

Testimony of Brigadier General Richard C. Gross, US Army (Retired)

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"Authorization for the Use of Military Force and Current Terrorist Threats"

Foreign Affairs Committee, U.S. House of Representatives

July 25, 2017

Chairman Royce, Ranking Member Engel, and members of the Committee, thank you for inviting me to testify today about authorizations for the use of military force against terrorist groups. It's a privilege for me to appear before this distinguished committee.

I am purposely keeping my remarks brief today. What I hope to offer the Committee is a military legal practitioner's view on the Authorization for the Use of Military Force (AUMF).

I retired in December 2015 after serving over 30 years in the United States Army, both as an Infantry Officer and later as a Judge Advocate. Following the tragic events of 9/11, I served as the legal advisor to several joint and special operations task forces, deploying multiple times to Iraq and Afghanistan. I also served as the legal advisor for the Joint Special Operations Command, the NATO International Security Assistance Force (ISAF)/U.S. Forces-Afghanistan, and U.S. Central Command. During my final four years of active duty, I was the Legal Counsel to the Chairman of the Joint Chiefs of Staff, General Martin Dempsey.

During my final assignment in the Pentagon, I worked closely with the Department of Defense General Counsel, the National Security Council Staff Legal Advisor, and the interagency lawyers group on national security law issues, to include counterterrorism operations. I dealt with the 2001 and 2002 AUMFs on countless occasions during those 4 years, both in the context of specific targeting operations and in more general discussions on the scope of the AUMF and proposals to revise or amend it. Some of those latter discussions took place in the House and

the Senate, in briefings, hearings, and informal discussions with members and Congressional staff.

My views on the 2001 AUMF have not changed since I retired from the military. I continue to believe the 2001 AUMF contains adequate legal authority for the use of military force against the Islamic State of Iraq and Syria (ISIS), a view first adopted by the previous administration that also appears to be the position of the current administration. I recognize, however, that reasonable minds disagree on this point, with some voicing criticism of the decision to rely on the 2001 AUMF as the domestic legal authority to conduct military operations against ISIS.

While I believe the 2001 AUMF is adequate to address the current ISIS threat, I also believe it would be prudent for Congress to enact a new AUMF to specifically address the threat of ISIS and other terrorist groups, for a variety of reasons. First, a new AUMF would reflect the current will of the American people, as exercised through their elected leaders, regarding our ongoing operations against ISIS, al Qaeda (AQ), the Taliban, and other terrorist groups. A new AUMF would also define the current scope and extent of our military's mission against terrorist organizations. Finally, a new AUMF would send an important signal of Congressional support to the U.S. Armed Forces.

As the Committee considers what provisions a new AUMF might contain, please allow me to give you my perspective as a military legal practitioner. When I review an AUMF proposal, I think of it in terms of the mission: who, what, when, where, and how. Against whom are we using force? What force is authorized, and for how long? Where is the use of force authorized? Finally, how are we authorized to use that force—are there restrictions or constraints? To be clear, I do not think it is helpful nor desirable to have all of these elements in an AUMF, a point I will expound upon more in a moment.

With these elements, there is necessarily a trade-off between transparency and certainty on one hand and flexibility on the other. The more descriptive (or proscriptive) a provision of the

AUMF is, the less flexibility it may afford the President and military commanders to pursue a dynamic, ever-changing enemy terrorist group. I would urge the Committee to carefully consider that balance as it takes up AUMF proposals.

The most critical provision of an AUMF is the “Who”—identifying the enemy against whom force may be used. Our current enemies do not wear a uniform, hide among civilian populations, and operate in dynamic, dispersed networks of clandestine cells. This makes defining them, in a static AUMF, challenging. Given that, there should be some flexibility in the AUMF to account for the ever-changing and expansive nature of this enemy, while also defining which affiliates and co-belligerents rise to the level of “associated forces” and therefore fall under the scope of the AUMF.

The “What” element defines the scope of the authorized force. The 2001 AUMF authorized the President to use “all necessary and appropriate force”; this same language is also used in the Senate Joint Resolution introduced by Senators Flake and Kaine. This particular language provides the maximum flexibility to the President and military commanders.

Other elements—When, Where, and How—often appear in AUMF proposals, but these elements may create unintended consequences. I’ll discuss each of these in turn.

The “When” (or “for how long”) element usually arises in the form of a sunset provision which results in the automatic termination of the AUMF after a set period of time. These are generally included as a forcing function: a means of ensuring periodic review of the authority granted by Congress. However, sunset provisions may also create legal uncertainty for the President and military, particularly as the expiration date approaches without action to extend or reauthorize the AUMF. Sunset provisions could also be interpreted by both adversaries and coalition partners as a lack of resolve, and could potentially embolden adversaries to “wait us out.”

The “*Where*” element is typically reflected as a geographic limitation. This provides certainty and transparency, but may not afford the President and military commanders the flexibility necessary to pursue the enemy outside the named countries. Terrorist groups often seek safe haven in ungoverned and under-governed spaces, and publicly announcing geographic limits in an AUMF may encourage adversaries to seek out those countries where the AUMF does not authorize military force.

Finally, the “*How*” element, which occasionally appears in some proposals, may be the most problematic. These are provisions that attempt to specifically define how the military will be used, a role normally reserved for the President and military commanders. For example, some proposals seek to prohibit combat roles or “boots on the ground”; one past proposal included a prohibition against the use of the United States Armed Forces in “enduring offensive ground combat operations.” Provisions like these may significantly restrict the flexibility of the President and military commanders to adapt to a constantly changing, dynamic enemy.

I want to mention two final points. First, one should consider the AUMF in the broader context of other sources of law and policy—an AUMF is not the final word when it comes to military operations. There are many other sources of law and authority that act as restraints on the use of military force, to include international law (the U.N. Charter, treaties, the Law of Armed Conflict, etc.); other domestic law; U.S. policy; and the orders of the Commander-in-Chief, the Secretary of Defense, and Combatant Commanders.

Second, I want to assure the Committee that, before any military force is used, there is a robust review process in place. Up and down the military chain of command, senior commanders, advised by trained and experienced staffs, including intelligence officers, operations officers, and judge advocates, review operations for compliance with applicable U.S. domestic and international law, including the law of armed conflict, and for consistency with the policies and orders of superiors in the military chain of command. In counterterrorism operations, the AUMF is central to that robust review process. During my 30 years in the military, it was my

experience that commanders and their staffs worked very hard to ensure that all operations were conducted morally, legally, and ethically, and I have no doubt they will continue to do so.

I look forward to your questions. Thank you.