know we're going to have underway in the future, almost everyone top-to-bottom would say that the thin thread between -- there's a very thin thread between that AUMF that was authored, 60 words, back in 2001 to where we are today.

What's happened over time with Congress in general is that we have no ownership whatsoever over the conflicts that exist. And for what it's worth, some people like it that way. I mean, the fact is if you just look at what's happening right now, for instance with Egypt -- excuse me, with Syria -- where the administration, instead of having to come forward to Congress and to try to deal with this issue in a public way and to generate some degree ownership by those in Congress -- by the way, administrations have been doing this for some time, so this should not be perceived as in any way partisan -- what they're doing instead, and of course it's on the front page of every paper, it's not very covert, but it's dealing with it, you know, through the intelligence committees and actually just a handful of folks involve intelligence -- it's not even the full committees -- to try to generate funding and therefore alleviate, you know, Congress having real

ownership. And for what it's worth, in fairness, I was at an event yesterday talking to a very key person in Congress relative to that type of activity, and because it's tough, quote-quote-quote, "back home," he's just fine with that. He'd rather it not come to Congress. To me that is a totally feckless place for Congress to be. I think what that does is it keeps, candidly, the public from really being informed as to the decisions that we're making that are very important. We have an outstanding military that is willing to sacrifice life and limb, and we have certainly wonderful Foreign Service officers, and to have them out in harm's way and the American people not even fully understand why we're doing what we're doing, and certainly for Congress to have no ownership, that is a problem.

We recently had some debates on the floor, which to me were almost surreal. We had a debate -- a filibuster, actually, for a long period of time over drone attacks on cafés in Houston, an issue that I never really thought about. Okay.

[laughter]

And I don't in any way -- you know, look, I think that was a fine thing and I'm not criticizing the folks involved, but the point is that when Congress has no ownership over the activities that are taking place, whether it's drone or in other ways, sometimes Congress is able to debate and say some things that have no basis in reality and certainly do not contribute to the national debate and our national interests.

So, look, I'll stop with this last statement. We've had some discussions about developing a new AUMF. I do not want to be involved in anything that undermines our national interests. I don't. And I realize that Congress is very, very divided. I'm on the Foreign Relations Committee as ranking member. Somebody the other day said, "Well, Senator Corker is here to give the Republican perspective on foreign policy," and I thought I don't think there is a Republican position on foreign policy. I looked down the dais, for instance, and we have John McCain and Rand Paul on the foreign relations committee, and I don't think you could get -- you know, have a greater difference in point of view, both of which, by the way, are respected.

So, I think, you know, in order -- we have to move down the path to look at a new authorization for the use of military force that really causes Congress to own the activities that we're conducting around the world, and for the American people to be informed of those I think is a healthy thing. At the same time, I think basing that on some hearing that we have in the beginning to sort of develop a little bit of a foundation to ensure that we're going to be able to get to some place constructive -- is constructive is also in our national interests. So, I thank you for the opportunity to discuss this and any other topic you'd like to discuss. I'm really honored to be here with people that I know to be of great intellect and with a lot of knowledge. And with that: hello, Sarah.

[laughter]

How was the hearing?

[laughter]

Good to see you. Thank you. And with that, I'll stop. Thank you.

Rachel Martin:
Thank you, Senator. I was going to say that you and Neal were going to have to work twice as hard, but Sarah has rescued you. Thank you very much.

Bob Corker:
Not the first time.

Rachel Martin:
[laughs]. We are talking about incredibly important, extraordinary legislation that was passed, as Congresswoman Harman reminds us, in the days just after 9/11. This is a very short law, and if you will indulge me, I'm just going to read two sentences just to kind of plant us in this discussion. "That the President is authorized hereby to use all necessary and appropriate force against those nations, organizations, or person he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons." "All necessary and appropriate force." This short piece of

legislation, this law, has dictated -- been a legal justification for 12 years of U.S. foreign policy, especially when it comes to our national security. A lot of folks talking about how the AUMF is now outdated. It needs to be changed. We're going to try to solicit some opinions about what that change looks like today. Senator Corker has taken a vocal stance on this issue, has talked about how this is -- no longer meets the moment that we're at as a country without national security concerns. So, I will hand the floor back to you first, Senator. What needs to change?

Bob Corker:
Well, I think if you look at the genesis of the President's power relative to what is happening today, it goes back to those, as you just mentioned, that were involved in organizing the attacks that took place on our country on September 11. And I think it's pretty clear that we're now dealing with multiple other organizations around the world that have no relationship whatsoever to those entities. And so it seems to me that there is a -- without getting into a whole lot of detail, we've written a draft of an AUMF that is really complicated and gets into the weeds, and then we've written a draft of an AUMF that is a little more elegant and doesn't get into quite the details. And I think that in any authorization like this, probably what you would like to see is some tiered decision. In other words, there are some decisions that we authorize the president to take automatically, and then maybe there are some groups, because of their affiliation, that get added, but maybe there's a mechanism through which Congress has the ability to authorize those particular groups. For instance, I'll just give an example, you look at Al Nusra today in Syria, and they recently have affiliated themselves with Al Qaeda or said that they pay homage to them. So, I guess one could, if they wanted to stretch, go back to the original Authorization for the Use of Military Force back in September of '01 and say because of that --

Rachel Martin:
Fair game.

Bob Corker:
-- fair game. Let's have military action in Syria. So I would just say, again -- somebody would say, "Well, should it be narrowed or should it be broadened?" Well, I think we should do both. I think there's a way to do both. But

for one thing -- one thing is for sure to me: I think Congress needs to have some ownership over this, not in a way to keep us from acting in our national interests, but in a way that, as we're moving along, Congress is involved in helping make these decisions which Congress will fund, and Congress is involved in helping to sell that back home. I think one of the biggest mistakes we've made by virtue of the way we've carried out our activities over the last decade is very few Americans have any stake or ownership in our foreign policy, and I think that is a major problem for our nation.

Rachel Martin:
There are a couple of things I want to drill down on with you, the issue of broadening or narrowing this legislation, but first I wanted to ask Neal Katyal was this bill necessary? In other words, are there things that the President could have done under his Article Two constitutional powers without the AUMF?

Neal Katyal:
Well, sure, certainly in the, you know -- after the horrific attacks of 9/11, Article Two's Commander-in-Chief clause does give the President powers to repel the invasion and to do a number of things. I think the harder question is, you know, now -- not in the crises at the moment, but now, a dozen years later, what's the right course of action? I mean, if an alien landed from outer space and looked at this situation in which you have a resolution that has authorized a war in Afghanistan, drone strikes, you know, in multiple different countries, NSA surveillance according to the news reports, and a prolonged detention that's over a decade long --

Rachel Martin:
Guantanamo Bay?

Neal Katyal:
And other places. I think it would be hard -- that alien would be hard-pressed to think this is the United States of America. I mean, it might represent some other place, but it doesn't represent what the United States -- what our founders' design was. Our founders' design -- and Congresswoman Harman, you know, talked about the Article Two Commander-in-Chief clause, power in Article One, Section Eight's power -- Congress's power to declare war, but there's a more fundamental point, which is it's

Congress's power to make the law. And here you have a situation in which that law, which was just read to you, is 60 words long, passed in a moment of crises. It was 98 to zero in the Senate. Just reminded me, when I was writing the Voting Rights Act case in the Supreme Court and the -- Justice Scalia asked my colleague, you know, "That passed 98 to zero in the Senate. What passes 98 to zero?" And I was sitting there wanting to -- I wished I had that question, because his confirmation vote was 98 to zero.

[laughter]

But in any event, you know, this is not the way that our democracy is supposed to function, and so I think the first and most important point that I want to leave -- that I want to say today is I really want to applaud Senator Corker for being -- I hope he doesn't mind the phrase -- a true democrat, and by that I mean in democracy terms not in the political terms, because that is the founders' design. The founders' design is not that the executive gets to take this vague law and make it -- I'm not saying it's unconstitutional. I am saying, though, it's not the proper way government should function, and it's certainly not the design that all of this gets sloughed off to the courts and to the courts in D.C. in particular that are now having to decide how much detention is too long and what the conditions are and so on. We live in a democracy. This is something that should be done by our elected representatives and not by these other entities, often operating, frankly, in secret.

Rachel Martin:
I want to get specific and bring Sarah into the conversation, who has spent an inordinate amount of time in Afghanistan also dealing with issues in Pakistan, obviously being inextricably linked. The AUMF has been criticized as being too broad. The former director of the NCTC, the National Counterterrorism Center, Mike Leiter, recently said, you know, we shoehorn groups in there sometimes to make it work, a couple of groups very active in Pakistan, the Pakistani Taliban, the TPP, and Lashkar-e-Taiba. In your experience, from you vantage point, is the AUMF too broad or does the administration need that flexibility?

Sarah Chayes:
I'll sort of take a bank angle. I actually disagree to some extent with the notion that a lot of the groups that

we're seeing are not related to the group that originally attacked the United States on 9/11. I think Al Qaeda has very deliberately embarked on a strategy of franchisation. They directed their subgroups to franchise, and they've deliberately taken in. It's an extremely, how to put, decentralized management structure, and deliberately so. So I actually think most of these, including the two that you just mentioned, have very deep association with Al Qaeda, but I'm not sure that that fact really has a bearing on the authorization. And, you know, to some extent you guys are here for a panel, but we seem to be a chorus instead of a panel. I think I would really associate myself with the remarks about the American democracy and how war powers are supposed to be exercised in the American democracy. And secondly, I think that this moment of being able to step back a little bit allows us to think a lot more clearly, I would hope, about what's the right instrument for addressing some of these challenges to our international -- sorry, to our national security. Because in a funny way, in the heat of the moment after 9/11 and because of this law we've almost taken a shortcut to sort of reach for that military tool almost as a reflex, and I'm really unconvinced that that military tool is necessarily the best tool for addressing these challenges going forward.

Rachel Martin:
You're talking about the use of unmanned aerial aircraft and drone strikes --

Sarah Chayes:
All of it. Exactly. Special Forces, kinetic -- basically a kinetic response to a phenomenon that is fundamentally political, frankly, in its genesis. So we haven't really looked at what are the grievances that have helped drive some the radicalization of some of these populations. We're not thinking about that.

Rachel Martin:
But it's really difficult -- I would imagine the administration would say, it is part and parcel of the problem. Yes, it's political but who wants to be responsible for taking that tool out of the toolbox?

Sarah Chayes:
Okay. So then that raises a really interesting question which is, number one, where is the disproportion of

resources placed? Look at where we've been spending not just our money, but our thought, our creativity over the last 10, 12 years. It's all been on the kinetic side. Second, are we then really concerned about the safety of American citizens? Is that what we're spending all that money for and all the other resources? Or is it really about protecting the reputations of some political leaders who don't want to be the guy or the gal where it happens on their watch? So are all those resources actually being expended to preserve political leaders from reputational risk or are they being expended to protect and further the wellbeing of the American citizens?

Rachel Martin:
Which is what you're talking about in terms of --

Bob Corker:
Yeah, if could jump in. I really appreciate the contributions that you made prior to my trip to Afghanistan and Pakistan --

Sarah Chayes:
Thank you.

Bob Corker:
-- and certainly your comments today. Think about the fact that she's exactly right regarding -- you know, we immediately jumped to the kinetic side. There is no planning whatsoever to keep those kind of things from happening. Congress has not approved -- now, this is just embarrassing to me. We've had some wonderful leaders of the Foreign Relations Committee in the Senate as individuals, but they did not cause us to do our job. We haven't approved a State Department budget in the United States Senate since 2002. We have not approved a USAID budget since 1986. Now, I was just Pakistan this weekend. In South Waziristan we are building roads, transmission lines, dams. I mean, it's amazing what we are doing with our U.S. dollars. By the way, this was the base of operations, until recently, of Al Qaeda, and it was amazing to see what your dollars are doing there. I mean, it's amazing. I will say, on the other hand, it's amazing to know that while we're spending those with the Pak military that they are at the same time assisting through the ISI, their intelligence agency, directly -- this is not, like, perception -- assisting directly the Haqqani network, which

is operating in Afghanistan, killing American soldiers and maiming Americans. This is happening simultaneously.

So I would get back to what Sarah said and say that there is that default position. We immediately move. What we don't do, in my opinion, is -- and Congress is to blame. A lot of people are to blame. Look, candidly, administrations kind of like it this way, too. I mean, they really don't have to engage. I remember being over at the White House there shortly -- I won't mention the names that I met with -- but I could tell there's a -- as there has been, unfortunately, recently with a lot of things at the White House, there are a lot of voices and it's difficult to come to conclusions. But there's a big debate, I can tell, internally going on regarding -- back to this AUMF, but there's almost no planning that is taking place between the executive branch and Congress to overcome the very things that Sarah is talking about. That is totally irresponsible, and because we're not doing that, I would say that American men and women are losing their lives and limbs and we are wasting resources because we don't conduct that kind of thoughtful planning.

Rachel Martin:
Former Defense Secretary Leon Panetta has -- the President himself has said the intention is to end this war, all wars have to end, but this one isn't over yet. It's too soon to say we're done with this, mission accomplished. So if the AUMF needs to be revised, what takes its place?

Bob Corker:
Do you want?

Rachel Martin:
I'll open it up to the panel.

Neal Katyal:
Well, let me start by just distinguishing between process and substance points. So, you know, I think that the administration, according to the news reports and other interest groups and the like, have been so afraid of reopening the AUMF discussion because they're afraid that we might authorize longer detention or more surveillance or this and that. And, you know, I think we can have a debate about that and about kinetic, you know, technology and war-making efforts and the like, but, you know, regardless of how that debate comes out, that's a debate we should have.

I mean, that's the fundamental point here. I mean, we can talk about whether or not it makes sense to have a fast-track authorization for particular organizations kind of modeled like the State Department's Foreign Terrorist Organization that Senator Corker mentioned and the details. My guess is actually, you know, that if Congress were to engage in this debate, we wouldn't substantively, probably, wind up as far as some of the comments might have suggested. I think most surveillance technologies, most drone strikes would be authorized. They won't necessarily be compelled, so the Presidents wouldn't have to use them, but they could be in the toolkit. But let's have that debate, and let's have it authorized by Congress specifically so that, as the Senator says, there's ownership over it. That's the way our democracy is supposed to function.

Rachel Martin:
This is a piece of legislation that, as you mentioned, has authorized the war in Afghanistan, targeted killings in several different countries, the indefinite detention of detainees in Guantanamo Bay. So, just saying we're now going to revise the AUMF means you have to resolve all of those issues.

Bob Corker:
That's kind of what we're hired to do, right?

Neal Katyal:
Exactly.

Bob Corker:
I mean, you know -- and, basically -- again, look, Congress has gotten pretty lazy, and, you know, in fairness, even being on the Foreign Relations Committee, I think there have been dissertations written about how it can shorten one's lifespan.

[laughter]

I mean, really. I mean, the fact is that back home, dealing with issues of national security and foreign policy and USAID and all of those kind of things, candidly, doesn't play that well and has ended many careers. I look it at as our responsibility when we come here. The most important decisions we can make on behalf of our nation are these types of decisions, and to shrink from that really

helps our society, if you will, shrink from many of the important decisions of the day. So, I agree. We don't know what the outcome would be, but to not debate, discuss, and to try to address Guantanamo Bay -- I was with -- I was at Bagram Saturday I think -- Sunday -- depending on which country you're in, it was with both actually.

[laughter]

But the fact is, you know, we've got some third-country nationals there, sixty-four of them that are detained at Bagram. We've got to figure out what to do with them, and all of those issues are things that we need to be dealing with as a Congress to take ownership, but also to come up with solutions. One of the things that I think Congress can do -- the administration, as you mentioned, has the ability to make decisions, but I think Congress not only can debate and hopefully resolve these in the public, but also I think Congress can set a context. You know, the administration has things coming in over the transom. Let's face it, I mean, many of the decisions that they make are almost hair-on-fire decisions, right? I mean, they're dealing with crisis after crisis after crisis. If Congress doesn't take the time through hearings like we had today and other kinds of things to set a context and sort of an order of pyramid of what our national interests are, it's very difficult to make wise decisions during those moments of crisis.

Rachel Martin:
It's been 12 years. You talk about Congress not wanting to take responsibility. Is that the primary reason this has taken so long. Why now? Why is this surfacing now?

Bob Corker:
I think -- I don't want to talk the whole time.

[laughter]

Go ahead, Neal.

Neal Katyal:
Well, I was going to say --

Bob Corker:
I'm talking way too much.

Neal Katyal:
I was just going to say because of your bravery and, you know, Lindsey Graham and John McCain who have been drawing attention to this issue. I mean, fortunately that someone is. I mean, there's a complicated thing though, because when Congress passes any sort of authorization to use force they have to worry how the courts are going to interpret it, how the President is going to interpret it. And you've had this weird situation in which you have a fairly vague authorization in 2001, the administration pushes the envelope on what that means for a long period of time, it's blessed by the courts, and now if Congress wants to get rid of it, boy, that's actually pretty tough because of a different provision in the Constitution -- Article One, Section Seven -- which requires bicameralism and presentment, and if the -- if a president vetoes it, then they've got to get a two-thirds vote in both houses. And so one of the hard things when Congress takes up this legislation is thinking, "Boy, if we authorize this now, what might we possibly authorizing for years to come that we have no idea could fall within this new AUMF and how could we ever retrieve that authority back, given Article One, Section Seven?" And one answer to that that Congress has used in the past is a legislative sunset, such as in the Patriot Act, so that it would automatically sunset and have to be affirmatively re-upped, which would flip the Article One, Section Seven bicameralism and presentment.

Rachel Martin:
Which is part of the problem, that no one can see into the future to know how this war on terror works.

Sarah Chayes:
So, I think that's also part of why this is happening now, is it has morphed and it's morphed in a couple of almost divergent ways. One is that there is a sense of a beginning to get toward closure in at least the first chapter of this, in particular in Iraq and Afghanistan and with the killing of Osama Bin Laden. But, secondly, we've had this whole explosion of consciousness about what exactly we were authorizing all these years, and those two have come together in a way that's really put this on the table. And I think I would go back to this issue of, you know, democratic principles and what are they, which aren't -- I mean, I think in this country it's not just about who won an election. It's about a pretty intricate mechanism. You know, this is the 18th century, right? God, the

clockmaker. So they made a pretty complicated clock which had to do with checks and balances and separation of powers. And what's essentially happened here is the seeding of an enormous power on the part of Congress, and to some extent, you know, I might start to say, "Why do we do another one of these?" We've got some pretty good provisions within U.S. -- the Constitution and the laws of the United States about how we go about using lethal force. And maybe this needs to be something that's much more of a retail authorization going forward than this kind of a wholesale authorization.

Rachel Martin:
You think the architecture of the AUMF itself could be used in a different area?

Sarah Chayes:
No, no, on the contrary. I'm saying repeal it, possibly. I mean, just done. We're going to go back to the pretty solid architecture that we've had to date and -- or you put in its place something that has much more specific triggers for oversight by somebody who is not the executive branch.

Rachel Martin:
Neal, is that easier to do? To just repeal and start over?

Neal Katyal:
I think that's very hard, and I'd probably disagree with that. I mean, the range of different government tools in the toolkit, sometimes they can't actually be affirmatively talked about, and you can get a little bit of a sense of that with the revelations from Mr. Snowden. But, you know, that's one of the very hard things that the Senator and his colleagues face, is if we get into a retail mode where we're authorizing very specific technologies, very specific actions, that can actually destroy the value of that technique. And so my gut is, at the end of the day, it's going to look a bit more wholesale than maybe we'd prefer in an ideal world, but there are some good reasons for that.

Female Speaker:
Senator, repeal? Restructure?

Bob Corker:
Well, you know, just in fairness, the repeal kind of scares me.

[laughter]

Okay. I mean, I --

Rachel Martin:
Why? Why does --

Sarah Chayes:
I just thought I'd put it on the table --

Bob Corker:
Yeah.

Sarah Chayes:
-- so we have a little bit of divergence.

Bob Corker:
Oh, I --

Rachel Martin:
As the only kind of tension point, why is it --

Bob Corker:
Yeah. No, no, there's no tension here. We [inaudible] --

Rachel Martin:
Why is it frightening, though?

Bob Corker:
-- now that I'm off the floor and back up at the table, I would say, you know, there are numbers of things that end when it ends, and I don't think we've resolved many of those, and --

Rachel Martin:
Can you give examples?

Bob Corker:
Well, a wonderful example would be the transfer of detainees at Guantanamo. I mean, I don't know how, you know, that -- we sort of -- I mean, it's one thing to say that you're going to do it, and I think, by the way, people on both sides of the aisle are open and willing, contrary to what's been said publically. You know, I know people on my side, they are -- we'd just like to see the plan. Okay? There's got to be a plan that works. And by the way, a lot

of constitutional rights and other kinds of things taken into account. So, I think, again, a repeal or something like that to me could be a little scary. I know there are activities that are taking place that -- you know, we rely upon that old AUMF, which is why we're having this debate to occur. And so I think what would be better would be a replacement of something that's refined. The thing that concerns me a little bit about the retail piece is -- you go back to Libya and look. I mean, Harold Koh, a really bright person at the State Department who is the lawyer there, you know, came before --

Sarah Chayes:
Was. Was.

Bob Corker:
Oh, was?

Sarah Chayes:
Yeah.

Bob Corker:
Well, I would say thankfully, you know, came before our committee and basically said that the activities that we were engaged in, going back to the Authorization for the Use of Military Force, that we were -- or War Powers Act, excuse me -- that we were not really involved in any kind of military activities. Now, we were dropping bombs and missiles, you know, taking out anti-aircraft, you know, weaponry. And I asked him, I said, "Well, let me ask you, if you somebody was doing that to the United States of American, on our soil, would that be considered military activity?" And so my point is I think that all administrations on both sides of the aisle -- this is not something that's partisan -- have taken advantage of the War Powers Act, and I think we've got to step back and do something that's a little bit more concrete than the retail, only to pull us back to a place where we get to that democracy, with a little D -- democratic values, with a little D, that you were talking about earlier. I think that's important at this moment.

Neal Katyal:
I completely agree. I mean, the statutory gymnastics that both administrations since 9/11 have gone through is just, frankly, sometimes astounding. I mean, the one that the Senator just mentioned, the idea that we're not in war --

we're not in a military action in Libya because our boots aren't on the ground. If we dropped a nuclear bomb on Libya, our boots wouldn't be on the ground. I think anyone would think that's obviously a military action. So it is, I think, a very tough position that the administration took, and equally so for the last administration. And that's all the more reason why our founders put that responsibility in Congress.

Rachel Martin:
We're going to open it up to questions in just a minute. Senator Corker actually has to leave us, so in the spirit of giving you a moment for closing remarks, I will frame one last question to you.

Bob Corker:
Okay.

Rachel Martin:
You talked about the need for Congressional oversight, but it hasn't really been politically tenable to be out there saying, "Redo the AUMF."

Bob Corker:
Yeah.

Rachel Martin:
How do you make that case to your colleagues? How are you making that case right now?

Bob Corker:
Well, I -- you know, I think there is a fear -- and I have a fear, I just want to be honest -- that you begin this and you end up in a place where you're locked, nothing occurs, and you can damage our country's national interests. Okay. I don't want to see that happen, and I know no one on this panel or in the audience or -- would want to see that happen. So I think what you do is you begin to have some hearings, and, you know, you can always -- you can see consensus develop, and I think that's the way to do it. We don't have to do this in a hurry. We can do this over time. I doubt there's less than a half of 1 percent of Americans who even know what an AUMF is. And so, you know, you got to -- there's a lot of development that needs to occur. But I think you begin, again, by having hearings, like the one with Jane, who came in with others, and you begin raising these questions and conscious. It's just

like anything else we do. Look, immigration -- how long have we talked about immigration and finally passed something out of the Senate? Maybe something will happen in the House, but it takes a while to develop. So, I think that's our job. I think the public discourse and debate is very, very important for our country, and I came here to solve our nation's problems, as much as I can, working with others and certainly listening to intelligent people like we have here today. It's a privilege, and I think, again, I'll go to that and stop. What a privilege it is to wake up every morning, drive down Pennsylvania Avenue towards the Capitol, and represent in essence all of you and people in this nation on these big issues. And to be here and to want to shy away from those debates and discussions, to me, is totally irresponsible. So I thank you for having this. Part of developing these thoughts is having forums like this. I thank you for letting me be here. I am going to move to another little event that has to do with economic growth in Tennessee, which our citizens also care about.

[laughter]

Rachel Martin:
Thank you so much, Senator Corker. We appreciate it.

Bob Corker:
Thank you, thank you.

[applause]

Rachel Martin:
We do want to proceed to questions from the audience with our few remaining minutes. Gentleman in the back of the room, if you could try to ask a direct question. I know it's a complicated issue, people have a lot of opinions, but try to get right to your question.

Michael Quigley:
Yes, thank you very much. My name is Michael Quigley. I'm with Human Rights First. I'm also a Combat Veteran. And I have a concern about the AUMF that was authorized in 2001, which was authorized against a specific enemy for a specific act in an extraordinary time, being stretched like too little butter over too much bread to cover more and more threats farther and farther afield that are getting farther and farther away from the enemy that attacked us on 9/11. I think that it's a mistake to link the global war

on terrorism to that specific act. And I think you're absolutely right, ma'am, when you said that the non-kinetic approaches are far better at addressing the underlying issues that radicalize and recruit and ultimately bring about terrorism. And so I concur with the senator and others who believe that we need to invest in those non-kinetics and still have a kinetic option for the more immediate. But I think that -- and I agree with you, ma'am ,and so my question is this: what is the ramifications of conducting counterterrorism absent an AUMF in other places other than the Al Qaeda core that exists in the Pakistan-Afghanistan region? Thank you.

Sarah Chayes:
Is that directed to me? Okay. So, here's the problem: you've got a law, and it's got words in it, and Rachel read them. Against those nations, organization, or persons he determines planned, authorized, committed, or aided -- so organizations -- that organization has not been destroyed. That organization still exists. It has morphed into a completely different, you know, physiognomy. The other thing that I found really interesting as I reread this: "or harbored such organizations or persons." So no wonder Kayani was sweating -- sorry, Kayani is the chief of staff of the Pakistani military -- was sweating on the night of May 1st, 2011. You know, I don't want to go down that rabbit hole, but in terms of harboring, there's just absolutely no question. So, if we had invaded Pakistan --

Rachel Martin:
That would have covered it.

Sarah Chayes:
It covered it. Totally. So, what I'm saying is we have the authority under this law to do everything you're talking about. If this law were to be repealed or significantly changed, what I'm trying to say is that would force us to rethink whether targeted killings in Yemen is the best approach to international terrorism. It would force us to actually think through and start enabling other options.

Michael Quigley:
Can I ask a follow-up to that?

Rachel Martin:
Quick. Quick.

Sarah Chayes:
What --

Michael Quigley:
Just a real quick follow-up. So, if the President says that he wants no -- you know, wants to revise and ultimately repeal the AUMF, Congress has never authorized an AUMF without the President asking for it. That would -- this would be a change to that policy if Congress took that action.

Rachel Martin:
I guess I'm not clear on your question.

Michael Quigley:
So, my question is: taking that unprecedented step of replacing the AUMF without a request from the President, it strikes me as --

Sarah Chayes:
Is it unconstitutional? It's unprecedented, but it's not unconstitutional.

Rachel Martin:
Question? Young lady right here.

Female Speaker:
Hello, my name is Lela Ogobien [spelled phonetically]. Just recently there was an article released in Politico about the AUMF and whether Congress should have a debate on using that against Iran, and specifically use it by fall and use airstrikes by fall if Iran does not stop enrichment by then. My question is, then, would the nation be well served by having a debate in Congress on the AUMF in Iran?

Sarah Chayes:
Do you want to take that one?

Rachel Martin:
It's provocative.

Neal Katyal:
Well, sure. I think that's a good illustration of -- you know, we don't want to -- our system doesn't want to engage in statutory gymnastics to try and authorize a war in Iran off of a statute that was passed a dozen years ago. You

know, maybe you can shoehorn it in. I'm not familiar enough with the facts to -- you know, Sarah read the statute. I mean, maybe there's a way to do it. But it's not the ideal -- it's not the American way. And so certainly I think, you know, that would be I think a pretty bad move democratically to try and go to war in Iran off of an old AUMF.

Sarah Chayes:
I think in that case, while I may be more expansive about Al Qaeda, I don't see how you get Iran in this. There's absolutely no evidence that Iran had anything to do with 9/11. So...

Rachel Martin:
You think about Shiite groups, relations with Hezbollah, it does start to get murky if someone was really intending --

Sarah Chayes:
I mean, beyond murky, I think. I mean, not that -- again, the gymnastics that we've been seeing about what happened in Egypt, for example. I mean, you can -- all sorts of things can be called --

Rachel Martin:
Illustrating the ambiguousness --

Sarah Chayes:
Yeah.

Rachel Martin:
-- of this piece of legislation.

Neal Katyal:
And the datedness. I mean, you know, I'm in the private sector now and I work a lot with technology companies and, you know, Apple makes 75 percent of their profits off of technology that wasn't even around five years ago, and here we're on a cycle of a dozen years on not some minor statue. This isn't some minor, you know, agricultural subsidy or something. This is, you know, making major, life and death decisions, and we're using this old thing from 12 years ago. It's not the way to do it.

Rachel Martin:
Anyone else? Gentleman right here on the end.

Male Speaker:
Professor Katyal, I'm curious whether you think that giving -- Congress giving such a broad delegation of power to the President is consistent with the court's intelligible principles test under its delegation of powers jurisprudence.

Neal Katyal:
I do. I think this is now getting into a bit of law geek discussion --

Rachel Martin:
You're a law student.

[laughter]

Neal Katyal:
-- you know, so I don't want to bore everyone with it, but the basic question is kind of can Congress pass such an open-ended resolution or do they have to be more specific? And the court has given broad deference to Congress in giving powers to the President, and so I don't think -- again, what we're talking about today is not really constitutional law writ large. I don't think anyone is saying it's unconstitutional for either administration to have engaged in this action. We're talking about what the best route forward is in a democracy.

Rachel Martin:
Is there a [unintelligible] to it? We can wait for the mic. There you go.

Male Speaker:
Benjamin Harned [spelled phonetically]. And this question is kind of directed at Ms. Chayes, but I'd welcome input from the both of you. I'm wondering, how are you supposed to sort out a lot -- all these organizations that you can link to Al Qaeda, you know, no matter how weak that link is? Say -- and, you know, in Mali you have Ansar Dine with -- they have this -- they've been helping out the Tuareg rebels there. And you can associate them with Al Qaeda in the Islamic Maghreb, and, you know, bring that back to Al Qaeda and bring that back to 9/11. How do you sort through these organizations so that we're not at war forever, essentially?

Rachel Martin:

Or -- and also distinguishing between -- it may be a legitimate target, but does it need to be justified with a different instrument?

Sarah Chayes:
That's the point. In other words, I'm not sure that the two halves of you question are necessarily linked. One issue is how do you sort through the way that Al Qaeda is morphing? And that's an intelligence question. And we have a large body of material that was taken off a particular building on May 2nd, 2011 that can help. The other question -- so that's an intelligence and -- you know, then you decide once you see what these organizations are and what their links are and things like that, you decide what's the best way to address them. The other question is is being at war with these organizations the best way of addressing the threat that they pose, not just to the United States but to the citizens of the countries where they're operating?

Rachel Martin:
Legal follow-up, though. Do we need to be at -- under -- I guess we're talking about international law now. Does the United States need to be at war with any of these groups in order to target them the way that they have been?

Neal Katyal:
No, I don't think so. I mean, you know, and indeed -- certainly not a declared war. I mean, there's I think a lot floating around in the discourse -- "Well, Congress hasn't declared war," and so -- I mean, Congress has declared war a total of five times since the founding. We've had over 200 different military operations since the founding, so the idea that there needs to be a declaration of war, certainly not. A state of war may be necessary under international law for certain things, or for self-defense and the like, and both of those can come into play in various situations. But, again, I think, strictly speaking, most of what we're talking about here isn't a legal question as much as it is a policy one.

Rachel Martin:
Sarah.

Sarah Chayes:
I would say -- you mentioned international law and my ears spiked up. There's a really serious issue under

international law in terms of our kinetic actions, and it's called imminence. So there's -- again, and I'm not a specialist, so I don't -- there's a lot of people in this room probably who are going to, you know, have more details than I do, but --

Rachel Martin:
And just really quickly, everyone knows what kinetic is? It's direct -

Sarah Chayes:
It means --

Rachel Martin:
-- military action.

Sarah Chayes:
Right.

Rachel Martin:
[unintelligible].

Sarah Chayes:
Killing people --

Rachel Martin:
Yeah.

Sarah Chayes:
-- is what it means, okay?

[laughter]

Let's get real. So, it's -- basically, under international law, nations are understood to have a right of self-defense and that self-defense -- there's been debate over whether the attack against you has to have been launched in order for you to exercise your right of self-defense as a nation, or whether that attack is, quote, "imminent." And that imminent argument has been used with some of the targeted killing, including of U.S. citizens. I think -- and I've worked on imminence in a different context, which is free speech and the imminence of violence that is caused by a certain kind of speech. That -- the test for that under the U.S. Supreme Court is like -- it has to be instantaneous, practically, for it to count as an imminent threat. And suddenly we're stretching -- back to the

notion of stretching -- we're stretching the notion of imminence with respect to exercising our self -- our right to self-defense beyond any possible kind of boundaries for that notion. So I do think the international law context is an important one in this regard.

Rachel Martin:
Any other questions with our remaining moments? Yep, I will try to get both of you. Let's go to this gentleman first. Yeah.

Male Speaker:
Thank, you [unintelligible] at Georgetown University. I have a question in that context. NATO Article Five is on the books, too.

Sarah Chayes:
Right.

Male Speaker:
And would you recommend to, you know, open that question up, too? And what I wanted to add is this could be very, very helpful in the context of the Snowden affair and the, you know, revelations about data-mining and all that. You know, to regain normative power from the U.S. point of view I think would be very useful in that context. Thank you.

Sarah Chayes:
I'm a little confused by the question because Article Five -- and I don't have the wording of it in my head, but it's an attack on one is an attack on all, right? So I don't quite see how that even relates to this conversation that we're having now.

Male Speaker:
Wait a minute. Article Five was invoked after September 11th and required, of course, commitments of every allies to support the United States.

Sarah Chayes:
Okay. It --

Male Speaker:
Now what's happening now is that a lot of the activities that went on, revealed by Snowden, was done in that context, and what I am saying is if you, you know, do what Ms. Chayes [inaudible] --

Sarah Chayes:
There's a microphone looking for you.

Male Speaker:
And if you do, you know, open up a debate about a possible repeal and say, "Well, Article Five is no longer in operation. We don't need it. The war's over," that could be very helpful, as I think, in the debate about the Snowden affair and the data-mining that went on, and the legal basis for this is in the context -- must be seen in the context of Article Five and the commitments that allies made to the United States. Is that clearer now, my question?

Sarah Chayes:
Not -- I really don't think the -- I think you're talking three issues and I don't think they're really that closely linked. Article Five, also -- I remember -- it was NATO that declared it as having been evoked. The United States did not call for it to be invoked. And, in fact, the United States said, "Thanks, but no thanks," initially, until about 2005. Essentially that was the answer. And right now what's going on -- actually, Afghanistan has proven to be one -- a really remarkable example of NATO working together as an alliance in a sort of non-traditionally-NATO context. And I just don't think that this internal U.S. debate on the authorization of military force really affects the very organic process that's been going on among the NATO allies over Afghanistan, and I also feel as though Snowden is a kind of separate -- the Snowden issue is pretty separate.

Rachel Martin:
Let's get that final from the gentleman --

Sarah Chayes:
Well, did you want to jump in on -- no.

Rachel Martin:
And we'll make this the last question.

Male Speaker:
Yeah, thank you. I'm Michael Craft. I've looked at Congress, dealt with it in three perspectives, first as a reporter, then as a Senate and House staffer, then State Department Counterterrorism Office. Now, I'd like to pick

up on -- first of all, on the comment about the need for resources allocations. Senator Corker mentioned the State Department authorization bill hadn't been passed for years. How do you deal with this kind of situation where some people say Congress should have more ownership on this issue? And when -- often when you get hearings, it's sort of hearings by sound bite, the grandstanding. It's very hard to get any of these things through Congress, and just the perspective of two former journalists, you know, how you deal with that issue. Are we dealing with a much broader American political issue, of the lack of interest in foreign policy and the lack of patience in dealing with some of these subtle issues? And, finally, you know, even if the executive branch consults, as they should -- I've seen masterful instances when senator -- when former Secretary Shultz [spelled phonetically] came up with closed-door briefings, consulted with the Foreign Relations Committee, and he brought them all aboard, and that kind of seems to work. But when it comes to action, as we've just seen in the headlines I think yesterday or today, the proposal to send arms to Syria, whether you think it's -- Syrian rebels -- whether it's right or wrong, are being blocked, in effect vetoed by Congress. So we have a dysfunctional Congress and an uninterested --

Rachel Martin:
How do you get Congress to do anything? That's a complicated question.

Sarah Chayes:
And the guy --

Rachel Martin:
And the guy --

Sarah Chayes:
Hey, Jane --

Sarah Chayes:
Yeah.

Sarah Chayes:
-- you want to take that one?

[laughter]

Neal Katyal:

That’s exactly what I’m thinking.

Rachel Martin:
Senator Corker talked a little bit about this, but just as an entree to closing statements, any thoughts on whether or not there is an appetite to make real change on the Hill on this issue from either --

Neal Katyal:
Well, we are in this situation in which we are, you know, a dozen years past. There is, I think, an evolving conversation among the population about kind of the balance between civil liberties and terror. It’s a pretty good time to have it, and I do think that there’s more interest now than ever before, and I think the most important thing, as we have it, is to not be afraid of where we will wind up. So many people are so scared of that, that they won’t have the conversation at all. And, you know, I submit that even if we wind up in a place where too much detention is authorized by Congress, or too little, at the end of the day we’re much truer to our values if we’ve had that conversation and had an affirmative, up-or-down debate on those techniques.

Rachel Martin:
Final thoughts, Sarah?

Sarah Chayes:
Basically the same. I mean, the best way for a muscle to atrophy is not ask it to do something, and the same thing, you know, for a very important branch of our government. If we just decide as American citizens, “Boy, the Congress is just too messed up, so let’s forget about Congress,” we’re on our way to no longer living in a democracy.

Rachel Martin:
Thank you so much for your [inaudible] --

Sarah Chayes:
We got one final thought here?

Jane Harman:
And I don’t want to abdicate my own responsibility, because I describe myself as a recovering politician, and I did spend nine terms there. I think there’re many people in Congress in both parties, and Senator Corker is one of them, who would step up to this debate, and I think it

should be had and I think Congress should be a leader in it. And I applaud NPR, by the way -- free plug for NPR -- and the Wilson Center for raising these issues. But I think this belongs front and center in Congress at this time in our history, and I hope that some way will be found to have that debate in both houses.

Rachel Martin:
Do you want to wrap us up or do you want me to do that?

Jane Harman:
I think the able moderator should wrap this up.

Rachel Martin:
[laughs]. Well, again, thank you so much for being here. On behalf of the Wilson Center and NPR, thank you so much to Neil Katyal and Sarah Chayes, to Senator Corker, and to Congresswoman Barbara Lee, who could not be with us. Thank you so much.

[applause]

[end of transcript]