

STATEMENT OF

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BEFORE THE

**COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE**

CONCERNING

**COUNTERTERRORISM POLICIES AND PRIORITIES:
ADDRESSING THE EVOLVING THREAT**

PRESENTED ON

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Chairman Menendez, Ranking Member Corker and Members of the Committee, thank you for the invitation to join in this discussion of the evolving threat that our Nation faces today. My name is Ken Wainstein, and I'm a partner at the law firm of Cadwalader, Wickersham & Taft. It is an honor to appear before you along with my two co-panelists, both proven experts in this field who have devoted much of their professional lives to defending our Nation against its terrorist adversaries.

Today's topic is particularly timely, given that we are now seeing a transition in the scope and nature of the terrorist threat we face -- a transition that requires us to assess whether we have the right counterterrorism strategy, organization and authorities to successfully meet this evolving threat.

It is vitally important that we, as a Nation, continually gauge our readiness to meet the threat we face. Our Nation's history since World War II illustrates both the importance and the mixed record of calibrating our readiness to meet overseas threats. In 1941, we found ourselves completely unready to meet the threat that struck us at Pearl Harbor. After building the war-making machine that defeated the Axis powers, we then recognized the new threat from the Soviet bloc and designed a governmental infrastructure and a foreign policy that successfully contained the communist threat.

In the aftermath of the Cold War, however, we let our guard down again. We enjoyed the peace dividend while the threat of international terrorism evolved from the relatively isolated operations of the Red Brigades, the Baader-Meinhof gang and the other violent groups of the 1970's into the more globally-integrated organizations of the 1990's -- a threat that emerged in its most virulent form in the network of violent extremists operating out of its safe haven under Taliban rule in Afghanistan.

Despite its potency, we did not reorient our defenses to meet this threat and continued to operate with an intelligence and military apparatus largely designed for the Cold War. As we had in the 1930's when the storm of fascism was gathering overseas, we failed throughout the 1980's and 1990's to anticipate and prepare for the looming new threat posed by a globally-networked terrorist organization with the resources, the operational sophistication and the fanatical following to mount a sustained campaign against the United States and its allies.

Since 9/11, the last two Administrations have made tremendous efforts to bring our counterterrorism readiness more in line with the post-9/11 threat. These efforts have included a fundamental restructuring of our government's counterterrorism infrastructure, new and expanded investigative authorities for our intelligence and law enforcement personnel, the reorientation of our military to fight an asymmetric war against a non-traditional and shadowy foe, and the adoption of a foreign policy designed to enlist and coordinate with foreign partners in the global fight against international terrorism.

Thanks to the concerted efforts of both Administrations, the past seven Congresses and countless committed public servants, we as a nation are significantly better prepared to meet the international terrorist threat than we were on the morning of 9/11. There is no better evidence of that fact than the number of top-echelon Al Qaeda leaders who have been removed from the battlefield and the list of terrorist threats that have been foiled over the past few years.

It has recently become clear, however, that the Al Qaeda threat that occupied our attention after 9/11 is no longer the threat that we will need to defend against in the future. Due largely to the effectiveness of our counterterrorism efforts, the centralized leadership that had directed Al Qaeda operations from its sanctuary in Afghanistan and Pakistan -- known as "Al Qaeda Core" -- is now just a shadow of what it once was. While still somewhat relevant as an inspirational force, Zawahiri and his surviving lieutenants are reeling from our aerial strikes and no longer have the operational stability to manage an effective global terrorism campaign. The result has been a migration of operational authority and control from Al Qaeda Core to its affiliates in other regions of the world, such as Al Qaeda in the Arabian Peninsula, Al Qaeda in Iraq and Al Qaeda in the Islamic Maghreb.

As Andy Liepman of the RAND Corporation cogently explained in a recent article, this development is subject to two different interpretations. While some commentators diagnose Al Qaeda as being in its final death throes, others see this franchising process as evidence that Al Qaeda is "coming back with a vengeance as the new jihadi hydra." As is often the case, the truth likely falls somewhere between these polar prognostications. Al Qaeda Core is surely weakened, but its nodes around the world have picked up the terrorist mantle and continue to pose a threat to America and its allies -- as tragically evidenced by the recent violent takeover of the gas facility in Algeria and the American deaths at the U.S. Mission in Benghazi last September. This threat has been compounded by a number of other variables, including the opportunities created for Al Qaeda by the events following the Arab Spring; the ongoing threat posed by Hizballah, its confederates in Iran and other terrorist groups; and the growing incidence over the past few years of home-grown violent extremism within the United States, such as the unsuccessful plots targeting Times Square and the New York subway.

We are now at a pivot point where we need to reevaluate the means and objectives of our counterterrorism program in light of the evolving threat. The Executive Branch is currently engaged in that process and has undertaken a number of policy shifts to reflect the altered threat landscape. First, it is working to develop stronger cooperative relationships with governments in countries like Yemen where the Al Qaeda franchises are operating. Second, they are coordinating with other foreign partners -- like the French in Mali and the African Union Mission in Somalia -- who are actively working to suppress these new movements. Finally, they are building infrastructure -- like the reported construction of a drone base in Niger -- that will facilitate counterterrorism operations in the regions where these franchises operate.

While it is important that the Administration is undergoing this strategic reevaluation, it is also important that Congress participate in that process. Over the past twelve years, Congress has made significant contributions to the post-9/11 reorientation of our counterterrorism program. First, it has been instrumental in strengthening our counterterrorism capabilities. From the Authorization for Use of Military Force passed within days of 9/11 to the Patriot Act and its reauthorization to the critical 2008 amendments to the Foreign Intelligence Surveillance Act, Congress has repeatedly answered the government's call for strong but measured authorities to fight the terrorist adversary.

Second, Congressional action has gone a long way toward institutionalizing measures that were hastily adopted after 9/11 and creating a lasting framework for what will be a "long war" against international terrorism. Some argue against such legislative permanence, citing the hope that today's terrorists will go the way of the radical terrorists of the 1970's and largely fade from the scene over time. That, I'm afraid, is a pipe dream. The reality is that international terrorism will remain a potent force for years and possibly generations to come. Recognizing this reality, both Presidents Bush and Obama have made a concerted effort to look beyond the threats of the day and to focus on regularizing and institutionalizing our counterterrorism measures for the future -- as most recently evidenced by the Administration's effort to develop lasting procedures and rules of engagement for the use of drone strikes.

Finally, Congressional action has provided one other very important element to our counterterrorism initiatives -- a measure of political legitimacy that could never be achieved through unilateral executive action. At several important junctures since 9/11, Congress has undertaken to carefully consider and pass legislation in sensitive areas of executive action, such as the legislation authorizing and governing the Military Commissions and the amendments to our Foreign Intelligence Surveillance Act. On each such occasion, Congress' action had the effect of calming public concerns and providing a level of political legitimacy to the Executive Branch's counterterrorism efforts. That legitimizing effect -- and its continuation through meaningful oversight -- is critical to maintaining the public's confidence in the means and methods our government uses in its fight against international terrorism. It also provides assurance to our foreign partners and thereby encourages them to engage in the operational cooperation that is so critical to the success of our combined efforts against international terrorism.

These post-9/11 examples speak to the value that Congressional involvement can bring both to the national dialogue about counterterrorism matters and specifically to the current reassessment of our strategies and policies in light of the evolving threat. It is heartening to see that Congress is starting to ratchet up its engagement in this area. For example, certain Members are expressing views about our existing targeting and detention authorities and whether they should be revised in light of the new threat picture. Some have asked whether Congress should pass legislation governing the Executive Branch's selection of targets for its drone program. Some have suggested that Congress establish a judicial process by which a court reviews and

approves any plan for a lethal strike against a U.S. citizen before that plan is put into action. Some have proposed legislation more clearly directing the Executive Branch to send terrorist suspects to military custody, as opposed to the criminal justice system. Others have argued more generally that the AUMF should be amended to account for the new threat emanating from Ansar al Sharia, Boko Haram and the other dangerous groups that have little direct connection to Al Qaeda and its affiliates or to anyone who “planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001.” While these ideas have varying strengths and weaknesses, they are a welcome sign that Congress is poised to get substantially engaged in counterterrorism matters once again.

In assessing these and other proposals for national security legislation, Congress should be guided by a pair of principles that their legislative efforts have largely followed over the past twelve years. First, it is important to remember the practical concern that time is of the essence in counterterrorism operations and that legal authorities must be crafted in a way that permits operators and decision makers in the Executive Branch to react to circumstances without undue delay. That concern was not sufficiently appreciated prior to 9/11, and as a result many of our counterterrorism tools were burdened with unnecessary limitations and a stifling amount of process. In fact, the tools used by our national security investigators who were trying to prevent terrorist attacks were much less user-friendly than those available to criminal investigators who were investigating completed criminal acts. The result was slowed investigations and an inability to develop real-time intelligence about terrorist threats, like the one that hit home on 9/11.

The Patriot Act and subsequent national security legislation helped to rectify that imbalance and to make our counterterrorism tools and investigations more nimble and effective, while at the same time providing for sufficient safeguards and oversight to ensure that they are used responsibly and consistent with our respect for privacy and civil liberties. Any future legislation should follow that model. For instance, any scheme for regulating the use of targeted drone strikes -- which may well raise myriad practical and constitutional issues beyond the concern with operational delay -- should be designed with an appreciation for the need for quick decision making and action in the context of war and targeting.

Second and more generally, Congress should maintain its record of largely resisting legislation that unduly restricts the government’s flexibility in the fight against international terrorism. For example, there have been occasional efforts to categorically limit the Executive Branch’s options in its detention and prosecution of terrorist suspects. While there may well be good principled arguments behind these efforts, pragmatism dictates that we should not start taking options off the table. We should instead maximize the range of available options and allow our counterterrorism professionals to select the mode of detention or prosecution that best serves the objectives for each particular suspect -- development of intelligence, certainty of successful prosecution, etc.

Flexibility should also be the watchword when approaching any effort to amend the Authorization for Use of Military Force. The diffusion of terrorist threats that has led to the call for amending the AUMF is bound to continue, and new groups will likely be forming and mounting a threat to the U.S. in the years to come. Any amended AUMF must be crafted with language that clearly defines the target of our military force, but that also encompasses all such groups that pose a serious threat to our national security.

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Congress is to be commended for having largely followed these principles in its legislative efforts over the past twelve years and for playing a vitally important role in the construction of our national counterterrorism program since 9/11 – a role that it should continue to play in the years to come.

This Committee is specifically to be commended for recognizing the recent evolution of the terrorist threat and the need to assess our counterterrorism program and policies in light of that evolution. It has been an honor to be a part of that effort, and I will be happy to answer any questions you may have.