

**AUTHORIZATIONS OF USE OF FORCE:
ADMINISTRATION PERSPECTIVES**

HEARING

BEFORE THE

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UNITED STATES SENATE**

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AUTHORIZATIONS OF USE OF FORCE: ADMINISTRATION PERSPECTIVES

TUESDAY, AUGUST 3, 2021

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The committee met, pursuant to notice, at 10:12 a.m. in room SD-106, Hon. Robert Menendez, chairman of the committee, presiding.

Present: Senators Menendez [presiding], Cardin, Shaheen, Coons, Murphy, Kaine, Markey, Merkley, Booker, Schatz, Van Hollen, Risch, Romney, Paul, Young, Cruz, Rounds, and Hagerty.

OPENING STATEMENT OF HON. ROBERT MENENDEZ, U.S. SENATOR FROM NEW JERSEY

The CHAIRMAN. This hearing of the Senate Foreign Relations Committee will come to order.

Let me start by thanking our esteemed witnesses for appearing before us today to help the committee consider the perennial challenge of ensuring an appropriate balance between Congress and the executive branch concerning the use of military force.

I am holding this hearing at the specific requests of Senator Romney and other Republican Senate Foreign Relations Committee members who requested it prior to a vote on the 2002 AUMF repeal, as well as to jumpstart the broader discussion on the 2001 AUMF and other issues surrounding the use of force.

I believe that this subject, which is ultimately on whether to send our sons and daughters into conflict, is one of the most solemn votes that any member can take.

So with that in mind, let me start with the repeal of both the 1991 and 2002 authorizations. Let us be very clear about what we are talking about.

The 1991 authorization resolution authorizes the United States Armed Forces to take action to ensure Iraq's compliance with U.N. Security Council resolutions related to Saddam Hussein's invasion of Kuwait.

The 2002 AUMF authorizes the Armed Forces to take action against the continuing threat posed by Iraq, which at the time was still under the rule of Saddam Hussein, and the then administration claim was developing weapons of mass destruction.

We know now that that was simply not true. Regardless, these authorizations simply do not reflect reality, which is that any U.S. troops currently in Iraq are there at the invitation of the Iraqi Government.

Indeed, the President just welcomed Prime Minister al-Kadhimi to the White House for a strategic dialogue. It simply makes no sense to keep an authorization against Iraq.

The Biden administration has made clear through a formal statement of administration policy that it is not relying on the 2002 AUMF for ongoing operations or detention authority, logically, as the terms of the AUMF applied only to threats emanating from Saddam Hussein's Iraq.

In my view, it is irresponsible to keep this outdated authority on the books to address future hypothetical threats for which it was never intended.

Now, some have made the argument that repealing this authorization would somehow show weakness or lack of resolve, particularly against Iran as it continues to attack our forces in Iraq.

However, I see little logic in this argument. Iranian-backed militias derive much of their support from the false narrative that the United States is still an occupying power of Iraq. Repealing the 2002 AUMF would clearly show that we are there in support of the sovereign Iraqi Government.

Let us be very clear. Repealed or not, the 2002 AUMF does not authorize any military activity against Iran.

Now, that is not to say that the United States will not show resolve against Iran as it continues to threaten our people or our national security interests, but the 2002 AUMF provides no authority to do that. Beyond the 2002 AUMF, I would like to use this hearing to start a serious discussion on repealing and replacing the 2001 AUMF, another 20-year-old authorization.

I absolutely believe we must provide this and any executive with the appropriate authority for conducting counterterrorism operations, but such an authorization must adequately reflect the true nature of today's threats and challenges.

As one who did vote in support of the 2000 AUMF 20 years ago, I can safely say we never could have imagined it being used as a justification for airstrikes in Somalia or against groups that did not even exist at the time.

Now, I appreciate that the Biden administration and National Security Adviser Sullivan have been engaging with the chair and with interested members on the question of what a 2001 AUMF repeal and replacement would be, and we look forward to having those continuing discussions on the path to being able to achieve that.

Of course, the President has authority under Article II of the Constitution to repel attacks against the United States and against our personnel, but we must have an honest conversation about the scope of this authority and the power of Congress under Article I of the Constitution to declare war.

The Office of Legal Counsel at the Department of Justice has advanced a theory that congressional approval is required only for actions that rise to the level of war based on the conflict's, "anticipated scope, nature, and duration," and if the action serves, "important national interests."

This interpretation is a self-serving, one-way ratchet. Over time, it has enabled the executive branch to justify large-scale uses of military force without any congressional involvement, stretching

the Constitution in ways that would be unrecognizable to the framers. A rebalancing is in order.

Finally, over the past decade, the U.S. Government has advanced a more aggressive strategy in cyberspace. We are all aware of recent cyber-attacks and significant cyber campaigns launched by state and non-state entities in Russia, China, North Korea, and Iran.

President Biden has made it clear that the United States will use offensive cyber capabilities when warranted and will accelerate U.S. operations to disrupt and to “defend forward” against foreign cyber operations.

The increasing use of cyber operations implicate a host of AUMF and war power issues. I firmly believe that the committee, and I will be able—I will be pursuing this, needs to be more assertive in our role as it relates to the use of force in the cyber domain, and that the executive branch needs to be more responsive to our requests in this area.

So there is a lot to address, but I do believe that our goal in repealing these two authorizations that were for a time and place and against a country with a leader that no longer exists and for which there is no authority to deal with any challenges with Iran, and which actually serves as fuel to militias to say that we are an occupying power, needs to be repealed, and I intend to move forward at a business committee meeting to do exactly that.

With that, let me recognize the distinguished ranking member, Senator Risch.

**STATEMENT OF HON. JAMES E. RISCH,
U.S. SENATOR FROM IDAHO**

Senator RISCH. Well, thank you very much, Mr. Chairman, and thank you for holding the hearing. Thank you for our witnesses for being here.

It is interesting to note, I think, that probably the objective of everybody on this committee is the same when it comes to AUMFs.

I have sat through scores of hours, on this committee and on the Intelligence Committee, both open and closed, to deal with what is probably one of the most vexing problems that we face.

Having said that, we all have the same objective. It is good that we sit down and talk together in a rational basis to reach a conclusion as to where we go with these things, and I agree with the chairman that messaging is extremely important.

I think as much as anything, messaging is one of the things that the AUMF telegraphs to both our friends and our enemies. I guess I come down on a different side of that.

Having said that, I think when you are talking about messaging what you have to do is look at not as much your message as the people who are receiving the message, and I suspect that the arguments on both sides probably prevail with some people.

That is, some will read the message one way and some will read the message the other, and so it is important that we discuss it. It is important that we resolve that and it is important that we do not only message, but interpret that message for the people that are listening to it.

President Biden has directed airstrikes on Iranian-backed militias in Iraq and Syria twice since February. Both actions have failed to deter further Iranian aggression.

Within a few days of the U.S. airstrikes in February, Iranian militias attacked us forces at al-Assad Air Base in Iraq, attacked Israeli-owned ships in the Gulf of Oman, and increased drone attacks against Saudi Arabia from both Iraq and Yemen.

The day following the most recent U.S. strike, Iranian militias launched multiple rockets at our forces in southeast Syria and several days of attacks against our troops and diplomats in Iraq, resulting in American injuries.

Beyond Iran's terrorism in the region, we recently saw a plot to kidnap an American citizen on United States soil, an appalling demonstration of Iran's disregard of what we are doing.

While the Administration cited Article II authorities as the legal basis for recent strikes, I am concerned with the practical impacts of repealing the 2002 AUMF. The fact of the matter is that the 2002 AUMF provides the only statutory authority to strike Iran-backed militias in Iraq.

After all, the 2002 AUMF served as part of the legal basis for the strike against General Soleimani. The Biden administration's policy of less than robust responses to attacks against U.S. interests have, clearly, failed to restore deterrence.

Having said that, it is all the more important that we underscore the message that we are trying to send. Coupled with troop reductions across the Middle East, I am concerned that the repeal of the 2002 AUMF only adds to the wrong message the Administration and, I think, all of us are already sending to Iran, our allies in the region.

A repeal of this authority amplifies Iranian messages that they are ejecting the U.S. from the region, rewards Iranian proxies for attacks against Americans, and decreases U.S. leverage in the nuclear talks in Vienna, indeed, if we have any leverage.

It is vitally important that we understand the conditions under which we have previously relied on this authority for both strikes at attention and that we are certain that a repeal would not have the negative unintended consequences.

Finally, I am concerned that the repeal of the 2002 AUMF could increase calls for repeal of the 2001 AUMF, an authority that is critical to our global counterterrorism operations.

I have already heard some of my colleagues calling for a repeal of the 2001 AUMF and I believe such an action without a suitable replacement, which is the real problem, would make Americans less safe.

Again, I think we have a lot to agree on. I think the messaging is incredibly important, and again, it is important that we hold this hearing.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Risch.

We will turn to our witnesses now. We have a great panel here: the Honorable Wendy Sherman, who is the Deputy Secretary of the Department of State, we appreciate your insights today; Mr. Richard Visek, acting legal adviser at the U.S. Department of State;

and the Honorable Caroline Krass, general counsel, the U.S. Department of Defense.

I would ask that you summarize your statements as much as possible within 5 minutes. Your full statements will be included in the record without objection.

With that, Secretary Sherman, you are recognized.

STATEMENT OF THE HONORABLE WENDY SHERMAN, DEPUTY SECRETARY OF STATE, U.S. DEPARTMENT OF STATE, WASHINGTON, DC

Ms. SHERMAN. Thank you very much, Mr. Chairman, and thank you, Ranking Member Risch, distinguished members of the committee. Thank you for inviting me and my colleagues to testify here today.

Ensuring the safety of American personnel overseas is the highest priority of the State Department and, of course, of the U.S. Government, the United States Congress, and the United States Senate.

As diplomats, it is our honor to represent America's values and interests at home and abroad. That requires our personnel to travel and live all over the world, including in very challenging environments.

We are here to discuss authorizations for the use of military force, but I believe the hearing is also about our democracy and the values we model around the world. Our foreign policy works best when we work together.

President Biden is committed to engaging with Congress on questions of war and peace, and to being transparent about when, where, why, and how the United States uses military force.

I want to state clear that the Biden/Harris administration believes the 2002 authorization for the use of military force against Iraq has outlived its usefulness and should be repealed.

For the State Department, repealing the 2002 AUMF would not affect our diplomatic initiatives, and the Administration has made clear that we have no ongoing military activities that rely solely on the 2002 AUMF.

The fact is, the 2002 AUMF is no longer necessary to protect the American people from terrorism, to respond to attacks on our personnel or facilities, or to ensure the safety and security of our people.

The President has other tools available to achieve these objectives. In fact, for the last 6 years, the executive branch has relied on other authorities to underpin counterterrorism actions and has only cited the 2002 AUMF as an additional authority.

This was true for both the Trump and now the Biden administration. The 2002 AUMF is also woefully outdated in terms of our diplomatic relationship with Iraq.

The preamble of the 2002 AUMF states that Iraq "poses a continuing threat to the national security of the United States and international peace and security." As the chairman has said, this is not the case today.

We work closely with the Government of Iraq on a range of issues, from economic development to combating terrorism. Far

from a threat, Iraq is an enduring strategic partner of the United States.

There should be no doubt that President Biden will take necessary proportionate action to respond to attacks against U.S. personnel or facilities, including in Iraq.

Indeed, he has already demonstrated his resolve. Just over a month ago on June 27, the President relied on his Article II authority for our direct strikes in Syria and Iraq, at sites used by Iran-backed militia groups who have been involved in attacks against U.S. personnel and facilities in Iraq.

President Biden did not need the 2002 AUMF to protect American interests in June, and our current assessment is that we will not need the 2002 AUMF to protect American interests in the foreseeable future.

If we do need additional authorities to defend our people, we will not hesitate to come back to Congress to seek those authorities.

I want to thank members of the Senate, including members of this committee, who have worked tirelessly on this issue. I particularly want to acknowledge Senator Kaine, Senator Young, and Senator Murphy for your leadership and to thank former Senator Udall for his efforts.

I know members of this committee and others in Congress are also actively considering options to repeal and replace the 2001 AUMF. As these efforts continue, the Biden/Harris administration stands ready to provide our guidance and expertise and other materials to assist Congress in its deliberations.

As the chairman noted, those conversations are already ongoing. Repealing outdated, broad, or unnecessary authorizations for the use of military force and replacing them as needed with narrow, clear, and specific frameworks will allow us to continue protecting our people and our interests around the world.

Finally, I want to take a moment, Mr. Chairman and Ranking Member Mr. Risch, to thank you for your help in trying to confirm pending State Department nominees.

I thank the Chairman, Ranking Member Risch, for moving many nominees forward with broad bipartisan support, and I hope they will be swiftly confirmed by the Senate.

We are currently hamstrung in our ability to advance America's interests around the world without confirmed ambassadors and senior leaders.

I recently returned from a trip to China where it would have been very helpful to have had the expertise of Ambassador Dan Kritenbrink, our nominee to serve as Assistant Secretary for East Asian and Pacific Affairs, who has been passed through this committee and waiting floor approval.

Given the critical need to do everything we can to strengthen our economy and improve the lives of working people in our country, I hope, as the committee has done, that Jose Fernandez will soon be confirmed as our Under Secretary for Economic Growth, Energy, and Environment as soon as possible.

I thank this committee and the Senate for confirming Bonnie Jenkins as our Under Secretary for Arms Control and International Security before this strategic stability dialogue we held with Russia last week.

I know there are other nominees who have already been reported out of committee—10, I believe—by voice vote with strong bipartisan support, and this committee has noticed an additional hearing this week, which we greatly appreciate.

We appreciate this committee's continuing work to move our nominees forward so they can get to work on behalf of the American people.

Thank you again for inviting me to testify today. I look forward to taking your questions.

Thank you, Mr. Chairman. Thank you, Ranking Member Risch. [Prepared statement of Ms. Sherman follows:]

Prepared Statement of Ms. Wendy Sherman

Chairman Menendez, Ranking Member Risch, distinguished members of the committee, thank you for inviting me to testify today.

Ensuring the safety and wellbeing of American personnel overseas is of the highest priority to the State Department. As diplomats, it is our responsibility and our honor to represent America's values and interests at home and abroad. That work requires our personnel to travel—and live—all over the world, including in many challenging environments.

We are here today to discuss authorizations for the use of military force. But I believe this hearing is also about our democracy, and the democratic values we model around the world. President Biden is committed to engaging with Congress on questions of war and peace, and to being open and transparent about when, where, why, and how the United States chooses to use military force.

At the outset, I want to note that the Biden-Harris administration believes the 2002 Authorization for the Use of Military Force against Iraq has outlived its usefulness and should be repealed.

For the State Department, repealing the 2002 AUMF would not affect our ongoing or planned diplomatic initiatives. The Administration has made clear, and my legal colleagues can elaborate further, that we have no ongoing military activities that rely solely on the 2002 AUMF for their legal justification, and that repeal would have minimal impacts on military operations.

The fact is, the 2002 AUMF is no longer necessary to protect the American people from terrorist threats, respond to attacks on our personnel or facilities overseas, to ensure the safety and security of our people, or to maintain our strong relationships with Iraq and other regional partners. The President has other tools available to achieve all of these objectives. In fact, for at least the last 6 years, the executive branch has primarily relied on other authorities to underpin counterterrorism actions overseas, and has only relied on the 2002 AUMF as an additional authority.

There should be no doubt that, even if the 2002 AUMF is repealed, the President will not hesitate to take necessary, proportionate action to respond to attacks against U.S. personnel or facilities, including in Iraq. On June 27, the President relied on his authority under Article II of the Constitution to direct targeted strikes at locations in Syria and Iraq used by Iran-backed militia groups who had been involved in attacks against U.S. personnel and facilities in Iraq. He did not need the 2002 AUMF to protect American interests in June, and our current assessment is that we will not need the 2002 AUMF to protect American interests in the foreseeable future. If we do need additional authority at any point, we would not hesitate to come to Congress and seek that authority.

I want to thank members of the Senate, including members of this committee, who have worked tirelessly on AUMF reform for many years. I particularly want to acknowledge Senator Kaine, Senator Young, and Senator Murphy for your leadership on this committee and in the Senate, and to thank former Senator Udall for his efforts as well.

I know members of this committee and others in Congress are actively considering options to repeal and replace the 2001 AUMF as well. As these efforts continue, the Biden-Harris administration stands ready to provide expert guidance and other materials to ensure Congress understands the likely effects of such a measure, as well as the threats facing American forces, personnel, and interests around the world.

Repealing outdated, broad, or unnecessary authorizations for the use of military force, like the 2002 AUMF, and replacing them as needed with clear, narrow, and specific frameworks will allow us to continue protecting our people and our interests.

Thank you again for inviting me to testify today. I look forward to taking your questions.

The CHAIRMAN. Thank you, Madam Secretary. We share your concerns about having a State Department that is fully staffed at some of the highest levels to promote U.S. foreign policy and pursue U.S. national security and national interests.

It is my hope that we will have a process on the floor that would allow these nominees that have, for the most part, overwhelmingly passed through the committee in a bipartisan way to be achieved.

I know that in the case of Mr. Fernandez, the objections of one of our colleagues has been lifted, but it seems that the Republican leader is still not putting his name forward.

We are waiting eagerly to get the final Under Secretary in place. So we will continue to work at this. It is incredibly important for any administration to have their nominees to be able to conduct foreign policy on behalf of the United States.

Mr. Visek.

**STATEMENT OF RICHARD VISEK, ACTING LEGAL ADVISER,
U.S. DEPARTMENT OF STATE, WASHINGTON, DC**

Mr. VISEK. Thank you, Mr. Chairman, Ranking Member Risch, and members of the committee for inviting us to address the Administration's support for repeal of the 2002 authorization for use of military force against Iraq.

The preamble to the 2002 AUMF speaks to the threat the United States was facing from Iraq in 2002. At that time, Saddam Hussein's regime was threatening the lives of Americans, flouting its obligations under U.N. Security Council resolutions, brutally oppressing its own people, threatening its regional neighbors, and posing a danger to international peace and stability.

Today, the circumstances in Iraq have changed dramatically. The Iraqi Government seeks friendship, partnership, and cooperation with the United States and with the international community.

The threats posed by ISIS and destabilizing Iranian activities, including by Iran-backed militia groups in Iraq, are serious and real, but those threats are not what the 2002 AUMF was designed to address nearly 20 years ago. As a result and as Deputy Secretary Sherman just explained, the Administration supports repeal of the 2002 AUMF.

Repeal is aligned with the President's commitments to continuing a strong relationship with our Iraqi partners and to working with Congress to ensure that outdated authorizations for the use of military force are replaced with a narrow and specific framework that ensures we can continue to protect Americans from terrorist threats.

The President has stated that in any effort to reform existing AUMFs it will be critical to maintain authority to address threats to the United States with appropriately decisive and effective military action. To be clear, we do not believe that the repeal of the 2002 AUMF will impede our ability to do so.

U.S. forces remain in Iraq at the invitation of the Iraqi Government in a training, advising, assisting, and intelligence-sharing role in support of our Iraqi partners in their fight against ISIS.

This mission remains essential, but the 2002 AUMF is not necessary to execute that mission or to protect and defend our forces while doing so.

The 2001 AUMF authorizes the U.S. counterterrorism mission against ISIS and al-Qaeda in Iraq and Syria. In addition, Article II of the Constitution empowers the President to direct certain military action when necessary to protect and defend our personnel and facilities.

Some members of this committee have pointed out that Iran's destabilizing activities in Iraq undermine U.S. objectives and pose a threat to U.S. forces in Iraq. We agree. Iran-backed militia groups have engaged in UAV and rocket attacks against U.S. forces and facilities in Iraq.

Although we seek to deescalate and avoid conflict with Iran and Iranian-backed militia groups, as Deputy Secretary Sherman just noted, the President has made it clear that we will take necessary and proportionate action in self-defense to respond to attacks against U.S. personnel and facilities and Iraq.

To that end, the President directed strikes in both February and June of this year in order to defend and protect U.S. personnel from ongoing series of attacks to deter further attacks. The President did not rely on the 2002 AUMF in directing any of these recent actions.

In sum, we believe we have sufficient authority to continue the vital counter-ISIS mission in Iraq and Syria, and to address any threats to U.S. personnel or the United States that might arise in Iraq without relying on the 2002 AUMF.

If circumstances change and it becomes clear that other legal authorities are insufficient to address such threats, the Administration would work with the Congress to develop an appropriate new domestic authority that is tailored to addressing that scenario.

Thank you, Mr. Chairman.

[Prepared statement of Mr. Visek follows:]

Prepared Statement of Mr. Richard Visek

Thank you very much, Mr. Chairman and Members of the Committee, for inviting me to address the Administration's support for a proposal to repeal the 2002 AUMF. I'm pleased to have the opportunity to be here.

The preamble to the 2002 AUMF speaks to the threats that the United States was facing from Iraq in 2002 and that the authorization was drafted to address. At that time, Saddam Hussein's regime had demonstrated a continuing threat to the national security of the United States and international peace and security. It was threatening the lives of Americans; flouting its obligations under UN Security Council resolutions; brutally oppressing its own people; threatening its regional neighbors; and posing a danger to international peace and stability. Just months after the 2002 AUMF was enacted, the UN Security Council recognized a military occupation of Iraq by the United States and the United Kingdom to promote the welfare of the Iraqi people, restore security, and support the formation of a new representative government for the Iraqi people. The 2002 AUMF authorized the United States to use necessary force to defend the United States national security from the continuing threat posed by Iraq, and to enforce all relevant United Nations Security Council resolutions regarding Iraq.

Today, the circumstances in Iraq have changed dramatically. The Iraqi Government seeks friendship, partnership, and cooperation with the United States and the international community. The threats posed by ISIS and destabilizing Iranian activities, including Iran-backed militia groups in Iraq, are serious and real, but they are not the threats that the 2002 AUMF was designed to address nearly 20 years ago.

As a result, the Biden-Harris administration supports the repeal of the 2002 AUMF. Repeal of the 2002 AUMF is aligned with the President's commitments to continuing a strong relationship with our Iraqi partners, and to working with Congress to ensure that outdated authorizations for the use of military force are replaced with a narrow and specific framework that will ensure that we can continue to protect Americans from terrorist threats. As part of efforts to work with Congress on repealing and replacing outdated authorizations of military force, we want to ensure that Congress has a clear and thorough understanding of the effect of any such action. I am here today as part of that effort.

The President has also stated that, in any effort to reform existing AUMFs, it will be critical to maintain authority to address threats to the United States with appropriately decisive and effective military action. To be clear, we do not believe that repeal of the 2002 AUMF will impede our ability to do so. The United States has no ongoing military activities that rely solely on the 2002 AUMF as a domestic legal basis, and repeal of the 2002 AUMF would likely have minimal impact on current counterterrorism operations. At least for the last 6 years, the U.S. Government has at most referred to the 2002 AUMF as an "additional authority," alongside the 2001 AUMF and, at times, the President's Article II authority, underpinning ongoing counterterrorism operations against ISIS in Iraq and Syria. It is not the sole—or even primary—authority for any of those ongoing operations.

U.S. forces remain in Iraq at the invitation of the Iraqi Government in a training, advising, assisting, and intelligence sharing role in support of our Iraqi Security Forces partners in their fight against the continuing threat that ISIS poses in Iraq and Syria. We continue to seek a stable, prosperous, and democratic Iraq. Although this mission remains essential, we do not believe that the 2002 AUMF is necessary in order to execute that mission or to protect and defend our forces while doing so.

A separate statute, the 2001 AUMF, authorizes the counterterrorism mission being carried out by U.S. forces in Iraq and Syria against ISIS and al-Qa'ida to address the threat those groups continue to pose to the United States. As we have previously briefed this committee, the 2001 AUMF also authorizes U.S. forces to use necessary and appropriate force to defend U.S. or partner forces against threats and attacks as they pursue missions authorized under the AUMF.

In addition, Article II of the Constitution empowers the President to direct certain military action when it serves important national interests, including protecting and defending U.S. personnel and facilities, and when such action would not result in a "war" in the Constitutional sense. The legal and historical foundation of this Constitutional authority to protect the national security interests of the United States is extensive and has been recognized over more than two centuries, across presidential administrations.

Some members of this Committee have pointed out that Iran's destabilizing activities in Iraq undermine U.S. objectives in Iraq and continue to pose a threat to the national security interests of the United States. We agree. Iran-backed militia groups have engaged in UAV and rocket attacks against U.S. forces and facilities in Iraq that have escalated in recent months. Although we seek to de-escalate and avoid conflict with Iran or Iranian-backed militia groups, the President has made clear that we will take necessary and proportionate action in self-defense to protect U.S. personnel and facilities in Iraq from attacks.

This is evidenced by the military action that U.S. forces have taken to protect and defend our personnel and our partners against attacks from these actors, and to deter future attacks. The President did not rely on the 2002 AUMF in directing any of these recent actions. In particular, on June 27, the President directed targeted strikes against facilities at two locations in Syria and one location in Iraq near the Iraq-Syria border. These facilities were used by Iran-backed militia groups that have been involved in a series of UAV and rocket attacks against U.S. personnel and facilities in Iraq. The strikes were a necessary and proportionate action to defend our personnel against these attacks and the threat of further attacks, and the operation was consistent with both domestic and international law.

In sum, at the present time, we believe we have sufficient authority to continue the vital counter-ISIS mission in Iraq and Syria and to address any threats to U.S. personnel or the United States that might arise in Iraq, without relying on the 2002 AUMF. We recognize that there is always a risk that tensions with Iran and Iranian-supported militia groups could further escalate and require a more sustained military response than the discrete, episodic individual strikes to date. If we are faced with that scenario, and if it becomes clear that other legal authorities are insufficient to address such an escalation, the Biden administration believes that it would be important for the Congress and the Administration to work together to develop an appropriate new domestic authority that is tailored to addressing such a scenario. Thank you.

The CHAIRMAN. Thank you.
Ms. Krass.

STATEMENT OF THE HONORABLE CAROLINE KRASS, GENERAL COUNSEL, DEPARTMENT OF DEFENSE, WASHINGTON, DC

Ms. KRASS. Thank you, Mr. Chairman, Ranking Member Risch, and distinguished members of this committee. I am honored to be here today to help address your questions about the 2002 authorization for the use of military force against Iraq and any legal implications of its repeal.

My colleagues from the State Department have already provided a thorough summary of the key issues at the heart of any discussion about repealing the 2002 AUMF. As a result, I will keep my remarks very brief.

I want to be clear that the Department of Defense agrees with this Administration's view as expressed in the statement of administration policy that repealing that law would have minimal impact on current DoD activities and operations.

We can say that confidently, because no ongoing military activities rely solely on the 2002 AUMF as a domestic legal basis.

Repealing the 2002 AUMF would not impede U.S. forces' ability to protect and defend themselves. The Department of Defense would have raised concerns and opposed repeal if we thought it would put any of our men and women in uniform at greater risk.

Repealing the 2002 AUMF also would not affect the legal authority to continue the important work of ensuring the lasting defeat of ISIS.

United States, along with members of the global coalition to defeat ISIS and our local partners, including, in particular, the Iraq Security Forces, have made tremendous gains in that fight over the years.

For at least the past 6 years, the 2002 AUMF has been cited only as an additional authority underlying the defeat ISIS campaign. It was not a necessary authority at the outset of the campaign and it is not necessary now.

The President will have sufficient legal authority to continue addressing the threat from ISIS and other terrorist groups, even if the 2002 AUMF is repealed.

Finally, repealing the 2002 AUMF would not significantly constrain the United States' ability to respond to other threats that are currently foreseeable in Iraq.

In particular, the department is clear eyed about the risks to U.S. forces and to our partners and allies that are posed by Iran-backed militia groups. We take those risks extremely seriously.

The Department has considered the full scope of how any repeal might affect our ability to continue addressing threats in the region quickly and effectively.

In the end, we believe that sufficient domestic legal authority would be available to do so even in the absence of the 2002 AUMF.

As my Department of State colleagues have noted, if in the future we are faced with a currently unanticipated need to use military force, the Department, together with our interagency col-

leagues, would work with Congress to develop any appropriate new authorization tailored to addressing those threats.

Thank you again for the opportunity to speak with you today, and I look forward to your questions.

[EDITOR'S NOTE.—Ms. Krass chose not to submit a prepared statement for the record.]

The CHAIRMAN. Thank you very much to all our witnesses. Let me start a round a questions for 5 minutes.

The Administration has issued a statement of administration policy supporting a repeal of the 2002 AUMF.

Madam Secretary, I assume the State Department was part of that process and as, I think, your testimony suggests the State supports repeal?

Ms. SHERMAN. Yes, we do.

The CHAIRMAN. Ms. Krass, was the Defense Department part of the process for the statement of administration policy and does the Defense Department support repeal?

Ms. KRASS. Yes, we were part of that process.

The CHAIRMAN. Does the Department support repeal?

Ms. KRASS. Yes, we have no objections to repeal.

The CHAIRMAN. Now, it is my understanding that there are no ongoing military operations for which the 1991 or 2002 AUMFs are necessary as a domestic legal authority.

Is that the case, Mr. Visek?

Mr. VISEK. Yes, it is, Mr. Chair.

The CHAIRMAN. I understand that the 1991 and 2002 AUMFs are not necessary as the domestic legal basis for any detention activities at Guantanamo Bay. Is that accurate?

Mr. VISEK. That is correct.

The CHAIRMAN. Similarly, neither the 1991 nor the 2002 AUMF is necessary for the detention of ISIS members abroad. Is that correct?

Mr. VISEK. That is correct.

The CHAIRMAN. Now, the Administration has not cited the 2002 AUMF in relation to the U.S. defensive actions against Iranian-backed militias in February and July.

Is it accurate that the Administration believes it has sufficient authority under Article II to defend U.S. interests in personnel against Iranian-backed militias and does not need the 2002 AUMF to do so?

Mr. VISEK. That is correct.

The CHAIRMAN. If there was a need for the Administration to take sustained action against Iranian-backed militias or Iran, for that matter, in a manner that goes beyond Article II authority, would the Administration come back to Congress, Madam Secretary, for a new AUMF?

Ms. SHERMAN. As we all have said, yes, we would.

The CHAIRMAN. All right.

Based on those responses, I do not think Congress would be doing its job or living up to its constitutional responsibilities if we do not move forward with repealing the 1991 and 2002 AUMFs.

It was an authorization to use force against Saddam Hussein and Saddam Hussein's Iraq. The need for that authorization ended over

a decade ago, and as our witnesses just testified, neither AUMFs is needed for any ongoing operation or detention activities, period.

Moving forward with this repeal of this authorization is not just what is important for us to do to uphold our congressional oversight responsibilities. It also directly responds to the overwhelming will of the American people to curtail endless wars in the Middle East.

Now, I suspect there will be a lot of hypotheticals, what-ifs, thrown at our witnesses today, but I believe our duties as senators is not to dream up scenarios in an effort to keep a dead letter law on the books, especially when it comes to something so serious as sending our troops into harm's way.

The 2002 AUMF is not the answer to any threat that we are facing today, and if other existing authorities are insufficient to address those threats, I would expect the Administration to come to Congress to seek a new AUMF.

Now, Madam Secretary, I have heard the arguments against repeal, that it would weaken our position vis-à-vis Iraq, Iran, and in the Middle East, more generally.

In fact, Senator Risch and I recently had a productive meeting with Iraqi Prime Minister Kadhimi on numerous facets of the U.S.-Iraq bilateral relationship and the challenges it faces with Iranian-aligned militias.

Our discussion underscored that we are in a radically different paradigm in our partnership with Baghdad than we were in 2002. So some have argued that repeal of the Iraq AUMFs will cause the United States to appear weak.

I do not personally agree to that, but I would like to hear from you, from the Administration's point of view. What is the Administration's position on that point, and what steps is the Administration taking and will the Administration take if a repeal passes to ensure the United States maintains its overall leverage in the region?

Ms. SHERMAN. Thank you very much, Mr. Chairman.

Indeed, we believe that repealing the 2002 AUMF is a signal of the bipartisan work over the last more than two decades to establish an Iraq that is very different than the one that existed at the time that the 1991 and 2002 AUMFs were decided.

We now have a strategic partnership with Iraq. It is, in fact, a sign of strength that together, both Republicans and Democrats, have created a relationship with Iraq that is built on strength, on a strategic partnership, that indeed, as you pointed out, we are currently in a place as was decided by the Iraqis themselves where our troops are focusing on training, enabling, and advising our Iraqi partners that, indeed, the U.S.-Iraq strategic dialogue in July resulted in a communiqué that was less focused on military cooperation as the defining feature than having the Iraqi Government itself commit to defend any American personnel or troops in Iraq.

I think it really speaks to how strong we are in the region that, in fact, we have developed this strategic relationship with Iraq.

Iraqi forces, including the Peshmerga, have shown increased capability to lead counterterrorism efforts and defend Iraq sov-

ereignty, and I think it speaks to the strength and the success of the bipartisan efforts in building the strategic partnership.

I think as well, as you have heard from me and from my colleagues, that the President will not hesitate to take action if we believe that any backed militia, Iranian or otherwise, are a threat to the United States, that he has sufficient authority under his Article II abilities and relying on a revised 2001 in other appropriate circumstances to take targeted strikes, as he did in both February and on June 27.

So I think, quite frankly, Senator, rather than speak to weakness, this speaks to strength that the United States has established this strategic partnership, that Iraq is quite a different country than at the time of Saddam Hussein, and that the United States is poised to have a different relationship with Iraq and in the Middle East.

The CHAIRMAN. Thank you very much.

Senator Risch.

Senator RISCH. Thank you. I want to pick up where the chairman left off.

The meeting he and I had with the head of the Iraqi Government was interesting, to say the least, and I think one thing that went through my head was just what you have referred to, Ms. Sherman, and that is how different things are today in Iraq than they were in 2002 when the AUMF was passed.

Again, I want to underline here that I think we are all wanting to reach the same objective here and that is to message that we are going to continue to act out of strength and not out of weakness, and I think that is probably where we part ways as far as whether the 2002 should stay on the books or whether it should be repealed.

I am concerned that if it is repealed that those who receive the message will say, aha, no matter what they say, they still repealed the 2002 AUMF, which is a sign of weakness.

The thing that I have not been persuaded on is what is to be gained by the 2002 AUMF being left on the books.

I mean, we have all kinds of laws and resolutions and executive orders and everything else that are put into place. When they are over, they are put on the shelf and nobody repeals them or anything else.

I see a gain in not repealing it so that those that are our enemies cannot use it to say, look, we are backing down and we are weak. I just do not see the advantage to leaving it on the shelf.

Convince me why I am wrong, Ms. Sherman.

Ms. SHERMAN. Well, Senator, I understand your concern, and messaging is very important.

In my own view, as I just said, I think that, in fact, repeal says we have succeeded. Repeal says that the time of Saddam Hussein is over. The time of an Iraq that was not a partner of the United States is behind us.

So in my view and in the view of the Administration, repealing the 2002 AUMF is a sign of strength, of success, of moving forward in history.

I agree it should be put on the shelf and I think the only difference we have is the word repeal, because I think everyone, as

you have noted, is saying that we are at a very different time, as you experienced in your own discussion with the Iraqi Government.

So I think repeal is really a message to the international community that the relationship between—and our democracy is one where we acknowledge the progress we have made, we establish the strength of Iraqi sovereignty, that we have a partnership with them, going forward, that this is a different Iraq and a different time, and that in a bipartisan fashion that the United States Government has moved forward to a more peaceful, sovereign, and, hopefully, moving towards a more democratic Iraq.

Senator RISCH. Well, thanks. I like the message. Again, I am troubled by the fact that the message might just be a little too sophisticated for some of the people that are receiving the message and passing it on.

Be that as it may, I think the best messaging we have done in recent years is taken out General Soleimani, and, of course, 2002 AUMF was used as part of the reason for that. I do not know whether it was or whether it was not. I think they would have done that with or without the 2002 AUMF.

That is the best messaging that we have sent in a long, long time. In any event, again, we are all headed for the same objective here. I like your message.

I hope it is heard loud and clear throughout the Middle East, and I am all in, but I do not think we need to repeal the 2002 AUMF to get there. Again, I think there is a whole lot more agreement than there is disagreement on this.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Risch.

Senator Cardin.

Senator CARDIN. Well, Mr. Chairman, first, I want to thank you for holding this hearing. I think this is what we should be doing, oversight on the AUMF, and I want to thank all three of our witnesses for their service to their country.

Senator Risch, I think I will answer your question. It is just possible that if we leave an authorization on the books, an administration will misuse that authorization, and I give you as example the 2001 authorization, which has clearly been interpreted well beyond any of our interpretations when we voted for it.

I speak personally because, like the chairman, I was a member of the Congress in 2001. So was Senator Markey and others that voted for that.

We never ever in our wildest dreams thought it would be used in seven countries the way it's been used by now, I guess, four administrations.

So one of the lessons that has been learned through this process is that we need, in considering AUMFs, to have some process in that AUMF for administrations to be able to update that authority with congressional approval or allow that authorization to expire.

I think that is going to be critically important that we include in any further authorizations for use of military force and our lessons that we learned from that is the 2001 authorization. The 2002 repeal should not be controversial, and I understand Senator Risch's point and I respect it greatly, but the 2001 should also be repealed and replaced.

I just would like to talk about the urgency here and then ask the question. We are now in August of this Congress. Time is evaporating. This is not an easy subject to replace authorizations for the use of force.

In all due respect, I think it is absolutely essential for the Administration to come forward as to the authorization that they need because, you see, we all have different views about the threats that are out there, the geographical scope of any authorization, the requirements to come back to Congress if circumstances changes and what type of an approval process is necessary, the length of time for the authorization.

All those are questions that each of us have different views, but the starting point should be those that have the responsibility to exercise the power to keep us safe—the executive branch, the president—to come to us and tell us what you need and then let us debate it with you and, hopefully, come up with a replacement.

Secretary Sherman, I very much respect your view on this. I thought your last statement about repealing outdated, broad, and unnecessary authorization for the use of military force like 2002 AUMF and replacing them as needed with clear, narrow, and specific frameworks will allow us to continue protecting our people and our interests. I agree with that paragraph, but I would add 2001 rather than 2002. We have got to replace that. So I am seriously considering whether there will be an opportunity for us, Mr. Chairman, to put a sunset on the 2001, giving ample time for replacement to be voted on by Congress, because otherwise, I am not sure we will ever do it.

It is just too easy for administrations to misinterpret the authority of 2001 and, quite frankly, we are not at risk because, as our witnesses have testified, there is adequate authority under Article II to protect us.

So Article II is there to protect us against any imminent threat. We are not going to be bare as far as protecting our country. The President will protect us as the Commander-in-Chief, but Congress should give the Administration the authority they need and not just this broad use of an outdated authority.

So, Madam Secretary, what is wrong with us setting a date that we need to replace this by, recognizing that you always have Article II authority?

I would hope the legacy of the Biden administration will be that future administrations will not be relying on the 2001 authorization in order to protect us from a threat that did not exist in 2001.

Ms. SHERMAN. Thank you very much, Senator.

As you know, the President of the United States served in this body for 36 years and he has great regard for both the Article I responsibilities of the Congress and the Senate, and the Article II authorities of the President of the United States.

He has committed and we have all committed to work with Congress to ensure that outdated authorizations for the use of military force are replaced with narrow and specific frameworks that will ensure we can continue to protect Americans from terrorist threats.

There are a lot of complex questions involved in doing this scope duration more, but we welcome enhanced congressional involvement and inter-branch dialogue over the use of military force in-

cluding in protecting the United States and U.S. interests from the evolving terrorist threats we face.

We know that these are changing. The chairman mentioned some, including in cyber that have changed the nature of thinking about terrorist threats.

So the Administration is open and has begun already discussions with Congress to replace or revise the 2001 AUMF that might consider some of the following things: establishing a mechanism to add groups beyond those that may have been identified by name in the text of the AUMF because, as you point out, it has been relied upon in circumstances, perhaps, that you did not imagine; through appropriate input from an engagement between the President and Congress or the executive branch and Congress to establish a mechanism to add countries in which the use of force is authorized against particular groups; and to have a periodic review of groups and countries.

So I think that there is a lot of work to be done. It may be that those kinds of ideas are not the right ones, but those are things that we are willing to discuss as well as other things that the Senate might put on the table.

We are in support, Senator, very much of continuing those discussions in a timely manner to reach a revised 2001 AUMF at the same time that we continue to support the repeal of the 1991 and the 2002 AUMFs, which we believe are not useful anymore and are not relied upon in any circumstance.

Senator CARDIN. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Romney.

Senator ROMNEY. Thank you, Mr. Chairman, and I very much appreciate the opportunity that you have given our committee to hear from these witnesses and to discuss this very important matter.

I am going to continue with some of the comments and questions that were raised by Senator Cardin.

Secretary Sherman, will the Biden administration misuse this AUMF?

Ms. SHERMAN. No, sir.

Senator ROMNEY. Good. Senator Cardin indicated that this should be repealed and replaced, and I am focused on the word replaced. There have been efforts to try and narrow and replace these AUMF in the past.

Senator Corker, when he was chairman of this committee back in 2018, brought forward such a revision. Did not make it out of committee.

Going back to 2013, President Obama sought an AUMF with regards to Syria. That, of course, was not successful on the floor.

I am concerned that the prospect of this body ever approving an AUMF to deal with the ongoing threat represented by ISIS, the Taliban, al-Qaeda, and other like groups would never pass this body and that, in addition to the comments and the concerns that were raised by the ranking member, with which I concur, that the idea that somehow we are going to come up with some new AUMFs is just not realistic.

I think about a scenario. Perhaps, yes, certainly, the President has Article II power to defend our troops and to defend against imminent attack of the United States.

Let us say he continues to withdraw or a president continues to withdraw troops from Afghanistan and Iraq and we have no troops in Afghanistan and Iraq, and ISIS goes on a rampage and starts expanding territory and wiping out individuals there, or, for that matter, in Afghanistan, that the Taliban routs the democratically-elected government and starts killing women and children.

Would we, under Article II, have legal authority to go in if we had no troops there or were not threatened in the homeland?

Ms. SHERMAN. I would defer to my legal colleagues to answer the legal point there. Your broader point, Senator, about whether we need a new AUMF, we do believe revising the 2001 AUMF is appropriate and we hope that, working together with the United States Senate, that, indeed, a 2001 AUMF revision can take place.

So we fully support your view. That would be a good thing to do.

Senator ROMNEY. Quoting a great American, "Hope is not a strategy." Are there other AUMFs out there that have not been repealed?

Ms. SHERMAN. No. We have the 2001, the 1991, the 2002. As you point out, the Article II authority of the president which, in fact, is most often been used not only by this president, but by the previous president as the basis for taking action.

Senator ROMNEY. Given the fact that you are convinced that the Biden administration will not misuse this AUMF and the fact that we face ongoing threats from various terror organizations, and at least my conviction that it would be very difficult for this body to ever agree to another AUMF absent a threat to the homeland, why do you believe it is necessary for us to remove this AUMF, which has been used by President Obama, President Trump to defend our interests?

I think there is a sense that if the homeland is going to be threatened that we have every right to step in. We all agree with that, but our interests in the world go beyond protecting the homeland. They also keep bad things from happening and becoming so severe that they draw us in and, ultimately, do represent a threat to the homeland.

So why take the chance that, as the ranking member indicated, that this is misinterpreted in the Middle East? I cannot imagine anybody in any leadership position thinks that we are at war with Iraq.

It is very clear we are there at Iraq's request, that we are collaborating and helping the government protect themselves from ISIS and protect against the incursion of Iran.

That is the message loud and clear. No one thinks Saddam Hussein is still in charge of Iraq and that we are fighting Saddam Hussein.

So this has extraordinary potential to be misinterpreted. Why do it now? They are about to have elections in Iraq.

Potentially, this could be misconstrued as somehow America is pulling away. It just seems like the risk is much greater than the benefit of the nature that you are describing.

Ms. SHERMAN. I think, Senator, I am going to defer to my legal colleague on the use of the 2002, though I do not believe that even President Trump used 2002 as the basis for any action he took. The killing of Soleimani was done primarily under Article II.

To your broader point, the Iraqi Government now sees itself as a sovereign country in partnership with United States and does not wish to have an appearance of the Iraq that is cited in either 1991 or 2002.

Let me, if I may, let our acting legal advisor add from legal perspective the value here.

Mr. VISEK. Thank you, Senator.

I think there is a little bit of confusion that is creeping in and I think that is because we are talking about two AUMFs.

Senator ROMNEY. Yes, and that was raised by the chairman and Senator Cardin. I think, in reality, we are talking about two. I know it is not literally on the agenda, but that is the case.

I know I have gone over my time, Mr. Chairman. So I will—

Mr. VISEK. If I may, Senator, the 2001 AUMF, obviously, authorizes our activities against ISIS and the Taliban.

That is a cornerstone of that effort, and I think it is important to recognize what we are talking about in the context of the 2001 is replacing that with a narrower specific framework that can ensure that we are still able to carry out that duty.

The 2002 AUMF, on the other hand, the AUMF against Iraq, we can continue to conduct our operations and we can address the ISIS and the Taliban threat—

Senator ROMNEY. Even with no troops there?

Mr. VISEK. Without—well—

Senator ROMNEY. If we had no troops there?

Mr. VISEK. Well, sir, whether or not we have troops there is another question, but without the 2002 AUMF. The 2002 AUMF would not put troops there. It would not take away troops, but it does not add any authority and we do not rely on it for those operations.

Senator ROMNEY. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. Just two remarks for the senator's consideration. I was the author of the 2013 AUMF, then at the request of President Biden, because Assad was using chemical weapons against his people.

That AUMF passed this committee with the late John McCain and Barbara Boxer, two extremes of the ideological divide, in a robust bipartisan vote.

The reason it did not go to the floor—it is not that it failed on the floor. It did not go to the floor because President Obama took that authorization of the committee and made it very clear at the G-20 meeting in Russia that he would seek to finalize that authorization and use it against Assad if he did not give up his chemical weapons.

It is not that it failed on the Senate floor. It just never got there because it was not necessary.

I know that I opened up the conversation, and I intend for it to be that way, about the 1991, 2002, but also the 2001, but what the committee will be voting on in the first instance will be the 1991 and 2002 AUMF repeals.

All I will say on that regard is it would be a perversion of what Congress voted for to read in those authorizations anything, anything, that goes beyond the Saddam Hussein era of Iraq, and that is we have a legitimate conversation going on in the 2001 and what it means.

On the others, I think it is a little less certain, but I appreciate the senator's views and interest.

Senator Shaheen.

Senator SHAHEEN. Thank you, Mr. Chairman, and thank you to each of our witnesses for your service and for your testimony today.

Ms. Krass, I am going to actually begin with you and I am going to try and restate what I think was Senator Romney's question to Mr. Visek, and I am directing it at you because you are in the Department of Defense.

Would the repeal of the 2002 AUMF impact U.S. forces that remain in Iraq now in any way?

Ms. KRASS. No, Senator.

Senator SHAHEEN. Can you provide a scenario in which the President might need to rely on that AUMF to use force in Iraq?

Ms. KRASS. No, I cannot think of one.

Senator SHAHEEN. Thank you. I am not sure who to direct this at, but some of the U.S. litigation around AUMF authorities has dealt with the issue of detaining enemy combatants.

So maybe, Ambassador Sherman, you would take the first crack at this. What, if any, effect do you anticipate the repeal of the 2002 AUMF would have on the detainee issue?

Ms. SHERMAN. None whatsoever, Senator, and certainly defer to Mr. Visek and to Ms. Krass if they have anything to add from a legal perspective, but my impression is none.

Senator SHAHEEN. Mr. Visek.

Mr. VISEK. Senator, the 2002 AUMF is not a source of authority for any current detainee operations, including those at Guantanamo.

Senator SHAHEEN. Thank you.

Just to go back, I think, Secretary Sherman, you answered this in your opening statement, but I do believe that the previous administration cited the 2002 AUMF and strikes against Iran and its proxies.

As you pointed out, this administration does not believe that the AUMF provides authority for force against Iran-backed militias or against Iran. Did I understand that correctly?

Ms. SHERMAN. So it does not provide any authority to attack Iran. Indeed, as I mentioned a moment ago, is my understanding and recollection that when the previous administration took the attack against Qasem Soleimani, it primarily relied on Article II.

Article II—the AUMF 2002 was used as an additional authority, but was not a necessary one.

Senator SHAHEEN. So can you describe what authorities the Administration is relying on in the operations that have been taken so far this year against Iran-backed proxies in Syria and Iraq?

Ms. SHERMAN. If I may, let me let the legal advisor answer the legal authorities for those strikes, though I believe they were Article II authorities.

Senator SHAHEEN. Mr. Visek.

Mr. VISEK. That would be correct, Senator. Under the domestic law basis, the President acted under his authority under Article II to defend and protect U.S. personnel from attacks.

From an international law basis, we were relying on our inherent right of self-defense under Article 51 of the U.N. Charter.

We reported the Article II to the Congress, consistent with the War Powers Resolution, and also we reported our basis to the U.N. Security Council in accord with Article 51.

Senator SHAHEEN. Just to be clear, so if U.S. personnel are affected again, we do not need the—in the Middle East, we do not need the 2002 AUMF in order to defend them?

Mr. VISEK. That is correct.

Senator SHAHEEN. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Paul.

Senator PAUL. I wholeheartedly support the public and official ending of the Iraq war. Many of us thought the war was a mistake to begin with. Large percentages of the public now in retrospect think the war was a mistake.

Even if you poll our veterans who fought in the war, the vast majority of our veterans actually think it was a mistake. So publicly ending the Iraq War, which has been over for a decade, is a great idea and should not be controversial.

People who want to keep it in place have to realize that this vote will be similar to the vote in 2002. The vote in 2002 allowed 100,000 troops or more to be in Iraq, it allowed 2,000 of our soldiers to die, it allowed 20,000 people to be wounded, and over a thousand young men and women to lose their arms and legs.

That is what you are voting for now. If you leave this in place, any president could do the same thing they did in 2002. That is what you are voting for.

Would not you want to vote again? People say we might not vote for it. That would be good if we did not vote for another Iraq war, but if there is another need for a war, come and vote. When we have been attacked, we have voted overwhelmingly. When we were attacked on 9/11, we overwhelmingly voted.

Iraq was a different story, and still people have debates over whether it was a good idea to this day, but if you vote to leave it on the books, you are voting to allow a president to send as much as hundreds of thousands of troops in.

Now, there is just debate over what you can do under Article II authority. I, personally, think it would be much narrower than any reason a president has interpreted it to be.

Every president has interpreted it to be wide open, and the only way we stop them, the only way we can possibly stop them is by defunding something they do and we are unlikely to do that.

I do not think any president believes they can take 100,000 troops into Iraq or into any country without an authorization of force.

So getting rid of this gets rid of the possibility of a big war by any president, I think. I do not think any president would attempt to do that without this in place. So we get rid of the possibility of a big war. That is what we are voting against.

All the little things—not always little, but all of the military actions that presidents take they will continue to take without any authorization.

With regard to 2001, there is a danger, and this is where I disagree with many who want to replace it. Absolutely, we should repeal it. People say, oh, we want to make it narrower. It is extremely narrow.

It authorized us to go after those who planned, authorized, committed, and aided the terrorist attacks on one day, September 11. It has been interpreted to be associated forces, ISIS, al-Qaeda. There is no one left alive that has anything to do with 9/11.

So it is very narrow. It does not apply to anything we are doing around the world as we speak, but it has been overly broad and overly broadly interpreted. So we should repeal it also.

We should not have a thousand troops in Mali. We should not have a thousand troops in Somalia. We should not be in 14 different countries.

If we replace it, all of the replacements of 2001 authorization have been still broad enough to be interpreted to include all the places we are involved with. Dozens of wars could be fought with most of the replacement bills.

So I would say repeal them all. War is supposed to be something that is difficult to get involved with. Come before us. We just give up our power by having any AUMF on the books.

They all should be repealed, and if people want to go to war, which is a terrible thing, come and vote. When we have been attacked, we will vote to go to war, but we are reluctant to, and good. That should be a good thing that we should not.

Is it likely we would vote to go to war in Mali or Somalia tomorrow? We would probably vote against it and that would be a good thing. That is also why we should not be there now.

I caution those who want to replace it that replacing 2001 most of the efforts, while well intended, I think were as broad or broader in the actual language. The language is actually very narrow in 2001, but has been overly interpreted.

So I think it is important that the American people know this is a vote about a war that has long been over, but a vote to keep this is really a vote to allow something as big as the Iraq War was at its maximum. That is what this is about.

If you want that kind of power on the books and you do not want to vote again—you know, if a brand new threat comes up, you do not want to have the power to determine for your constituents whether we go to war or not, that is giving up a huge amount of power that our Founding Fathers thought should always be vested in Congress.

That is all I have. Thank you.

The CHAIRMAN. I thank the senator.

I have asked Senator Coons, who is next to question, also to preside for a few minutes.

Senator Coons.

Senator COONS [presiding]. I would like to thank our witnesses who have appeared before us today and just take a moment to make sure that I have clarity and that those who may be watching

have clarity and the members of this committee have clarity about what we are discussing and what we are not discussing.

If you could each just repeat briefly. It has been your testimony today that repealing the 1991 and the 2002 AUMFs will have no impact on our security, on our operations.

In fact, they will have positive impacts on our relations with Iraq on a demonstration that the constitutional roles in the democratic process can actually function, and I will speak for myself now describing this Administration.

One might view that action as the beginning step in rebalancing the operational roles between the executive and legislative, in particular, the constitutional role of the Senate, and the declaration of war.

So could you just please, each of you, am I understanding you correctly, the repeal of 1991 and 2002 will have no impact on our security or deterrence and would, in fact, be a positive for our nation.

Ms. SHERMAN. I agree, with you, Senator.

Senator COONS. Mr. Visek.

Mr. VISEK. That is correct, Senator.

Senator COONS. Ms. Krass.

Ms. KRASS. Yes, Senator. There are no ongoing military operations that rely solely on the 2002 AUMF.

Senator COONS. So it is my hope that we will proceed to take this important first step and repeal these two outdated and no longer relevant or necessary AUMFs.

There has been a lot of conflating those two AUMFs and the 2001 AUMF, and I think that is, largely, because of a dynamic where the 2001 AUMF has been stretched beyond all recognition in terms of its scope and reach from what was contemplated when it was initially adopted.

The chairman referenced the process many of us went through in 2013 where we debated and, ultimately, passed in a robust and bipartisan way an AUMF related to Syria.

Let me ask just a few questions, if I could. The United States recently carried out strikes on al-Shabaab targets in Somalia, and I think that raises exactly the sorts of questions about scope, about narrowness, about adding new combatants. That is really at the heart of our debate and our concerns.

Ms. Sherman, if you might, given the 2001 AUMF does not mention al-Shabaab or Somalia, how did we come to be at war with al-Shabaab and has al-Shabaab ever specifically targeted Americans or our homeland prior to the Obama administration determining it was an associated force?

Ms. SHERMAN. Right. As you noted, Senator, the Obama administration determined and notified Congress in 2016 that al-Shabaab is covered by the 2001 AUMF as an associated force of al-Qaeda.

The determination was made with respect to al-Shabaab because, among other things, al-Shabaab has pledged loyalty to al-Qaeda in its public statements, made clear that it considers the United States one of its enemies, and been responsible for numerous attacks, threats, and plots against U.S. persons and interests in East Africa.

In short, al-Shabaab has entered the fight alongside al-Qaeda and is a co-belligerent with al-Qaeda in hostilities against the United States, making it an associated force and, therefore, within the scope of the 2001 AUMF.

As I understand it, and my legal colleagues—I should say to this committee I am not a lawyer—my understanding is that it was in fact the 2001 AUMF that allowed for the domestic law basis for this, and as a matter of international law the legal basis for use of force by the United States in the territory of Somalia is consent of the Somali Government itself.

So that is my understanding. I do not know if my colleagues have anything they want to add.

Senator COONS. Ms. Krass, anything you would like to add to that? I am going to ask you a follow-on briefly on top of that.

Did the Biden administration review the Obama or Trump administration's determination that al-Shabaab was an associated force, and if so, on what basis if it differs in any way from what the deputy secretary just articulated?

Mr. VISEK. Senator, first, I should say that Deputy Secretary Sherman answered perfectly and she has proved that she does not need lawyers.

With respect to the review, there is an ongoing review being conducted by the Administration across an entire spectrum of counterterrorism issues, including direct action, and we hope to—when that review is done, we hope to be as transparent as possible, but it is taking a deep dive look at the entire CT program and it is underway. At this point, I do not have anything final to report on that score.

Senator COONS. Ms. Krass.

Ms. KRASS. I have nothing to add, Senator.

Senator COONS. Let me just ask whether—in the interest of transparency something I welcome and will celebrate about the Biden/Harris administration.

Could you provide a list to this committee of all countries where force has been used pursuant to the 2001 AUMF since it was enacted 20 years ago and a list of groups against whom you believe force may currently be authorized pursuant to the 2001 AUMF? Is that a list you could imagine providing to this committee?

Mr. VISEK. Senator, I know that we report as a matter of course on our activities under the regular war power reporting and also pursuant to various provisions of the NDAA on military operations, including their location as well as groups that are targeted.

Whether we have the ability to go back 20 years, I do not want to necessarily commit to that. I think if we have that, I do not see why we would not be able to provide that.

Senator COONS. Madam Deputy Secretary, I wondered if you could make any commitment to us that we would have an open debate about the current groups and nations in which authorization is believed to rest on the 2001 AUMF.

Ms. SHERMAN. As I said earlier, Senator, we absolutely are open to open conversation with you about how the 2001 AUMF might be revised, including the groups that should be covered and how we might have an ongoing process to ensure a strong partnership between the Congress and the executive branch in this matter.

Senator COONS. Well, thank you. Before I turn to Senator Young, I am just going to say how much I appreciate your articulated commitment to finding a way to craft an AUMF that is narrower, more specific, that has a clear process for adding territories or groups and that would include an end date.

That is a direct challenge to this committee and to the Senate to engage in a respectful, appropriate, and constitutionally necessary dialogue with this administration about our role and your role in both securing the people of the United States and in demonstrating our ability to exercise our constitutional responsibilities.

Senator Young.

Senator YOUNG. Thank you, Chairman.

I understand that the 2001 AUMF is of great interest to many of my colleagues because there is much to be debated there in the future as it pertains to the scope of the authorities, how it might be amended, how it might be replaced.

I am going to focus on, really, the thrust of today's hearing, which is the legislation that is before this committee and will soon, I suspect, be before the United States Senate—the repeal of the 1991 and 2002 AUMFs.

Now, each of those AUMFs was focused on the threat posed by Saddam Hussein and his regime in Iraq. Let us take the 2002 AUMF as our focal point.

After lengthy findings on the threats posed by the regime of Saddam Hussein, Congress authorized the President in 2002 to, "Use the Armed Forces of the United States as he determines to be necessary and appropriate to, number one, defend the national security of the United States against the continuing threat posed by Iraq"—that is Saddam Hussein's Iraq—"and, two, enforce all relevant United Nations Security Council resolutions regarding Iraq." That is Saddam Hussein's Iraq.

Secretary Sherman, is the United States still at war with the Government of Iraq as it states in the 2002 AUMF?

Ms. SHERMAN. No, we are not, Senator.

Senator YOUNG. Okay. Are our forces deployed to Iraq today at the invitation of a new Iraqi Government?

Ms. SHERMAN. Yes. Iraq is a sovereign government and we have a strategic partnership with them.

Senator YOUNG. Let us put a pin on that. That is what we are talking about here. It has nothing to do with 2001. We are just focused on 1991 which, incidentally, I was right out of high school. I had just enlisted in the United States Navy.

In 2002—as you know, the regime of Saddam Hussein was removed in 2003 pursuant to the terms of the very AUMF, the 2002 AUMF that I have just referenced, and Saddam Hussein was brought to justice by brave American servicemen and women and by some of the Iraqi people.

The Government of Iraq is now a partner. They are not an enemy of the United States, and U.S. troops are there at the Government's invitation, as Deputy Secretary Sherman just indicated.

With that, if our forces in Iraq were to be attacked by Iranian-backed militias, the Islamic State, or other terrorist groups, is there anything whatsoever that would stop the President of the

United States from allowing U.S. forces to defend themselves against such an attack?

Deputy Secretary Sherman.

Ms. SHERMAN. No. There is nothing that would keep the President from taking action as he has done on more than one occasion since he has become president.

Senator YOUNG. Mr. Visek, do you agree with that assessment?

Mr. VISEK. I agree.

Senator YOUNG. Ms. Krass, do you agree with that assessment?

Ms. KRASS. Yes, I agree, sir.

Senator YOUNG. Would repeal of the 1991 or 2002 AUMF, the only thing we are focused on here today, negatively impact or endanger our service members and diplomats serving in Iraq?

Deputy Secretary Sherman.

Ms. SHERMAN. No, it would not, sir.

Senator YOUNG. Do you agree with that assessment, Mr. Visek?

Mr. VISEK. Yes, I do.

Senator YOUNG. Ms. Krass.

Ms. KRASS. Yes, I agree.

Senator YOUNG. Okay. If this repeal of the 1991 and the 2002 AUMF and no other AUMF's moves forward, as I expect it will, would any of you on the panel have any concerns about the safety and security of U.S. personnel stationed in Iraq on account of said repeal?

Yes or no, please. Deputy Secretary Sherman.

Ms. SHERMAN. No, not as a result of the repeal.

Senator YOUNG. Mr. Visek.

Mr. VISEK. Not as a result of the repeal, no.

Senator YOUNG. Ms. Krass.

Ms. KRASS. I agree, not as a result of the repeal.

Senator YOUNG. I have no further questions. Thank you so much.

Senator COONS. Thank you, Senator.

Senator Murphy.

Senator MURPHY. Thank you very much, Mr. Chairman.

Mr. Chairman, I have had only a few of what I call supermarket moments in my time in public service.

These are moments when the people I represent are so exercised by a conversation we are having here in Washington that they do not sort of wait to walk across the supermarkets to register their opinion with you. They yell it at you, and there has been a handful of them.

The health care debate in 2009 was one of them, but another was Labor Day weekend 2013 when President Obama had requested the authorization to use military force in Syria and we were about to have that debate.

My constituents back home had grave concerns about a commitment of U.S. forces into Syria and so did all of yours, because while this committee did do good work in moving that resolution forward—I did not support it—but it did receive a bipartisan vote before this committee, it was not likely going to pass the United States Senate or the House of Representatives.

It likely did not have enough support to move through the entire body. Why? Because the American public often is much more skeptical about the commitment of U.S. forces abroad than this body is

or that the foreign policy consensus is in Washington, DC. Why? Because they have seen time and time again mistakes being made.

So I think Senator Romney is right that passing future AUMFs will be difficult, but for good reason. Because the American public are very, very hesitant to commit U.S. forces abroad.

Sometimes, despite the fact that think tanks in Washington think it is a good idea for us to make war overseas, the American public do not. As our Founding Fathers believed, we have an obligation to listen to them.

So I just think it is important to lay that down for the record that the difficulty of passing authorizations of military force is not an excuse to grant wholesale new powers to the Administration. There is a reason for the difficulty.

My set of questions is in pursuit of trying to find limiting principles around the powers that have been granted to the executive branch, particularly in the post-2001 era.

I agree with Senator Young. Repealing 2002, 1991 likely has no impact on our ability to protect forces in the region. I think we should go forward quickly in this matter.

I also think it makes us stronger in the region when we more accurately define our enemies. When we train our objectives with a finer point in the Middle East, a very complicated place we are stronger. So I do not buy the argument that this makes us weaker.

So let me ask you about a couple of limiting principles.

Secretary Sherman, does the Administration recognize the concept of imminent threat as a limiting principle? In other words, if a strike is simply retaliatory against an enemy who has struck the United States or is designed to prevent future attacks, is that allowed without an AUMF?

Or does the Administration always have to prove that they are trying to prevent an imminent future attack against the United States?

Ms. SHERMAN. Senator, on that question, I am going to defer to my legal advisor.

Mr. VISEK. Senator, I will start and I suspect it would be helpful if I turned over to my colleague, Ms. Krass, who understands the DoD operational guidance better than I, but when we are attacked, we have a right to defend ourselves, and I think the idea of imminence is really more in the—what we would sort of call the use—from just a legal standpoint as opposed to a policy standpoint, the *jus ad bellum* idea that you can certainly defend yourself against an imminent attack, and there are various—

Senator MURPHY. You do not perceive it necessary to prove that there is an imminent attack?

Mr. VISEK. Taking the two strikes that we did this year, the February and the June strikes, I do not think there was a requirement that there be a concern about—

Senator MURPHY. The proof of an imminent attack.

Let me ask you this, just because the time is running out, do we have the ability to take military action to protect partner forces?

Let us say there is no attack that is imminent against the United States. Can we take action to protect partner forces?

Mr. VISEK. On this one, I will certainly defer to my colleague, Ms. Krass.

Ms. KRASS. Senator, our U.S. Armed Forces are operating under existing domestic legal authority, and there is threat of imminent attack against our partner forces who are working alongside us, for example, to defeat a counter a terrorist group, we may use force.

Senator MURPHY. Even if there is no threat of force being used against United States, if there is a threat of force against a partner force in a country subject to a battle against an associated force of al-Qaeda under the 2001 AUMF we have the ability to use military force against them without prior authorization from the United States Congress?

Ms. KRASS. Yes, because the whole conflict would have already been authorized by Congress.

Senator MURPHY. Lastly, I think you can see how it is a little difficult for the American public to figure out where these authorizations end when it is construed so broadly.

Lastly, I will address this to whoever wants to take it. How do you take a look at the question of when the frequency of Article II strikes requires you to come to Congress for a new authorization?

We have seen an increased frequency of attacks against Iranian-aligned militias. How do you enter into this question of when the frequency of Article II attacks requires you then to come to Congress for new permission?

You can see a circumstance in which if you are striking twice a year maybe you can consider that Article II authority, but if you are striking once a week, that does not sound like Article II authority. What is the limiting principle there?

Mr. VISEK. Well, Senator, as the voice in my head is always going you are—I am now having to engage in hypotheticals, and I guess that is my one point where facts and circumstances are always important. So we would, obviously, have to assess it in light of that.

To try to attach it to concrete sort of—a situation that we are dealing with now, the attacks from the Iran-backed militias, for example, we do not see those to be—we do not see any sort of continuing ongoing attacks by a particular entity.

They tend to be more in the discrete individual—episodic, if you will. So there we think the Article II power is more than adequate.

Now, at the beginning of this hearing, Senator Menendez referenced the OLC opinions, and I realize that there are differing views on those, but as executive branch lawyers, we do take guidance from the Office of Legal Counsel in that regard and there are limiting principles in terms of at what point do we think the—and I believe Senator Menendez referred to this—the scope, duration, and nature—the reasonably anticipated scope, duration, and nature would rise to, basically, a level of war that would require us to come to the Congress and that would be focusing on not only our operation, but the likely responses that would follow from that.

Then in terms of limiting principles, because I am here on behalf of the Department of State I would also say there is, plainly, limiting principles in international law, which we respect and that a strike would need to be necessary and it would need to be proportionate.

Then, obviously, once we are engaged in strikes, we, obviously, follow the rules of international humanitarian law, which focus on

the principles of distinction, necessity, humanity, proportionality so as to minimize, say, harm to civilians and to make sure we are acting proportionately.

Senator MURPHY. I am well over my time. This is a fascinating conversation, but I appreciate the indulgence, Mr. Chairman.

Senator COONS. Happy birthday.

Senator Rounds.

Senator ROUNDS. Thank you, Mr. Chairman.

First, let me just begin by saying thank you to all of you for being here and participating in this. I think Senator Murphy has really started the conversation that many of us wanted to have here today with regard to, number one, the role and responsibility of the United States Congress, the role and responsibility of the executive branch, and how the AUMFs that are currently in effect impact that relationship.

I think there is pretty broad agreement that the 1991 is outdated. It appears that the 2002, the challenges here I think a number of the members here believe that it is outdated.

Yet, at the same time, it would appear that it has been relied on most recently by two different administrations in conjunction with Article II capabilities.

Just looking back, it would appear that the attack on General Soleimani by the Trump administration and it appear that both the Obama administration and the Trump administration had used the 2002 AUMF to justify military action against Iranian-backed militias and proxies, the Iranian Government and the Islamic State.

Now, unless I am mistaken, I believe they referred to both the Article II and the 2002 AUMF in their justifications, and I am just simply going to ask our two attorneys here am I correct in that assumption?

Ms. Krass.

Ms. KRASS. Yes. My understanding is, particularly vis-à-vis the Trump administration, is that it was cited as an additional authority, but the primary authority for the Soleimani strike was Article II.

Senator ROUNDS. Thank you. Would you agree, sir?

Mr. VISEK. I would agree, and I would just note, Senator, that my predecessor and my former colleague when he came up to testify, he, with respect to the Soleimani strike, he said, "I would emphasize that independent of the 2002 AUMF the President's constitutional authority under Article II provided a sufficient basis in domestic law for the strike."

In other words, the 2002 was not necessary. The Article II would have been sufficient. The 2002 has been over the last 6 years referred to as, I think, an additional or a reinforcing authority.

Senator ROUNDS. Thank you. I think the question for many of us here is the AUMF, in a way, was an acknowledgement of Congress' role in the declaration of war or the actions that would be considered warlike.

If we walk away from or we decide that one of these AUMFs is no longer necessary, then we are also recognizing that the sole authority that the executive branch uses under Article II is, in some cases, not restricted by that same AUMF.

So I look at the AUMF as, perhaps, a restriction or a direction by Congress, and I guess what I am looking for is, is in this particular case, Congress had deemed that it was necessary to lay out where those actions were to be authorized.

I would suspect that the executive branch of government would not have recognized that as a limitation, but as a further authorization.

I do not want to acknowledge or to suggest that the authorizations or the use of force by the United States Government is solely reliant on Article II responsibilities and what I would ask just, very briefly, is would it be fair to say that if we eliminated the 2001 and the 2002, would there be—and I think you have all indicated somewhat this—but is there a need to look at the 2001 and perhaps make modifications and update that as part of the overall review of these AUMFs?

Ms. SHERMAN. So we have stated quite clearly that we believe that it makes sense to revise the 2001 AUMF and look forward to those ongoing conversations with Congress because the President does respect and appreciate the Article I role of the United States Congress, along with his Article II authority, which has been the basis.

What I would say, Senator, because I understand the point you are making, that you want to make sure that if the 2002 and 1991 AUMFs are repealed that it does not give a green light to the President, any president, to do whatever he wants whenever he wants without regard to the Article I authority of the United States Congress.

I think that is why, indeed, to follow up on Senator Murphy's questions, working on a revised 2001 AUMF would, indeed, assert further Congress' role in defining the uses of military force.

I think every Congress has wanted to make sure that any president of the United States is able to act in the defense of our country.

Senator ROUNDS. Thank you. My time is expired.

Thank you, Mr. Chairman.

Senator COONS. Thank you.

Senator Kaine. If Senator Kaine would take over the presiding duties, please.

Senator Kaine [presiding]. Be glad to. Thank you, Senator Coons, and thanks to the witnesses for a great hearing. I am going to confine my comments to the 1991 and 2002 AUMFs.

I think the 2001 AUMF revision is a more complex decision, and so let me just confine my comments to 1991 and 2002.

I believe the repeal of 1991 and 2002 is very straightforward because the war is over. The 1991 authorization was to push Iraq out of Kuwait. We succeeded.

The 2002 authorization was to topple a hostile government, the government of Saddam Hussein. We succeeded, and in the years since he was executed following a trial in 2006, there is a new government that has been constituted. So the war is over.

After World War II, we did not keep a military authorization live against Japan, just in case. We did not keep an authorization live against Germany, just in case, and we could have because we had had two wars against Germany in the previous 30 years.

No, we ended the war and we made allies out of Japan and Germany. After the Vietnam War, we did not keep a military authorization for war against Vietnam around just in case.

We have worked to build an increasingly cooperative partnership with Vietnam. There are still challenges in that relationship, but we do not keep military authorizations around when the war is over, just in case.

We try to make allies and partners out of those with whom we have been at war. What a unique thing about our country, that we can be at war with Japan and then Japan becomes an amazing ally of the United States, that we can be at war with Germany and Germany becomes an amazing ally of the United States, that we can have a relationship with Vietnam, where the USS John McCain does port visits in Danang Harbor.

It speaks to the magnanimity of the United States and these other nations that we turn enemies into allies, that we beat swords into plowshares.

So when a war is over, we should not continue to label a nation an enemy. We should try to make them an ally, and I believe, Secretary Sherman, what you said. We have done this with Iraq to a significant degree.

We have made them a partner, and to continue to label them as at least an enemy enough to warrant a war authorization against them strikes me as something that we have not done in the past and we should not do now.

Let me dig into this. You are a diplomat and you have done a lot of work in the Middle East. What does Iran fear more?

Would they rather have an Iraq that was hostile to the United States or would they rather have an Iraq that was a close economic, diplomatic, military, strategic, humanitarian, and security partner with the United States? What is more trouble for Iran?

Ms. SHERMAN. I think you have painted it quite clearly, Senator. Iran is quite anxious about the fact that we are partners now with Iraq.

Senator KAINE. So Iran would much rather have us be kind of on a war footing with Iraq because that would give them the ability to go to Iraq and say, the United States will never be your partner.

They may, you know, say some nice words now and then, but they are not really your partner. They have got a war authorization against you. They are unwilling to repeal it. What kind of a partner maintains an ongoing war authorization against you 10 years after a war is over.

Your diplomatic work that you have done, work with Iran, Iran, clearly, sees the U.S. relationship with Iraq is very problematic for itself, does not it?

Ms. SHERMAN. Yes.

Senator KAINE. Your judgment about Prime Minister Kadhimi in the recent meetings with President Biden and others, Iraq really wants a strong relationship with the United States right now because—for many reasons, including the threat they perceive from Iran. Is that not correct?

Ms. SHERMAN. Yes, it is.

So I think it is very important—given that maybe the two primary worries we have in the Middle East are Iran and non-state

terrorist groups, I think it is really important that we send a message to Iran that the U.S. is here in Iraq and we are partners and we are going to work together. That is the message that we would send by repealing this, in my estimation.

Now, the other worry is non-state terrorist organizations, including these militias that attacked the United States, but when they attack U.S. troops, and I just want to make this clear—when they attack U.S. troops in Iraq or Syria, we almost have a belt and suspenders ability to go back at them.

We have the Article II power to defend U.S. troops from attack, but also the U.S. troops that are there are there pursuant to the 2001 authorization, the anti-ISIS mission.

Is it not the case to our lawyers if our troops are deployed in the anti-ISIS mission and somebody attacks those troops, the 2001 authorization also gives us the ability to repel attacks against those U.S. forces that are deployed with respect to the anti-ISIS mission?

Is that not the case?

Mr. VISEK. That is correct, Senator.

Senator Kaine. Ms. Krass.

Ms. KRASS. Yes, I agree.

Senator Kaine. So repelling non-state terrorist attacks, including militia attacks in Iraq and Syria, the President has Article II power and those troops deployed in the anti-ISIS mission are also covered by the 2001 AUMF. So we have a belt and suspenders.

We do not—I do not even know what you would have in addition to belt and suspenders. I do not know, long johns or something.

We have a belt and suspenders military ability to protect the United States already with Article II in 2001. The war is long over in Iraq. We should recognize that reality as we have with past wars.

Thank you, Mr.—wait, I am the chair for a few minutes.

I recognize next Senator Hagerty.

The CHAIRMAN [presiding]. Enjoy it while you can.

[Laughter.]

Senator Kaine. Oh, I am not? Oh. My brief moment of fame.

Senator HAGERTY. Our chairman has returned, Senator Kaine, and I want to say a particular thanks to our chairman and ranking member for having this important public meeting and the classified meeting that we had, too. This is a very important topic and I appreciate our ability to have this.

Right now, the Biden administration is continuing to negotiate with the Iranian regime over how to revive the Iran nuclear deal.

This is a deal that I believe is fundamentally flawed, but more broadly, the United States and our allies in the Middle East are also in a longer struggle with the Iranian regime over the—whether this whole region will be dominated by the forces of moderation and modernity or by the forces of tyranny and terrorism.

On that score, Iran is leveraging. It is escalating its posture against us. It is using terrorists. It is using militants. It is using rockets and drones to attack American personnel in Syria, in Iraq, and it has done so numerous times since January of 2021.

It is in this context, at a time of Iranian escalation, that the Biden administration is supporting the repeal of Saddam-era U.S.

military authorizations in Iraq, but they are not asking for a replacement congressional authorization.

As a lifelong businessman, as a former diplomat, I am loath to ever unilaterally take leverage off the table unless we are getting something for it or unless we simultaneously put another card back on the table.

I think Chairman Menendez made this point in a very salient manner during the questioning we had in our classified briefing.

Deputy Secretary Sherman, I was very glad to see you say in your prepared testimony today that the Administration supports not only repealing the Iraq authorizations, but also “replacing them as needed with clear, narrow, and specific frameworks” and that is in order to “continue protecting our people and our interests.”

Right now, I believe updated congressional authorities are needed precisely because terrorists and state sponsors of terrorism are continuing to escalate attacks on Americans in the Middle East.

The executive branch will only be in a stronger position if Congress authorizes it to defend Americans in harm’s way, and that is why I have authored legislative language that would do three things.

First, it would repeal the 1991 and 2002 authorizations for use of military force in Iraq.

Second, it would authorize the President to defend our national security interests against continuing threats that are posed by terrorists and state sponsors of terrorism operating in Iraq.

Third, it would authorize the President to prevent and respond to attacks against Americans by terrorists and state sponsors of terrorism who are operating in Iraq.

Deputy Secretary Sherman, I appreciate your acknowledgement of the respect that the Biden administration holds for Congress’ Article I authority, and given the escalation of events in Iran, I think it is absolutely critical that Congress exercise its authority.

So I have a very simple question.

Deputy Secretary Sherman, will you commit to ensuring that the Administration will provide written feedback on the language that I proposed in advance of this committee’s business meeting on the AUMF repeal that will occur tomorrow on Wednesday?

Ms. SHERMAN. Senator, we will certainly do the best that we can to do that in a timely manner. In advance of tomorrow’s vote, though, I will say that we may not be able to do the thorough review you would want of your legislation because we have an inter-agency process when we do these reviews. We will, certainly, do the best we can to be responsive.

Senator HAGERTY. Back to our negotiating posture, again, I am loath to remove an authority and not be prepared to put another in its place. It is not good negotiating strategy.

That is the way I would encourage us to look at this, and my colleagues and I would implore your team to put the time and the effort in to provide us with feedback because I think it would be absolutely critical.

I think it is important to put something on the table to signal to our allies in the Middle East and to our adversaries where we stand and that we have the resolve to defend not only our nation’s interest and our partners’ interest, but also the American people.

Ms. SHERMAN. Senator, I will add that we do still have the 2001 AUMF, which is focused on those counterterrorism threats, and so we very much look forward to reviewing the legislation you have put forth.

I do not want to leave you or anyone listening to this and your colleagues to think that we are without tools. We have the Article II authority that we have been discussing this morning and we have the 2001 AUMF, which we have used both in terms of al-Qaeda and associated forces and ISIS. So we do have those.

Senator HAGERTY. Back to Ranking Member Risch's earlier comments about communication and messaging, I think we are talking about removing a tool right now, and again, I am loath to remove any tool that gives us leverage at a time that the Iranian regime is escalating its posture against us without at least replacing it with something more focused, more current, and more responsible.

Thank you very much.

The CHAIRMAN. Thank you.

Senator Markey.

Senator MARKEY. Thank you, Mr. Chairman.

I was in Congress in 1991, and we had a robust debate around the need to give President Bush the authority to remove Saddam Hussein from Kuwait. He received that authority.

We removed Saddam from Kuwait. That was 30 years ago. It is ancient political history. So that 1991 authorization just has to go.

I was in Congress in 2002 when we debated the authorization for use of military force in Iraq. Of course, we know that the war, ultimately, was fought on a lie that President Bush and Dick Cheney, his entire administration, made, which was that there were nuclear weapons in Iraq. They knew there were not. That there were weapons of mass destruction in Iraq.

We know that they lied, and the whole premise of the war was a big lie, that we were going in to remove nuclear weapons and other weapons of mass destruction from that country.

So it is time for that authorization to go. What Senator Kaine has said and others, we are now in a completely different posture with the Iraq Government.

We are no longer at war with them. Again, that war was based upon a complete and total fabrication, a complete and total lie that was told to the American public with incredibly negative consequences for so many tens of thousands of families across our country and families in the country of Iraq as well.

So we have to move on, I think, to the conversation about where we are today, and one of the questions I would like to ask is that I welcome the Biden administration's announced decision in February to end its support for offensive operations by the Saudi-led military coalition in Yemen and for its commitment to a political solution that ends a 6-year civil war that has the tragic distinction of being the largest humanitarian emergency on the planet.

However, the United States Government is continuing to support the Saudi forces responsible for immense human suffering in Yemen.

Ms. Krass, the United States maintains contracts with the Saudi Royal Air Force to maintain its fighter aircraft. How does the Administration make the distinction between supporting offensive and

defensive operations when we know that the Saudi Air Force is carrying out strikes in Yemen using U.S.-maintained fighter aircraft?

Ms. KRASS. Senator, our armed forces are providing advice and limited information for defensive and training purposes only in connection with that conflict, and we are always very mindful of legislative mandates and restrictions to make sure that as we provide assistance to our partners that we make sure that the law of armed conflict, you know, is appropriately complied with.

Senator MARKEY. Let me ask you this question.

In Oman, I know that the Biden administration is attempting to get the Houthis and the Government of Yemen to return to the negotiating table.

What leverage does the United States and its partners have to urge the Houthis to end its military offensive and return to diplomatic talks?

Ms. SHERMAN. Senator, as you note, the President took a step to end the support to Saudi-led coalition forces' offensive actions, to basically say it is time to bring this war to an end, given the devastating humanitarian impact that you noted.

We do continue to believe a political solution is the only way to resolve this and lessen the humanitarian crisis. We have urged countries like Oman that has relations with the Houthis to put pressure on them to, in fact, come to the table.

I was just in Oman on my latest around-the-world travels and encouraged them to do just that. We have an envoy, Tim Lenderking, who is just nonstop in his going to those countries who can affect all the parties here to try to reach a political resolution, which is the only way out of this nightmare.

Senator MARKEY. What success are we having in getting Saudi Arabia and the United Arab Emirates to pay their fair share to take care of this humanitarian crisis in Yemen?

Ms. SHERMAN. There is an ongoing effort to do that with some success, but, quite frankly, Senator, the real answer to this is the one that you were implying and that is to have a political resolution and bring any conflict to an end.

Senator MARKEY. Okay. Thank you.

The CHAIRMAN. Senator Cruz.

Senator CRUZ. Thank you, Mr. Chairman. Thank you to the witnesses who are here today.

Ambassador Sherman, as you and I have discussed at length, I have very deep concerns with the Biden administration's approach to Iran.

I believe the Biden administration has consistently demonstrated weakness and appeasement towards Iran, and I believe that weakness and appeasement only invites further conflict and further risk of loss of human life.

In the last 6 months, the Ayatollah has declared open season on the United States and our interests. The Iranians have attacked American forces repeatedly and killed a U.S. military contractor.

They have tried to conduct terrorism on U.S. soil, even going so far as attempting kidnapping of an American journalist on American soil, sending an Iranian kidnap team to our country.

They have launched attack after attack after attack on our Arab allies. They have launched multiple attacks on civilian vessels in-

cluding an attack on an Israeli ship, and killed citizens from two close U.S. allies, Great Britain and Romania. In just the last few hours, there are reports of yet more ships being hit by Iranian mines.

Meanwhile, the Biden administration has again and again declined to respond to these attacks, and worse, the Biden administration has revoked terrorism sanctions against Iran's terrorist proxies in Yemen.

Your administration has removed Iranian officials from sanctions. You have dialed back enforcement of oil sanctions, including violations by the Chinese Communist Party.

You have unlocked Iranian accounts worth billions of dollars to allow Iran to pay down debts and, pointedly, you have repeatedly declined to respond to Iranian attacks against our troops and have not imposed a single new sanction.

Why is it that the Biden administration has not responded and responded forcefully to these repeated Iranian attacks?

Ms. SHERMAN. Senator, you and I, as you note, have an ongoing discussion about how best to ensure that Iran does not obtain a nuclear weapon, that it stops its state sponsorship of terrorism, that it stops its malign behavior in the region, that it stops putting our allies and partners at risk.

We both have the same objective, and that is to ensure that our people and those of our partners and allies are protected, and to ensure that Iran does not obtain a nuclear weapon and stops its malign behavior.

So we are in agreement on the objective. We have a disagreement about the means. I do not agree with some of what you have put on the table. I believe the Biden administration has had maximum sanctions.

Senator CRUZ. Name one sanction you have imposed on Iran.

Ms. SHERMAN. We have added additional entities on an ongoing basis as we have the evidentiary information about those entities, but more—

Senator CRUZ. Is your strategy working? Are they stopping the attacks or are they scaling them up?

Ms. SHERMAN. Senator, nothing has stopped the attacks by Iran. The killing of Qasem Soleimani did not deter the Iranians from attacks.

Senator CRUZ. Now, is the reason that you have not responded, do you lack the authorization to respond?

Ms. SHERMAN. We do not lack the authorization to respond, and the President has taken strikes, both in February and in June, against Iranian-backed militia.

So, Senator, I think we probably will not come to an agreement on this on how best to approach Iran, but I do appreciate that we have the same objective.

Senator CRUZ. So the debate Congress is having over the 2002 AUMF, I very much support Congress reasserting its authority over the war-making authority of our government. I think that is an important constitutional authority, but I worry that this debate is occurring in the context of the Biden administration's embrace of Iran and the Ayatollah, and that the repeal of the AUMF will be used as justification for continuing to go soft on Iran.

The White House has stated in a June 14 statement of administration policy that, “The United States has no ongoing military activities that rely solely on the 2002 AUMF as a domestic legal basis, and a repeal of the 2002 AUMF would likely have minimal impact on current military operations.”

That statement uses the word “current” very precisely. Is it the position of the Biden administration that the 2002 AUMF was necessary for any of the operations against Iran undertaken in the past 10 years?

Ms. SHERMAN. I can have the lawyer speak to the last 10 years. What I can say is that the strikes that were taken in February and June against Iran-backed militia were taken Article II—

Senator CRUZ. Let me ask you specifically about the one you referenced a minute ago, which is the attack on General Soleimani.

Do you believe that that was legally authorized, number one, and number two, did it require the 2002 AUMF to have authorization?

Ms. SHERMAN. I was not part of that administration, but my understanding is that Article II was used as the primary authority for taking that strike.

Senator CRUZ. What is the Biden State Department’s position now? Was that—was that strike authorized by Article II or not?

Ms. SHERMAN. I will defer to my—

Senator CRUZ. I am asking the Biden State Department.

Ms. SHERMAN. I defer to the State Department’s lawyer.

Mr. VISEK. Good morning, Senator.

The strike on Soleimani under the last administration, as my former colleague, who was then the acting legal advisor, said to this committee, I would emphasize that independent of the 2002 AUMF the president’s constitutional authority under Article II provided a sufficient basis in domestic law for the strike.

Senator CRUZ. Thank you.

Mr. VISEK. So, plainly, at the time, it was thought that the Article II authority was sufficient. The 2002 AUMF was cited as an additional authority, which is consistent with the way it has been articulated at least for the last 6 years.

You will recall there was—prior to the 6 years there was a period of time where there was not a lot of military operations in the Iraq space.

With the return of ISIS that things ramped up again and, obviously, with respect to ISIS, we have the 2001 AUMF that provides us authority.

Senator CRUZ. Thank you.

The CHAIRMAN. Thank you.

Senator Merkley.

I will advise members there is a vote going on. At some point, I will determine whether we recess or we can power through.

So Senator Merkley.

Senator MERKLEY. Thank you, Mr. Chairman and Deputy Secretary Sherman.

Back in 1797, John Adams was in the situation of observing that the French were seizing U.S. commercial ships. So he requested to Congress authorization to respond, and Congress did not respond.

So he requested it again in 1798, and in May of that year Congress did give him authorization and then he deployed U.S. ships to protect our Navy ships.

In 1801, Thomas Jefferson was President and the Bey—that is B–E–Y—of Tripoli, the ruler of Tripoli, was seizing U.S. commercial ships in the Mediterranean. So Thomas Jefferson asked Congress for authorization to respond, and a few weeks later Congress did, in 1802.

So he made the request in December of 1801 and in February 1802, Congress gave that authorization. In 1815, President Madison had the situation where the Regency of Algeria was seizing U.S. ships in the Mediterranean, and so he sent a message to Congress and asked for a declaration of war. In March, the following month, Congress rejected the request for declaration of war, but passed in legislation authorizing responding.

Why did these three presidents not simply assert Article II powers and proceed to deploy U.S. ships, naval ships, to protect our commercial ships?

Ms. SHERMAN. Senator, my guess is you know the answer to that better than I do. I do not know the history here that you are citing. So I am not sure why they did not assert Article II.

Senator MERKLEY. Well, I am happy to help with this little history lesson.

Ms. SHERMAN. Thank you.

Senator MERKLEY. Because the answer is that when our Founders wrote our Constitution, they were very, very concerned about the use of the power of war and so they delegated that not to the President, but to Congress, and our early presidents took that extremely seriously.

If we fast forward to the Vietnam era, we have the conduct of hostilities under President Kennedy, President Johnson, President Nixon, without an authorization, which led to the 1973 War Powers Act where Congress said, stop, this is a complete violation and we need to re seize the vision of our Constitution in which Congress has to provide authorization as envisioned in our Constitution, as envisioned by and acted on by our early presidents.

However, it has proved extremely difficult to maintain that vision, and the argument our Founders made was that the impact of, essentially, conducting war or actions of war is so significant that it should be entrusted to no one person, but Article II as now interpreted asserts the opposite, that one person can make these decisions.

We would think that the Supreme Court would play a role here in deciding where is that balance between the constitutional vision and the current actions, but the court has bailed on these questions, leaving us to wrestle with this as we are at this hearing.

So here we are, debating this question of when will the President ask for authorization or how will the President reinterpret existing authorization, and how does that fit with our constitutional division of powers.

I have been extremely struck that the 2001 authorization for the use of military force did not contain the words “and associated forces.”

Yet, time after time after time, the justification for using the 2001 authorization in various parts of the world has been because various administrations assert, we are going to add the words “and associated forces,” which means there is no limit in time, no limit in geography, and no limit in terms of the direct involvement that was written in the 2001 authorization where it said it was specifically about groups that planned, authorized, committed, or aided the terrorist attacks on a specific date of September 11, 2001.

So now we have a situation where new areas around the world, new involvement of groups we do not like, we employ forces against and we justify it under the 2001 AUMF in part or under Article II, but the list of groups and individuals the executive branch considers covered by the 2001 AUMF is secret.

So I ask you this. Did Congress intend for the 2001 AUMF to authorize secret wars?

Ms. SHERMAN. Certainly, Senator, AUMFs, in my understanding, is for us to have a transparent relationship about the threats that we are trying to address, and the Biden/Harris administration, as we have said today, is very open and already in discussions with this committee and with the Senate to revise the 2001 AUMF to be narrow specific framework that would resolve some of the concerns that you are raising.

Senator MERKLEY. If we were to create that specific framework in a legislative process, we would have to, essentially, list the places in the world that were authorizing. Those places are currently secret in terms of the additional information or authorizations that have been interpreted and added.

Is there a reason then not to make those locations, those situations, public here in the United States of America?

Ms. SHERMAN. My understanding, and I will defer to my legal counsel here, is that we are obligated to report to Congress what we are doing and that there are no secrets.

Mr. VISEK. Senator, we report regularly under the War Powers Resolution and under the—

Senator MERKLEY. Yes, my question was about public disclosure, not reporting to Congress.

Mr. VISEK. I think you are probably referencing, I believe, perhaps—

Senator MERKLEY. I am sorry. I cannot hear you. Can you speak up a little bit?

Mr. VISEK. I am sorry, Senator. My understanding is that certain groups may have been classified for national security reasons, but other information is publicly available. I do not know if my colleague—

Senator MERKLEY. It is not may not; may have been. They have been, and my point is if Congress is going to have a discussion over tailoring such a new AUMF, it becomes a public discussion.

I guess I am asking this. Will the Administration consider making public all the locations where they now have granted themselves authorization to conduct military strikes?

Ms. SHERMAN. We are open to having that discussion with you, Senator, but to back up what my legal advisor colleague has said, there are situations where it may be in the interest of our national

security for those reports to come to Congress in a classified setting.

The CHAIRMAN. Thank you.

Senator Booker.

Senator BOOKER. Thank you very much, Mr. Chairman. I am grateful for the conversation we are having today and I agree with a lot of my colleagues on their concerns about the authorizations for military force that have been out there for too long and the need to reform them and revoke them.

I guess I would just like to, Secretary Sherman, dig a little deeper into our current strategy with Iraq. Last week President Biden announced that the United States would end its combat mission in Iraq.

Can you describe what is the strategic objectives we now have in Iraq now that we are ending our combat mission?

Ms. SHERMAN. Certainly, Senator.

At the request of the Iraqi Government, we have agreed that U.S. military forces will remain in Iraq to focus on training, enabling, and advising our Iraqi partners.

This is not the end of our military mission in Iraq, as our consultations with the Iraqi Government have highlighted.

The progress of our Iraqi partners in the growth of their capabilities will allow for the full transition later this year of U.S. and coalition forces to a mission that is focused on training, enabling, and advisory tasks. I would defer to my DoD colleague for any additional details.

Ms. KRASS. I agree very much with that summary. Thank you.

Senator BOOKER. Secretary Sherman, you would agree, though, that there has been some backlash or resistance from the Iraqi Government about having combat troops stationed there and, obviously notwithstanding, the more limited role of training and advising, but in our diplomatic engagements with Iraq, they have expressed they do not want us to have a combat mission in Iraq.

Is that correct?

Ms. SHERMAN. Indeed, this came out of discussions with the Iraqi Government and one of the points we have been making here today is that the Iraq Government is a sovereign government that is fully formed, that our relationship has shifted over these decades from adversary to partner.

Senator BOOKER. Is the 2002 AUMF really needed to ensure any of these strategic objectives? Is it necessary for what we are trying to achieve in Iraq?

Ms. SHERMAN. It is not at all, Senator.

Senator BOOKER. In some ways, as I think Senator Kaine was making the point, it could actually be problematic in terms of Iraqi perceptions of the United States and having us label them in this manner with these past AUMFs. Am I correct in that opinion?

Ms. SHERMAN. I would agree with you, Senator. Yes.

Senator BOOKER. Okay. I would also like to just dig in a little bit to the idea that two different administrations now have pointed to more than just the AUMFs as an authorization to use military force.

The Trump administration used sort of an expanded interpretation to claim that the 2002 Iraq AUMF authorized its assassination

of Soleimani, and Congress, though, and many other scholars said that the 2002 AUMF was not that broad. The Trump administration did later say that they had other authorities.

I just want to go back to this 2002 AUMF, which I agree does not serve a purpose to any of our strategic objectives. It clearly states that it is concerned with Saddam Hussein assembling weapons of mass destruction in defiance of the U.N. Security Council.

I guess I would like to know from the panel, do you believe that there is a viable argument that the 2002 AUMF authorizes, at this point, any use of force at all in terms of where things stand today?

Do we have the cover of an AUMF to carry out military strikes within Iraq?

Ms. SHERMAN. The 2002 AUMF, in our view, is not necessary at all for our operations in Iraq.

Senator BOOKER. What circumstances would enable or motivate the Administration to use that 2002 AUMF for strikes in either Iraq or Iran?

Can it in any way be stretched or bent or made to apply to any of our potential need for—a perceived need for conflicts in either of those countries?

Ms. SHERMAN. I am going to let the lawyers answer that, given the way you have asked the question, Senator, but I will say that we do not have a desire for conflict with either the Iraqi Government that is a partner, or Iran, which is certainly not a partner.

Senator BOOKER. I think my time is up. Mr. Visek, I would prefer if you do have a comment I would like to hear it and then I will yield to Senator Schatz.

Mr. VISEK. I would just say, Senator, that we do not need the 2002 AUMF for our mission in Iraq. We have the 2001, and for defense purposes we also would have Article II. Thank you.

Senator BOOKER. Thank you, Mr. Chairman.

Senator VAN HOLLEN [presiding]. Thank you, Senator Booker.

Senator Schatz is recognized via WebEx.

Senator SCHATZ. Thank you, Mr. Chairman.

Secretary Sherman, war is a failure of diplomacy and the ending of war usually requires diplomacy, and so I want to just flag the fact that we have not passed the State Department Reauthorization Act since 2003.

So there is no real way for us to dial up or down resources or authorize new programs to meet our diplomatic objectives, to work with the Defense Department on our strategic military objectives.

So can you talk about what it would be like if Congress passed an annual State Department Reauthorization Act as we do for the National Defense Authorization Act, and how that impacts this overall debate?

Ms. SHERMAN. Thank you very much, Senator, and thank you for your support for diplomacy, which we always believe should be the first resort and that any use of our military should be the last resort in solving problems.

I actually have been in government at a time when there has been a State authorization bill and it creates the contours and deepens the authorities that we have to engage in diplomacy around the world. So we would always welcome Congress' role in that regard.

Senator SCHATZ. Well, you know, Senator Sullivan was a leader in getting the Coast Guard reauthorization to sort of hitch a ride on the defense authorization. I think that is something we ought to consider for the next defense authorization.

Secretary Sherman, I also want to follow up on the NDAA and ask why we should not just sunset every AUMF in every defense authorization. I understand military leaders being concerned about geographic and time constraints so that our enemies can work around them.

If it is a matter of course that Congress sunsets every authorization of the use of military force and it is a matter of course, therefore, that we reconsider it and reauthorize every year, that would change the way we do our oversight and reassert our constitutional authority.

So why not just sunset every AUMF on an annual basis and then force Congress to do its job on an annual basis?

Ms. SHERMAN. I think I will leave that to the discretion of the United States Senate, though Ms. Krass may have a comment she wants to make on that in terms of what it would mean for our military forces.

Senator SCHATZ. Feel free.

Ms. KRASS. Senator, I think that there could be some challenging operational impacts of establishing a rhythm like that.

Senator SCHATZ. I have heard that, and I guess I want to press back a little bit because the challenging operational impacts with a rhythm like that is really the reason that we have not even seriously considered amending or repealing either of these AUMFs in the longest period of time in American history.

So how can we address those legitimate concerns that you are sort of obliquely referring to without just abandoning our responsibility?

Ms. KRASS. We support the conversations that Deputy Secretary Sherman has been discussing in terms of executive branch and congressional conversations about how to replace, for example, the 2001 AUMF with something more now and specific, and we look forward to continuing those conversations with you and your colleagues.

Senator SCHATZ. Thank you.

Secretary Sherman, as you know, the nature of war is changing with a keystroke. A foreign adversary can have a greater negative impact, even a violent impact, on the United States than had they mobilized tanks and troops and airplanes.

I am wondering how we address this new reality in the context of a statute that did not really contemplate anything other than traditional kinetic engagement.

So how do we define war under the War Powers Resolution or how do we interpret the definition of war under the War Powers Resolution in an era with cyber-attacks and in an era where we know many of our adversaries are operating in the gray zone?

Ms. SHERMAN. Yes, some of your other colleagues have raised cyberspace and its impact on both terrorist threats as well as the nature of war, so to speak.

I think we are all contemplating these new issues and these new domains and arenas. Indeed, we now have a new domain in the Defense Department with Space Force.

So we are always thinking about how we have to update how we proceed in the world, given these new threats.

In terms of what that means regarding law and war, I would defer to my legal counsel here about how they would view that, going forward.

Senator SCHATZ. Go ahead.

Mr. VISEK. Well, Senator, as I think you probably realize, this is an extraordinarily complex issue. Without a doubt, it is a cyber and what has been loosely defined as cyber war and how it relates to the law of armed conflict is a matter of intense discussion and examination in the interagency.

Obviously, if a foreign state uses cyber in a way that amounts to a use of force that would be an object of concern and under international law, but it is such a vastly complicated area that I, for one, would want to sit down and talk with the interagency colleagues in a studied way to address your concerns, which I think are a hearing unto themselves, not that I am inviting—

Senator SCHATZ. Sure. Two final thoughts here. What constitutes a use of force is, basically, the crux of the question, and the second final thought is that this is really Congress' role to define the use of force, given that there are new ways to use force that were not contemplated under the old statute.

Thank you.

Senator VAN HOLLEN. Thank you, Senator Schatz, and let me thank all of our witnesses for their testimony.

Madam Secretary, I am going to start with you, and if you want to refer any of these questions to your legal counsel, please feel free to do so.

I want to associate myself with the comments I heard Senator Kaine make and you, Madam Secretary, in your response that getting rid of the 2002 AUMF is important to send a message to the Iraqi people and the Iraqi Government that we are partners and not adversaries, as we were with the government that was there under Saddam Hussein at the time that authorization was passed.

Some questions just so I understand this administration's thinking. Would you agree, Madam Secretary, that other than the president's powers under Article II, the president does not have authority to launch military strikes against Iran?

Ms. SHERMAN. I take that as a legal question. So I am going to defer to Mr. Visek and to Ms. Krass.

Senator VAN HOLLEN. Mr. Visek.

Mr. VISEK. Thank you, Senator. Our position is the 2002 AUMF does not authorize strikes against Iran. Not to confuse this, I would note, however, that I believe it may have been Senator Kaine who talked about ancillary defenses where if we were carrying out a 2001 operation and came under attack by whatever force it might be that was not the subject of a 2001 mission, we would, obviously, be able to defend ourselves in the context of operating—

Senator VAN HOLLEN. Just so I understand, you are saying that you are invoking an other than Article II power there—

Mr. VISEK. It would be—

Senator VAN HOLLEN. —under the 2001 AUMF? Is that what you are suggesting?

Mr. VISEK. It is the concept of ancillary self-defense that when our military engages in authorized missions, this instance would be a 2001 AUMF mission against, let us say, ISIS. If they came under attack from whatever source collaterally they would—

Senator VAN HOLLEN. So I am not—look, it is a pretty direct question. I understand that legal responses can be technical. I am an attorney, but we have—the 2001 AUMF is, as you well know, as has been stated here, relates to ISIS and its successors, right. Iran is not ISIS or one of its successors, is it?

Mr. VISEK. No, it is not, and—

Senator VAN HOLLEN. Okay. So other than Article II, does the President have any authority to launch military strikes against the state of Iran? Pretty simple question.

Mr. VISEK. Senator, the 2001 does not authorize strikes against Iran. I would agree with that. Nor does the 2002 authorize strikes against Iran.

Senator VAN HOLLEN. Correct. So are there any authorities left other than Article II?

Mr. VISEK. Senator, with the caveat of what I—what I admit is a sort of nuanced ancillary defense argument. I take your point. Neither the 2001 nor the 2002 nor the 1991 AUMFs authorize the use of force against Iran.

Senator VAN HOLLEN. Got it. Okay. I did not think it would take so much time to get to this point. So with your indulgence, I am going to keep asking some additional questions.

Now I am trying to explore what the President believes is his scope of authority under Article II, and, of course, presidents do you have the authority to take preemptive strikes in the case of an imminent attack. Agreed?

Mr. VISEK. Yes, Senator.

Senator VAN HOLLEN. Okay. You are familiar with the Caroline doctrine that was reaffirmed by the Nuremberg Trials after World War II, correct?

Mr. VISEK. I am familiar with the Caroline case that goes back to 1837.

Senator VAN HOLLEN. Does this Administration, the Biden administration, subscribe to the standard regarding preemptive attacks that is laid out in the Caroline doctrine?

Mr. VISEK. Senator, I would want to consult with my colleague here from DoD. I would have to talk to others. This is not a question that I necessarily came equipped to answer and I would desperately like to get it right.

Senator VAN HOLLEN. All right. Counsel from Defense? Thank you.

Ms. KRASS. I, similarly, would like to get it right, and I joined the Administration just this week and so I would want to have those conversations as well.

Senator VAN HOLLEN. All right. If you could get back to me in writing, because, as you know, in past administrations we have had the theory of preventative war, which does not contain the important ingredients of imminence that is in the Caroline doctrine.

So I am very interested in understanding what the Biden administration's position is with respect to the Caroline doctrine.

Mr. VISEK. Well, Senator, we do have the authority to respond to an imminent threat, but I take your point and that you are interested in other—

Senator VAN HOLLEN. I am not disputing that. I am stating that. I am asking whether your definition of that standard is the Caroline doctrine.

If I could just ask a couple questions regarding the attack on the Mercer recently, which is, I understand it, is a Japanese-owned ship under Israeli management and two innocent people were killed, a British citizen and a Romanian citizen.

I saw the secretary, Secretary Blinken's response, saying that we were going to hold Iran responsible and accountable. I agree they should be held accountable.

My question, Madam Secretary, is not what you will do, not what you may do, but what you believe you have the scope of authority to do.

Does Article II give the President any authority to take military action against Iran in response to the attack on the Mercer?

Ms. SHERMAN. I would have to defer to Mr. Visek or Ms. Krass as a legal matter.

What I want to say, though, is that in this instance, as the secretary said, we are really relying on our British colleagues to take the lead on this since it is, in fact, their ship even though it was originally Japanese, and because a U.K. and a Romanian citizen were killed.

So we are letting the British take the lead both at the U.N. in terms of what the response would be as well as any further response. I do think it was quite critical that we had a coordinated attribution that this was, indeed, Iran.

Senator VAN HOLLEN. Okay. Let me just refine that question a little bit, if I could, Mr. Chairman.

With respect to the—here we have a partner. We have a NATO partner, of course, the British, but it does not seem to fall under an Article II response authority other than maybe invoking some other multilateral agreement like NATO charter or some U.N. Security Council resolution.

I am trying to get a sense of what the Administration believes its authorities are in terms of military response in a strike like this against a non-U.S. entity, but a close U.S. friend.

Mr. VISEK. Senator, subject to my colleague's views, this would be a situation where we would assemble with the interagency, we would talk about the facts, the circumstances, such factors of attribution, any of a number of factors before I would even want to venture an opinion as to whether or not there was an Article II basis and, obviously, we would look to the Department of Justice Office of Legal Counsel.

I am not aware of any. Nobody has asked me whether this is covered by Article II as of yet, if that is helpful.

Senator VAN HOLLEN. Got it. Thank you. That is.

Mr. Chairman, do you want to make any closing remarks?

Okay.

The CHAIRMAN [presiding]. Thank you. Thank you for presiding.

There is, obviously, a robust interest as is evidenced by the fact that an overwhelming majority of the members on both sides of the aisle have actually attended this hearing at one point or the other. So it speaks to the importance of the issue.

We appreciate the insights of this panel, Madam Secretary, and your distinguished colleagues, in trying to shed light on the issues that we are in the midst of deciding on, and the committee will hold a markup tomorrow on the 1991 and 2002 and we will see how the votes are cast there.

Then we will continue to engage the Administration, which I want to acknowledge, again, has been engaged to the national security advisor and others into what such a replacement might look like if the Congress were to go ahead with a repeal.

So this hearing's record will remain open to the close of business today, and with the thanks of the committee, this hearing is closed. [Whereupon, at 12:39 p.m., the hearing was adjourned.]

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

RESPONSES OF RICHARD VISEK TO QUESTIONS SUBMITTED BY SENATOR CHRIS VAN HOLLEN

Question. Does the Administration subscribe to the *Caroline* doctrine's standard for the permissible use of force in anticipatory self-defense against an imminent threat? If not, in the opinion of the Administration, what criteria must be met to justify anticipatory self-defense under the President's Article II authority?

Answer. As the executive branch articulated in its 2016 Report on Legal and Policy Frameworks Governing Use of Force and Related National Security Operations, under the *jus ad bellum*, a State may use force in the exercise of its inherent right of self-defense not only in response to armed attacks that have already occurred, but also in response to imminent attacks before they occur. When considering whether an armed attack is imminent under the *jus ad bellum* for purposes of the initial use of force against another State or on its territory, the United States analyzes a variety of factors. These factors include the nature and immediacy of the threat; the probability of an attack; whether the anticipated attack is part of a concerted pattern of continuing armed activity; the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action; and the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage.

RESPONSES OF CAROLINE KRASS TO QUESTIONS SUBMITTED BY SENATOR CHRIS VAN HOLLEN

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RESPONSES OF WENDY SHERMAN TO QUESTIONS
SUBMITTED BY SENATOR MITT ROMNEY

Question. Thank you for your candid discussion with me today during the Senate Foreign Relations Committee hearing on “*Authorizations of Use of Force: Administration Perspectives.*” During the Senate Foreign Relations Committee hearing on “*Authorizations of Use of Force: Administration Perspectives.*” I asked you whether there are other authorizations for the use of military force (AUMFs) out there that have not been repealed. Would you review and, if necessary, clarify the record on the number of AUMFs currently in existence that have not been repealed?

Answer. I understand that the following statutory authorizations for use of military force (AUMFs) have not been repealed to date and remain in effect: P.L. 85–7, Section 2 (also known as the “1957 AUMF”); P.L. 102–1 (also known as the “1991 AUMF”); P.L. 107–40 (also known as the “2001 AUMF”); and P.L. 107–243, (also known as the “2002 AUMF”).

