

Pepperdine Law Review

Volume 42

Issue 3 *Symposium: The Future of National Security Law*

Article 7


4-15-2015

AUMF Panel Transcript

Rosa Brooks

Benjamin Wittes

Follow this and additional works at: <http://digitalcommons.pepperdine.edu/plr>

 Part of the [Military, War and Peace Commons](#), [National Security Commons](#), and the [President/Executive Department Commons](#)

Recommended Citation

Rosa Brooks and Benjamin Wittes *AUMF Panel Transcript*, 42 Pepp. L. Rev. 607 (2014)

Available at: <http://digitalcommons.pepperdine.edu/plr/vol42/iss3/7>

This Symposium is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized administrator of Pepperdine Digital Commons. For more information, please contact Kevin.Miller3@pepperdine.edu.

AUMF Panel Transcript

Rosa Brooks and Benjamin Wittes

PROFESSOR GREGORY McNEAL: It's my pleasure to welcome you back, after a very brief transition, to our next panel. It's really my pleasure to introduce two people who I'm a huge fan of. I'm a fan of their scholarship, their research, their public writings, and I'm a fan of them as people because they're really enjoyable people to observe, to read, to be around.

I don't know Rosa as well as I know Ben, but the first time I heard Rosa speak was at an American Society of International Law conference. Law academic conferences are not the most exciting things in the world. I heard her speak and I thought, "She's funny, and honest. I need to meet this scholar." Then, I just had it in my mind to get her out to Pepperdine.

Let me do the formal introductions and then we'll hop into the panel. I'll start with Ben. Ben Wittes is a senior fellow of governance studies at the Brookings Institution. I think he'd be proud to say that he's not a lawyer. Maybe not, but he's as good as any lawyer you'll meet on public law issues. He co-founded and is Editor in Chief of the *Lawfare* blog, which is devoted to sober and serious discussions of hard national security choices.

I will tell you that this is not just any blog. It is mandatory reading for national security professionals in government, and informed outsiders, including academics. It is the eleventh most trafficked blog in the vaunted law professor's blog rankings, with 1.6 million page views per quarter. We're talking about a lot of traffic, a lot of eyeballs on that site.

Seventeen percent of those people who are viewing are in the DC area. The next cluster behind that is New York City. Interestingly, the third-ranked city viewing the page is Arlington, Virginia. What buildings could possibly be located in Arlington, Virginia, and interested in national security issues?

Ben has authored multiple books. It might be in the double digits. My favorites—I've read them cover to cover and flagged them up and highlighted them—are *Detention and Denial: The Case for Candor After Guantanamo*, and *Law and the Long War: The Future of Justice in the Age*

of Terror, two really great books.

He's also currently writing a book on data and technology proliferation, and their implications for security. We're all looking forward to hearing his insights on AUMF renewal.

Now let me tell you about Rosa Brooks. Rosa is a professor at Georgetown Law Center, where she teaches courses on international law, national security, constitutional law, and other subjects.

She also writes a weekly column for *Foreign Policy*, very interesting reading if you don't want the deep dive into the academic stuff. It's a mixture of wonderful pop culture issues, as well as national security issues and foreign policy issues. I'm going to embarrass her in a second with some excerpts. She also serves as the Schwartz Senior Fellow at the New America Foundation.

Her column, I really have to say, is a frank read on all things related to national security policy. They're honest. She, for example, wrote a column entitled, "How to Get a Job in the Obama Administration." It was two-thirds really good advice, sprinkled with really funny things like, "Be a rich donor, make rich friends, work for the campaign, be cynical—but not too cynical." I'm a big fan of that advice.

She also wrote a hilarious recent one. I think she'll give me a hard time about mentioning this, a hilarious but useful post entitled, "Recline!," by Sheryl Sandberg, the author of *Lean In*, the best-selling book, is killing us.

(Laughter.)

PROFESSOR McNEAL: Some excerpts from this, "I hate Sheryl Sandberg. It's not what you're thinking. I don't hate Sheryl Sandberg because she's so rich, or because she's the CEO of Facebook, or because she has gleaming, meticulously done hair. Rather, it's because," Rosa jokes, "all this leaning in is ruining life for the rest of us."

Not only is Rosa funny, but she's speaking from a perspective that I think we can all understand if you just look at her bio. Rosa is working so hard at being a public scholar and a public servant, and a prolific contributor as a public intellectual.

I've cited her book that's on my shelf, *Can Might Make Rights: Building the Rule of Law After Military Interventions*. She's an accomplished public servant. She worked at the highest levels of the Department of Defense. She helped to found the Office of Rule of Law in International Humanitarian

Policy.

She led a major overhaul of the Department of Defense's strategic communications and information operations, and she received the Secretary of Defense medal for outstanding public service.

Between the two of them, we've got a great conversation. Today, we're going to discuss whether or not the 2001 Authorization for Use of Military Force ("AUMF") should be renewed. Let's talk about that question.

On the screen, and Google it if you're at home, just Google "authorization for use of military force." It's this little piece of legislation passed after the September 11th attacks that has authorized pretty much every military counterterrorism operation that we've done since 2001, and that's how long it is there.

By the way, as those of you that are in my legislation class know, the preamble language isn't part of the operative language of the statute, although we might have a discussion about whether or not it is, the whereas clauses. In fact, the operative language of the statute is really just in section two, and I'll read that to you:

In general, the President is authorized to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11th, 2001, or harbored such organizations or persons in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

That is the law that has authorized most of our counterterrorism operations since 9/11. Should that law be renewed? Does it need to be renewed? Let me ask this question to the two of you. Ben, I'll ask you to answer it first. Is the U.S. conducting counterterrorism operations consistent with the text of the AUMF, and the intent of the AUMF? Let me offer a hypothetical that might help us tease this out for the audience.

Imagine that in just a few years, in 2019, the U.S. military's joint special operations command wants to target an 18-year-old Yemeni member of Al-Qaeda on the Arabian Peninsula. He's located in Yemen. He was born on September 12th, 2001. Would such targeting be lawful under the AUMF, under the text of the AUMF, its intent, interpretations? Let's hear from you, Ben.

MR. BENJAMIN WITTES: Thank you for that kind introduction, and thanks to all of you for having us here. I think the answer to your question is probably a matter that Rosa and I can agree on, though I'll certainly let her speak for herself.

I think the answer is that if you hypothesize that by 2019, the President has not yet declared the end of the conflict, which he said last May that he wants to do, that while you might not read that document as covering the 18-year-old in Yemen who wasn't born yet in 2001 and works for an organization that didn't exist at the time of September 11th, the administration will have a plausible argument that it is covered.

The fact that that situation is covered by that document is a deleterious thing for our democratic society, but there will be a plausible argument for military action under that document to cover that situation.

That's why I think there is a fairly broad agreement, which does not extend to a "what should we do" question, but there is a fairly broad agreement that the AUMF, which has been a giant workhorse of American counterterrorism, has outlived its day and that we should be thinking about what a post-AUMF world looks like. Broadly speaking, you could have three alternatives to this document for that situation.

One is to have no document, and to say that that's a situation that should be handled and authorized to the extent you want to use military force under Article II self-defense authorities. The second possibility is to say you want to replace that document with a different authorizing document that more faithfully describes the conflict that we are actually fighting today, or in Greg's hypothetical, going to be fighting five, six years from now.

The third possibility would be to pass very specific legislation for the uses of force that you envision. Those are three very different models. In some ways, each of them has advantages over the path of least resistance, which is to do nothing; to not declare the end of the conflict, and get to a stage in which you're authorizing whatever action you're going to do under that document.

PROFESSOR ROSA BROOKS: Thank you. Thanks, Greg, and thanks for having me here, and for saying those nice things about me, and cruelly quoting all sorts of things I said. In a total failure to stop leaning in, I actually flew in just this morning.

I spent most of my day traveling, and as a result, the only funny thing I'm likely to do today is keel over or something. If I say something really

incoherent, it's not actually my fault. It's actually Ben's fault, because I'm trying to emulate him and be serious and sober-minded.

MR. WITTES: You can recline if you want.

PROFESSOR BROOKS: I might start doing that very soon. Thank you, it's great to be here. Thank you all for coming out for this. Before I talk about your hypothetical, let me take a step back.

It's worth recalling that right after 9/11, Bush administration representatives proposed to Congress that they pass an authorization to use military force that would be extremely broad—even broader than what we ended up with.

They suggested that Congress should pass a resolution authorizing the President to use military force to “deter and preempt any future acts of terrorism or aggression against the United States.” This was, of course, all occurring in the immediate days after 9/11. The Twin Towers were still smoking, and bodies were still being pulled out of the rubble. But even at that moment of maximum panic and horror, Congress didn't want to do that. They thought that was too broad.

Instead, they came up with what we now have, which does, at least on the surface, contain some pretty significant limiting language. It restricts the use of force to those nations, organizations and persons who planned, authorized, committed or aided the 9/11 attacks, and it restricts the *purpose* of the use of force to prevention. Not retaliation, but prevention of future acts of international terrorism against the United States by such organizations and persons.

In other words, the AUMF that Congress passed was clearly not a blanket authorization for the executive branch to go out and get every bad guy in the world. We know that the number of individuals and organizations out there that might wish harm to the United States is fairly high, unfortunately. Nonetheless, the 2001 AUMF was clearly intended to be restricted to going after those responsible for the 9/11 attacks and preventing the responsible actors from carrying out similar attacks in the future.

In the hypothetical that you gave us, Greg, one thing that is *not* relevant is the date of birth of our putative Yemeni target. In the context of a more traditional war, you could join the army of an enemy state, and if you're part of that armed force, you're part of that armed force, even if the war that started before you were born, and that's the end of the story.

Whether your young Yemeni is targetable would really hinge on two questions. The first would be, is Al-Qaeda in the Arabian Peninsula one of the organizations that planned and carried out the 9/11 attacks? Is it functionally identical to Al-Qaeda, or acting in concert with Al-Qaeda and taking direction from Al-Qaeda? Then, second, with regard to this individual and the organization he's part of, are they linked to planning *future* attacks against the United States?

These are very fact-specific questions, and maybe the answer to both would be yes. I think that what Ben identifies as deleterious to democracy is what we seem to have seen—and I say, “seem to have seen” because most of this has been in the covert realm, so we're frankly left guessing about precisely what has been happening, but we seem to be seeing the AUMF mission creep on a fairly significant scale. The executive branch seems to be targeting people in organizations further and further removed from any culpability or connection to the 9/11 attack, and with less and less clear evidence that they are planning attacks against the United States.

I do think that that's very troubling. It's troubling on a legal level, and it's troubling on a policy level. I won't talk about the policy level right now, but I certainly think what we've seen is that the executive branch has taken the AUMF, which was clearly intended by Congress to place clear limits on the use force, and interpreted in a way that means there are effectively no limits at all.

Thus, we've seen drone strikes in Somalia against members of the Al-Shabaab organization, even though the links in the chain connecting them to 9/11 and to any future acts of terrorism against the U.S. are pretty tenuous. I think we've gotten very far away from what Congress could ever have imagined they were authorizing.

PROFESSOR McNEAL: I'm curious if I can push back a little bit, Rosa? Do you not think that the language of, “he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11th, 2001,” is important language? Because it seems that you could read that as restrictive language.

If one did not plan, authorize, commit or aid the terrorist attacks that occurred on September 11th, which, by making the individual born on September 12th, we make it metaphysically impossible; as opposed to maybe the infant somehow was providing moral support for the parents on the day of birth—that the child was inspiration.

We take it all off the table, isn't that language important? My question is why do you reject that language as being important? Because it seems like it would be helpful to the cause of wanting to narrow the scope of the AUMF.

PROFESSOR BROOKS: I don't reject it as being unimportant. Are you putting your emphasis on the words, "he determines?"

PROFESSOR McNEAL: No, on what must the President determine. The President must determine that the individuals planned, authorized, committed or aided the terrorist attacks that occurred on September 11th. Is that an implausible interpretation? Ben is looking at me like it is.

MR. WITTES: I think you're both missing the point.

(Laughter.)

MR. WITTES: He's missing the point of the way the administration understands the AUMF. The relevant question from the administration's point of view is whether the force in question is co-belligerent or an associated force with an organization that is much more directly covered by the AUMF.

The way the administration analyzes this is they say, "Al-Qaeda is an organization directly responsible for 9/11." The relevant question when you're evaluating an affiliated group with Al-Qaeda is, has that group sufficiently entered the conflict on the side of the enemy, that it is, for legal purposes, covered by the AUMF, irrespective of what its individual relationship with the events of 9/11 may have been?

Therefore, a group like, for example, AQAP, which didn't even exist at the time of 9/11 but has submitted to the discipline and the command structure of Al-Qaeda's core, according to the administration, which has command links in a direct way with that group, and which is fighting on the side of Al-Qaeda, including by planning attacks against us, is unambiguously covered by the AUMF. Whereas a group like Al-Shabaab, individual leaders of whom may have that relationship and individual leaders of whom may not, is much more ambiguous.

The relevant question that the administration would ask in the context of Greg's hypothetical has nothing to do with when the 18-year-old was born,

and it has nothing to do with what AQAP's organizational involvement is with 9/11. It has to do with the question of whether it entered on the other side of an existing conflict, and that's a binary question.

PROFESSOR McNEAL: You've wonderfully teed up for me. Rosa, did you want to comment?

PROFESSOR BROOKS: No, only to say that the concept of "associated forces" of Al-Qaeda is pretty squishy, as is the concept of co-belligerence in the context of such a non-traditional conflict. To some extent, Ben is actually right, if I understood your question, Greg.

This is absolutely how the administration has made the case for these strikes against organizations that clearly themselves often did not exist at the time the 9/11 attack. They have argued that they are associated forces, or sometimes they use the term "co-belligerents," with Al-Qaeda. But this just raises several additional questions.

One set of questions relates to whether Congress can, in fact, be understood as having authorized the use of force—by implication—against not only those organizations connected to the 9/11 attacks, but also against their "associated forces." That's not particularly well-defined as a legal concept. To the extent that Congress has used the "associated forces" language, it has done so in the context of authorizing detention rather than in the context of authorizing the use of lethal force. But it's not clear that you can assume that congressional authorization to detain members of AQ's associated forces logically implies authorization to target. Authorization to *target* logically must include the authorization to *detain*, but not the other way around.

The administration has also been somewhat contradictory as whether it is possible to define or specifically identify those organizations it considers to be to be associates of Al-Qaeda. It also raises certain metaphysical questions about the organization's identity over time. At least in terms of "Al-Qaeda Central," the original organization run by Bin Laden, at a minimum it's clear that group's power has been dissipated substantially. In fact, some argue that AQ Central doesn't really exist as an organization any longer. But if AQ Central—the organization that planned and carried out the 9/11 attacks—no longer exists, how can it have "associated forces?" Can an individual or group be an associate or co-belligerent of an organization that doesn't exist anymore?

Again, the bottom line here is that two successive administrations have interpreted the 2001 AUMF very broadly. Thus, what looks like limiting language—what surely looked to Congress like limiting language—turns out not to really create any meaningful limits.

PROFESSOR McNEAL: Let me ask a follow up question. It seems that some of our questions of who should have the final say turns on whether or not the AUMF has been exceeding. There are other ways we might look at it.

We might say that it is a question of the final say, in which case maybe we want to reference detention opinions and how detention is authorized—that we might expect it to other uses of force so they were detainable then, therefore they might be targetable, and so we just get detention decisions as a possibility.

We might say that the Congress is fine with this because they continue to appropriate funds, and they appealed the legislation. We might as well look at this as an institution; say, how we've created these broad boxes or buckets of detention targets who actually get means.

Into that bucket is a decision that's made not really very publicly. It's made by some bureaucrats inside intelligence agencies. We could call them analysts, but they're bureaucrats.

They're sitting deep inside these agencies and they say, "We can call up the criteria," and lifting up the flagpole maybe it gets all the way to the President's desk, maybe some has just been internally determined, "This guy's a member of Al-Shabaab," or "This guy's a member of AQAP."

So, who should be making these decisions? Have we calibrated it correctly on the area that matters in something that used to be changed? Rosa, I'll start with you unless you don't want to take part.

PROFESSOR BROOKS: Yes. These are difficult issues, right? Because it's virtually impossible to imagine any court actually weighing in directly on this.

The politics of military action are such that Congress tends to find it extraordinarily difficult to roll back powers granted to the executive branch. That's the historical trend. Once Congress grants power to the executive branch on national security issues, it's really hard to pull that back, for variety of reasons that you all understand.

So, who "owns" the AUMF? Who owns these decisions? There is no

single actor who has the authority to say, “This is too distant from the original intent of Congress,” or “No it’s not.” Eventually, Congress either changes the AUMF or it doesn’t.

For what’s worth, I think it is fair to say that the *only* group of people right now—Ben, tell me if this is wrong—who are arguing that all current U.S. uses of force for counterterrorism purposes fits neatly within AUMF are representatives of the executive branch.

Both those who favor expanding the 2001 AUMF and those who favor repealing it tend to share the view this is wrong—that it’s really hard to argue that you can shoehorn everything the U.S. is currently doing into the existing AUMF.

To me, that most deeply troubling piece of this is that—via the superficially legitimating power of the AUMF, if it’s stretched quite a lot—we have launched what effectively amounts to a third covert war, in addition to the overt wars in Iraq and Afghanistan.

Piecing together the best available open source information, it appears that U.S. drone strikes have targeted and killed roughly 4,000 people. Even if you think, as I usually do actually, that most of those people probably deserved it—that the world would be better off without them—I find it quite troubling, as a citizen, to contemplate the idea that really we have a third war that our government won’t acknowledge or describe. We can’t explain this covert war. We don’t really know where it is, and why. Instead of transparency, we have all of these decision’s being made based on legal criteria that have been developed in secret, based on evidence that is evaluated in secret, based on information from secret sources, with decisions ultimately being made by individuals whose identities are anonymous.

And for the most part, these strikes are not formally acknowledged to the American people or the world. I think at the end of the day, that’s what’s really troubling about this. It’s not so much the narrow question of whether this or that particular strike can plausibly be seen as consistent with the AUMF. As I said earlier, those are very fact-specific questions, and on any given strike, maybe it’s completely consistent with even the narrowest interpretation of the AUMF and maybe it’s not. But ultimately, the degree of AUMF mission creep has led us to a whole secret war.

MR. WITTES: I disagree with about 80 percent of what Rosa had just said and I agree of about 20 percent. I want to dwell in the 80 percent in the spirit of making this conversation interesting. Then, I’ll come back at the

end to the 20 percent.

First of all, I think it's wrong to say that courts will never weigh in on this. They have weighed on it. There are number of Guantanamo detention cases in which the courts have actually expounded on the meaning and scope of the AUMF.

They have been uniformly permissive on the questions that Rosa says are troubling. That is, the geographic boundaries of the conflict. They've okayed detentions of people who were grabbed nowhere near conflict zones.

They have been permissive also as to the detention of people who are part of associated forces connected to Al-Qaeda or the Taliban.

I think if you look to the courts to answer these questions, at least in the context of detention cases, all of the case law that has come down has weighed in favor of the administration's expansive conception of its authorities under the AUMF.

Number two, it's really important to talk here about what the default options are. What happens if you do nothing? The answer is, if you do nothing—that is either in the courts or the legislature—then Rosa is exactly right. What happens is a bunch of unnamed people in the General Counsel's Office of the Pentagon, sometimes in dialogue with other branches of the government and often not, make targeting decisions based on perfectly good faith, but based on a very broad legal analysis of what the AUMF tolerates. They may or may not brief a lot of people under the scope of that conception. Basically, you have created a definition of the legal scope of the war that resides in a very talented office, but it's an office of executive branch lawyers and nobody else.

Now, I'm not a hard-core congressionalist, but I actually think that's kind of a disturbing thing as a long-run proposition. Which is why I love Greg's hypothetical. We're talking about 2019, which is a long way off, right? That leaves you with a really troubling problem—if the courts are not going to be the ones to define the parameters of the war. And if you think—and this is a point on which Rosa and I really agree—that there's something troubling about a kind of secret long-term internal process within the executive branch to define a protracted, perhaps never-ending conflict, then you necessarily fall back on the question of that document and what is the right body to revisit that document?

Now, the irony is the position that Rosa takes, which is to repeal that document. This is a very attractive idea. If you believe that the response to that guy in 2019 in the wilds of Yemen in the absence of that document will

be some lesser or non-usage force that will neutralize him by some projection of state power that is more attractive than a drone strike.

I don't know. You're working with Yemeni law enforcement to arrest him, extradite him, perhaps some kind of snatch operation? You have to ask the question again. What's the default option? If that document isn't there, what do you do?

Now, I think—this just reflects my own prognostication—but I think the answer is you do the drone strike anyway in that situation because what drives that drone strike is not the presence of that document.

What drives the drone strike is that the guy is sitting there in an ungoverned space, and you've made a judgment as a military and as an executive branch that that guy actually is not an acceptable risk. That's what's actually driving our drone policy.

In the absence of that document, you will do that strike under inherent Article II authority. The irony is, in the name of repealing the AUMF, Rosa's camp is actually driving toward a world of inherent presidential authority.

I would suggest something else as an alternative, which is that Congress should sit down and replace that document with a document that describes who it is against, and under what circumstances, and compliant with what bodies of law that we want actually to be using force.

There've been a lot of debates on what the parameters of that document would look like that. And the allure of repeal is that it pushes you towards law enforcement options. But, I think the reality of the repeal is that it pushes you toward much more inherent aggressive presidential power.

PROFESSOR McNEAL: Rosa, would you and your camp like to respond to Ben?

PROFESSOR BROOKS: My camp? My camp would like marshmallows and s'mores. We don't want to respond to the question.

No, seriously, I think it's a fair question in terms of prognostications about the future. I would make an argument, however, that legally speaking, the standard for using force in the absence of an AUMF would be more restrictive than in the presence of an AUMF.

That being said, I am not particularly sanguine that future administrations will share my legal analysis, unfortunately. I'm also not terribly convinced that we don't already effectively have unlimited power

that has been delegated to the executive branch, so I'm not sure it would make much difference, in practice.

This is a cynical take on it. It could very well be that what Ben suggests will happen regardless, frankly. But here's why, though, I think at least if future administrations were to adopt my legal views—which they obviously should!—here's why I think that there is, in fact, a difference in the threshold for using armed force absent an AUMF.

The AUMF is the basis in U.S. law for treating U.S. efforts to combat Al-Qaeda and associated groups as an “armed conflict.” Once we decide to view U.S. counterterrorism efforts as an armed conflict, we trigger the *lex specialis*, the law of armed conflict, which has an extremely permissive set of rules regarding the use of lethal force by states when they are involved in armed conflict.

When you have an armed conflict, you can engage in status-based targeting. Classically, on the traditional battlefield, enemy combatants are targetable *because* they are enemy combatants, not because they pose any immediate threat to you, and not because of the gravity of any threat that they pose to you. Even if they're sleeping they're targetable, subject to the rather minimal limitations posed by the principles of necessity and proportionality.

But absent an armed conflict, at least in a traditional reading of international law, justifications for the use of force by one state inside the territory of another state, it's the international law of *self-defense* that's applicable. And traditional *jus ad bellum* rules say that a state can't use force in self-defense unless it's in response to an armed attack or an imminent threat.

Read into that are the requirements of necessity and proportionality, which I think traditionally speaking are, in the self-defense context, a much higher bar to surmount than for armed conflicts, because when you're using force in self-defense rather than in an ongoing armed conflict, you don't get to engage in status-based targeting.

If you have to rely on self-defense justifications for the use of lethal force, you don't get to say, “We're targeting that 19-year-old in Yemen because he's a member of Al-Qaeda in the Arabian Peninsula.” Instead, you have to be able to plausibly make the case, “we're targeting that 19-year-old in Yemen because he poses an imminent and grave threat to the United States”—and thus pulling in the necessity and proportionality principles.

I think that is, in fact, a much higher threshold, and I'd be a lot more

comfortable if the President had to justify the use of force in those terms. That is: yes, of course, the President *always* has the inherent authority to use force against an imminent grave threat against the United States, wherever it comes from—even if it comes from Basque separatists. It doesn't matter. It's irrelevant whether it's linked to 9/11. The relevant question is whether we're really seeing a threat that is both imminent and serious, and whether force is really necessary to respond—as opposed to some other means of prevention or response.

Historically the threshold for using force in self-defense has been fairly high. Ben is certainly right, however, there is no guarantee that that will be the case in the future. And when it comes to this administration, I admit that adopting a self-defense framework would not necessarily change things, given the understanding of imminence that this administration appears to be working with. Based on the leaked 2011 Justice Department white paper on the lawfulness of targeting U.S. citizens overseas, it appears that the administration is using a definition of “imminent” that is pretty chilling, and in fact redefines imminence so that *lack* of evidence of an imminent threat actually constitutes *evidence* of an ongoing imminent threat.

I won't get into that further unless you two are interested in discussing it. Ultimately, while as a legal matter I would quibble with you, Ben, I'm fearful that as a practical matter you could very well turn out to be right.

MR. WITTES: So, a couple things. I think that one of the wrinkles here is that in his May speech last year at the National Defense University, the President adopted, as a matter of policy, exactly the limiting restrictions that would exist as a matter of law if the conflict were ever over.

That is, he said—and this raises the question of what the word “imminent” and what the word “feasible” means—that he would only do drone strikes in circumstances of an imminent threat in which capture was not feasible.

That gets you both under U.S. domestic constitutional law and under international law at least really close, and probably compliant as a matter of policy, with the rules that would exist as a matter of law if you got rid of that document altogether.

Now here's the difference. The difference is it's policy. It's not law. So tomorrow if there were a guy we really, really, really wanted to get, and you couldn't argue that he posed an imminent threat; you could kind of waive the policy if you go high enough in the government to do it.

Once you end the conflict, once you repeal that document, that option is not available to you anymore. You either have to breach your international law obligations and violate the separations of powers, or you have to not do the strike.

That puts an enormous amount of stress on the word “imminent,” what it means, even more stress than exists today. While I’m perfectly, cheerfully comfortable with the way the administration has worked with that word, I concede that they have injected a lot of give into the word “imminent.”

It also puts a lot of stress on the word “feasible” in a way that we probably have also seen already. Feasible is a complicated word, by the way, because it’s almost always feasible in some distant sense to capture somebody if you’re willing to risk enough forces to do it.

Look at the Osama bin Laden raid. Was it feasible to capture him rather than kill him? Absolutely. Was it feasible to do it predictably without risking forces? Different question. When you do a drone strike, is it feasible to land a tactical team and pick somebody up instead of blowing them up? Often it is if you’re willing to get those people killed, right?

So the question of whether something’s feasible is often really a question of feasible given what risk to forces and given what risk to civilians. I think as long as those are questions of policy and not questions of law, those words will bear a fair bit of stress, as Rosa has said. They will be bearing more stress still the day you make them matters of law.

PROFESSOR McNEAL: Let me extend this a little bit. You’ve both been talking about the possibilities of capture and other alternatives to killing individuals. Is it possible then that the armed conflict approach is wrong?

So let’s say that President Clinton, Hillary, gets elected to office. Her first act upon entering office is that she issues a declaration, an executive order, that based on OLC memo that the right person she put in OLC says that AUMF is no longer operable.

It’s the stated position of the executive branch in interpreting their constitutional authority that they no longer have statutory authority. The AUMF is no longer applicable.

So President Clinton says, “From here, hence forth, we will only use a law enforcement approach, which in the legal memo it basically explains that that’s a human rights-based approach. Kill only when necessary, when you’ve exhausted all other alternatives.”

Maybe she leaves a redacted footnote for herself in that OLC opinion that some covert action authority might still sit on the table.

Is that such a bad approach? You could go three years ahead from there to our Yemeni example. It's 2019. How is that a problematic approach?

It actually seems like that might do more to protect lives, and if we assume under the human rights approach that a Navy Seal's life is just as important as the lives of innocent Yemenis, isn't this the right approach we should take as a matter of human rights and as a matter of legal policy?

MR. WITTES: Look, we're about 75% of the way there already.

A little more than a year ago, some colleagues and I—Matthew Waxman, Jack Goldsmith, and Bobby Chesney—wrote a paper in which we said, hey, the AUMF is really out of date. It's time to narrow it in most ways, expand it a few ways, make it more flexible and much more accountable. Loosely speaking, here are some ideas that you might want to implement in thinking about such a bill.

This produced a very significant debate. It was roundly criticized by a bunch of people, some of them in this room.

PROFESSOR McNEAL: Some sitting next to you.

MR. WITTES: Some sitting next to me. It is very rare in the context of public policy debate to have an issue resolved as decisively as a major presidential speech that answers the question, but three months after we wrote this paper, and Rosa criticized it, and Steve Vladeck criticized it, the President gave a speech at the National Defense University in which he said he didn't believe in extending the AUMF.

He would work to see it repealed, he said, and he would not sign any reauthorization of it. I think that actually gives you some of the answer to your question, which is that he announced that we are on a glide path, unclear of what duration, to exactly the regime that you just described.

The question is: Does something interrupt that glide path and get that plane going up again rather than down? I can only think of two things that would do it. One is congressional opposition to that idea, which you've seen a little bit of. There was a report yesterday that a bipartisan group of senators are working on an AUMF reform bill.

The second possibility, which is much more likely, is a change in the geopolitical circumstances that makes a lot of people think, gosh, we

actually do need to use force more, and we should have a congressional authorization that describes the circumstances in which we're going to do it.

But failing one of those two things, I think we are on the path to exactly what you describe, and the question is whether you want to construe that as a highly militarily active peace based on aggressive Article II authorities, or whether you would choose to describe it as peacetime backed up by the occasional exercise of self-defense military authorities, much like the pre-9/11 era.

Which it is, I think, will largely be determined less by legal definition than by how often that 19-year-old hypothetical case you opened with shows up, and whether we in those situations feel compelled to respond militarily, or whether we feel instead that's a situation we can let lie and deal with by law enforcement or not at all if we can't reach him.

PROFESSOR McNEAL: Rosa.

PROFESSOR BROOKS: I'm less convinced than you are, Ben, that we are, in fact, on that glide path that the President seemed to be signaling almost a year ago now. I think you're right that that was the suggestion in the President's language, and indeed, he—I won't quote his words exactly here—but he made a point that I think is also applicable to your question, is it wrong to view this as armed conflict?

The President said something to the effect of, "Not everything that is lawful is wise or right." To me that's actually the really fundamental issue here, and I know I'm supposed to be the law professor and you're supposed to be the non-lawyer, but I think lawyers have owned this discussion too much.

Lots of things are arguably lawful because we have somewhat vague legal categories, because we have a somewhat anachronistic legal framework that is fairly malleable, and because you can make a plausible good faith argument for stretching both the AUMF and the law of armed conflict quite far.

But there's a whole different set of questions about what *actually* makes sense in strategic and policy terms. Something may be "lawful," but may make little sense in terms of U.S. security, or in terms of the longer-term precedents we are setting.

As I've said earlier, I think what troubles me most about the largely covert war we have undertaken is its impact on our own democracy.

I'm also troubled by the precedential consequences of this covert war for foreign regimes that I trust a whole lot less than I trust the U.S. government.

By and large, what we have right now is we have a situation in which the government is essentially saying to us as citizens, "Trust us. We're not going out just to kill random Yemeni teenagers because we want to. We're going to be careful with this authority. We recognize it's very broad, and we recognize it's non-transparent, but we're going to do a good job. We're going to act in good faith."

I believe that's true. I've known and have worked with many of the people who have been involved in making those decisions.

That said, it's a pretty weak foundation for democracy to be relying on sheer trust. And though I have a lot of trust in U.S. officials, I certainly don't trust Vladimir Putin. There are a lot of other world leaders I don't trust. Right now, the United States of America is saying, in effect, "We, and only we, have the authority to assert that a particular individual in a foreign country is a terrorist and a threat to us, and we have the authority to decide, unilaterally, that it's lawful use force inside that country to target that individual—but we're not going to tell you why. We're not going to give you the evidence. We're not going to permit anyone to investigate after the fact. We're not even going to publicly acknowledge that we've done used lethal force." And when the U.S. is saying this, it doesn't take very long before Putin and a host of other despots and would-be despots think to themselves, "Ah, I'm going to try saying that too, next time I want to go after dissidents, next time I want to go after whoever I happen to regard as enemies of the state." And I don't think they're going to be as scrupulous as the U.S.

I'm also concerned from a strategic perspective. I never like to quote Donald Rumsfeld favorably, but his famous question during the Iraq war bears repeating: "How do we know if we're killing terrorists faster than we're creating them?"

With this infinitely expandable AUMF, we have arguably created a situation where it is enabling and justifying a perpetual whack-a-mole approach to counterterrorism—and increasingly, there's evidence it's causing a lot of blowback for us.

Of course, changing the law won't automatically change the politics of this. If the law changes, it will be because the politics of this have changed.

That's why we ultimately need to ask questions about policy and

strategy, not just about law and how we should interpret the law. In particular, I think we need to ask ourselves, “Are we keeping the gravity of the threat in perspective?”

Obviously, the terrifying nightmare scenario is that somebody, whether it’s a terrorist organization or a rogue state, gets—and wants to use and plans to use—a weapon of mass destruction.

But short of that, it’s not particularly clear that we should be as worried as we are about most of the actors we’re currently going after. I think that’s consistent with the portions of the intelligence reports that have been declassified. In no year since 2001 have more than sixty Americans been killed by international terrorism. In any given year, more Americans are smothered accidentally by their pillows in bed than are killed by international terrorism.

This is not to say that the deaths that do occur as a result of terrorism are anything other than tragic. It’s not to say that we shouldn’t try to prevent them. But it *is* to say that there are a lot of things to worry about in the world. It’s a big scary world, and there are lots and lots of things we should be concerned about. But absent WMD, is terrorism really such a grave threat to the U.S. that it’s worth handing over wholesale to the executive branch a blank check to use lethal force, in such a potentially dangerous and precedent-setting way?

PROFESSOR McNEAL: OK. I have at least six, eight cards stacked up so let me ask a closing question for you, and then I’m going to hop into the cards. If you have more cards, we’ve got about fifteen minutes to do Q&A, maybe a little bit more than that, so write them up and hold them up. Here’s the closing question.

What are the prospects for legislative changes to the AUMF, and let me take you to 2019. We have this conference again. We’re sitting around. We’re chatting. What has happened to the AUMF? This is prediction magic eight ball time. Then what should happen? What would satisfy you? I have Ben, then Rosa. So, Ben, go ahead.

MR. WITTES: On the prediction side I actually have been struck over the last few years by how sincere I think the President is in wanting to bring conflicts to an end. I actually take his rhetoric very seriously and more or less at face value on this.

Whether it’s plausible for him to do it, and what limits him in his ability

to do it, I think those are hard questions, but I think it's worth taking his words very seriously that that is his unambiguous aspiration.

I believe he wants to declare an end of hostilities under the AUMF, and I think he is not looking to expand it or to maintain it, and I think what he announced in May of last year is the adoption as a matter of policy of a set of standards that he hopes to evolve into legal standards with the declaration of the end of the conflict.

I believe he very much wants to do that by the time he leaves office, and I take that very seriously as an aspiration. Therefore, I believe we will, one way or another, likely be living, absent major intervening events, in a post-AUMF world that will look a lot like the current AUMF world in terms of kinetic American military activity.

What I think should happen is that we should have a very serious societal discussion about what part of the long-term confrontation with terrorists we want the U.S. military and covert operators to be using violence and military force and non-military lethal force to effectuate.

We should authorize that limited portion in a successor document subject to a series of reporting requirements that are not, by the way, features of the current document, and that should have various accountability mechanisms that we would not have put in place in the immediate aftermath of 9/11, and that the Congress of the United States should put its name behind the whole thing. That's my fifth-grade good-governance idea of what the right answer is. There was a time about a year ago when I even thought it was plausible.

Since then, I think there are a lot of reasons to not believe that it's plausible. The first of them is the President clearly doesn't want it. I actually don't really believe in forcing down a President's throat authorizations to use force that he does not want to have, and authorizing force that he does not want to use.

The second reason, which is perhaps more salient, is that we've had some amazing demonstration projects in congressional dysfunction over the last year. Not that we hadn't had some before.

Keeping the government open with funding is not a hard problem, intellectually. It may be a hard problem politically to get it done, but it's not an intellectually hard problem. Yet we've almost defaulted on the debt, and we've closed the government for failure to pass basic housekeeping legislation. These are easy problems. The problem that we're talking about right now is an incredibly hard problem.

Whether we should have an authorization to use force, and what the contours of it should look like if we do, that's a really hard problem. I haven't seen a lot of congressional aptitude for the management of hard problems.

So there's a lot of reason to be pessimistic that, even if you believe my vision of good governance is in fact good governance, that it is plausible in the current environment, but that's my sense of where it's going and where it should go.

PROFESSOR BROOKS: I agree with Ben that the President would like to find some way to bring an end to this armed conflict. I believe he's honest when he says that, but I don't believe he's likely to be willing to take any political risks to do that—either on his own behalf, in terms of his domestic political agenda, or in terms of potentially jeopardizing Democratic candidates in future elections.

Given that, while absolutely endorsing everything else that Ben says about congressional dysfunction, I'm going to bet that in the year 2019 the AUMF of 2001 is still ticking away. Exactly how it is being used is less clear.

It is certainly possible that this President and his successors will gradually, as a matter of policy, simply wind down or ratchet down the pace of the use of lethal force for counterterrorism purposes under the AUMF, but I doubt that the AUMF is going to go away.

We've seen this in the discussions on the Hill, as well. On both sides of the aisle, we've seen people basically saying, "I don't think this is really going to happen," because the risks of opening up the AUMF are so great. It's probably not going to change, absent some significant new external event or threat from a completely different source.

MR. WITTES: Can I just add one thing? I think Rosa's comments just now illustrate in a really beautiful fashion why the AUMF in its current form has been so robust, which is that it is everybody's second worst option.

From my point of view, the worst option is to repeal and rely on Article Two authority, which is Rosa's preference, though she would formulate it differently.

I look and say, well, I really hate that possibility. If I have to keep living under the current AUMF, OK. I think it's bad government. I don't like it, but it's better than the worst possible alternative.

Rosa looks at it and says, “The worst possible option is what Ben is suggesting.”

PROFESSOR BROOKS: It’s not the *worst*. It’s just bad.

MR. WITTES: It’s really, really bad. You really don’t want to see Congress renew an endless war authorization. Therefore, while I’d like to see the AUMF repealed, the second-worst option is leave it in place and let it drift, rather than breathing life into it.

The administration looks at it and says, we want to end the war. If Rosa’s right, though, they look at it and say, we can’t really quite do that, and so we won’t renew it. We won’t breathe new life in it, but we’ll just let it sit.

Congressional Republicans, some of whom are very interested in the idea of creating a very broad and sweeping AUMF, will say, we can’t have it repealed. We can’t replace it with something very narrow and textured, so leave it as it is. You have this option that actually almost nobody wants, but that’s dramatically politically robust because nobody thinks it’s the worst possibility.

PROFESSOR McNEAL: It’s funny. My first question to you was going to be this very insightful question, which must have been written by one of my students, which said, “How do you go about placing actual effective limits on this type of military force and creating a new document, given that, one, the limitations of the AUMF haven’t been effective in actually limiting power, indicating a tendency of the executive to take advantage of any broad language, and two, a very narrow law would likely require frequent revision in Congress, which would be either unworkable or impossible to do because of congressional difficulties, time statements, trying to gather a consensus, et cetera?”

MR. WITTES: First of all, I think the AUMF has been much more . . .

PROFESSOR McNEAL: It sounds like Rosa’s right. In 2019 . . .

MR. WITTES: As I say, I believe more strongly than Rosa does that the President actually means to bring this to an end before he leaves office. I could be wrong about that.

PROFESSOR BROOKS: How does he get rid of the AUMF, though, even if he wants that?

MR. WITTES: I think you declare the end of hostilities, and the President is free to do that.

There are certain tails wagging the dog questions associated with that, like what do you do with certain detainees? But there is certainly the possibility of doing this by presidential declaration.

I think the AUMF has been much more limiting than the question suggests. There are people in the world whom the Defense Department believes it doesn't have the authority to target. There are whole groups in the world—think about Hezbollah—that have really attacked Americans, yet whom we don't attack militarily because they're not covered by the AUMF.

To some degree, the premise of the question is wrong. Broadly speaking, very briefly, in our proposal, we tried to include a series of reporting requirements to Congress in terms of who is covered by the document, a series of other accountability measures, including a sunset provision, so that you don't have the situation where the default is the perpetuation of the conflict indefinitely.

PROFESSOR BROOKS: Okay, let me take on that narrow question of what would happen if President Obama, in his 11th hour, after Hillary Clinton has won the next election but has not yet been inaugurated, decides to do something serious about this.

Let's say he doesn't want her to inherit this. He wants to make her life easier by taking the fall for it because he's going out anyway, so he says, "I declare as President of the United States that the armed conflict with Al-Qaeda and its associates is over. We will, of course, continue to respond to any imminent threats, using force if necessary, but the armed conflict is over."

Well, even if he does this, I think the AUMF is still left standing. Absent congressional repeal, it's Justice Jackson's loaded gun. It's *available* for Hillary Clinton, should she wish to use it. It's available for any subsequent administration, should they wish to use it. That may, to some extent, be a semantics thing. I don't think the AUMF goes away, even if the President of the United States were to have a sudden, "I declare the war is over," moment.

What was the question? Now I completely forgot.

(Laughter and crosstalk.)

PROFESSOR McNEAL: Let me ask you a new one, because I want to make sure I answer a whole lot. Is that OK?

(Crosstalk.)

PROFESSOR McNEAL: I've got a lot of cards here I'm remixing and spinning. Let me remix this one. It is two questions on the AUMF and due process.

PROFESSOR BROOKS: I just remembered my answer.

PROFESSOR McNEAL: Go for it.

PROFESSOR BROOKS: This is actually important, although obviously not so important that I remember it the first time around. Much of what ails us right now, it seems to me, could be 95% addressed—in terms of the underlying rule of law issues—by having more transparency and more accountability.

At the end of the day, what wakes me up in the middle of the night feeling scared about the future of American democracy, and scared about the future of the world, is not whether or not the use of armed force can, with total plausibility, be said to fit into the AUMF or into the law of armed conflict.

It's the fact that the United States of America has been, in effect, engaging in a 13-year-long secret war based on secret law. That is what frightens me. It's not even because I think that there have been abuses. It's because I think that that is a *recipe* for abuse, sooner or later.

Whether or not the AUMF is revised or repealed, I think it is conceivable that there could be congressional legislation that is designed to force somewhat greater transparency and create a somewhat better post-hoc investigatory mechanism for uses of force by the United States outside of traditional battlefields.

I don't necessarily think that is likely, but I do think that there is a growing bipartisan concern on the Hill about this. I think we're seeing members of Congress from both parties saying, "We don't want to take away the power to use force, but we do want to ensure that it is reasonably

circumscribed and that is democratically accountable.”

That, I think, could happen, and that, I think, is the most important thing we could hope for.

PROFESSOR McNEAL: Great, we’re all glad Rosa did. We’ll keep your complex legal questions not as complicated as follows.

The AUMF is being used to justify actions against American citizens including surveillance and even targeted killings. What are your thoughts to apparently violate due process with a one-page law passed 12 years ago?

MR. WITTES: I think to formulate the question that way, actually does a little bit of violence to the notion of due process. Number one, if you believe that there’s an authorization to use force against the enemy, in what is actually an armed conflict—and that is of course a disputed question but that is the administration’s position and the prior administration’s position—it follows that if an American is a member of enemy forces, it is lawful under that authorization to use force against that American.

There are questions that arise from that: whether there’s some heightened level of scrutiny you need to give to the underlying identification, for example. When you blow up the German position in World War II and it turns out that there’s an American soldier who is fighting with the Wermacht, that issue doesn’t arise. We don’t really consider that a due process issue. In conflict settings, you do identity- and status-based targeting.

That’s a very ugly thing for the individuals involved, but it’s part of the nature or it’s part of what distinguishes a war footing and the law of armed conflict from the criminal law, human rights law, and the normal state of being.

PROFESSOR McNEAL: I’m going to mix two questions together again. Since you’ve both argued that secret war is inconsistent with democracy, what role should leaking play and enhancing democratic accountability?

Is shifting of the covered drone program from the CIA to DoD exclusive domain a good idea and why or why not? A transparency question: Can transparency increase by shifting the CIA program to DoD?

PROFESSOR BROOKS: Oh, gosh. I think that there is a time-honored

American tradition of whistle blowing and civil disobedience. I do think that there are times when it is clearly the ethical duty of a government employee who believes that something immoral and unlawful to leak it or to blow the whistle in some way or another.

That being said, I don't want to get this mixed up with the earlier set of questions about Snowden, for instance, whom I don't actually think fits in the paradigm.

The paradigmatic ethical whistle blower and leaker is someone who first exhausts internal mechanisms to report wrongdoing, and when that fails, they blow the whistle openly: they stand up and take responsibility for their disclosures and say, "I'm blowing the whistle. If you want to put me in jail, put me in jail, but the American people need to know this."

As for the CIA versus DoD question, I'm not particularly convinced that transferring the drone program, such as it is, from the CIA to DoD automatically introduces greater transparency.

The legal authorities under DoD operating in this context are also quite permissive. Contrary to some media reporting, DoD can engage in activities designed to remain unacknowledged.

I think it is probably accurate to say that the Armed Forces have internalized the law of armed conflict more deeply than the intelligence community has. But, I don't think there's any particular reason to believe that somehow we'll get a dramatic change in either the policy or the way in which it is carried out just because we shift institutions. The broad problem of transparency and accountability will remain, either way.

MR. WITTES: I actually agree with that almost entirely. I would not want to use our remaining minute to pick a nit.

PROFESSOR McNEAL: We actually are going to end this panel right on time. Please join me in thanking our panel.

(Applause.)