

STATEMENT OF MICHAEL B. MUKASEY
HOUSE COMMITTEE ON FOREIGN AFFAIRS
HEARING ENTITLED 'AUTHORIZATION FOR THE USE OF
MILITARY FORCE AND CURRENT TERRORIST THREATS
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I am grateful to the Chairman and to the Ranking Member for this opportunity to address issues surrounding the current authorization for the use of military force (AUMF), passed in the immediate aftermath of the September 11, 2001 attacks. Specifically, those issues are: whether the existing AUMF gives adequate authority to address current, critical operations against Al Qaeda, the Taliban, and ISIS; whether reliance on the existing AUMF presents problems; whether it is important to update or replace the current AUMF and what should be included in or excluded from any new AUMF.

I. Need for an AUMF

Any discussion of those issues must proceed based on an understanding of why an AUMF is necessary in order to protect the country. Is an AUMF necessary for the executive, in the person of the President, to employ force in defense of the nation? The War Powers Resolution of 1973, which became law when Congress overrode President Nixon's veto, has been the subject of controversy since it was passed. It requires the President to notify Congress within 48 hours of using the armed forces of the United States overseas, and requires that such forces be removed within 60 days, unless that period is extended or an AUMF is enacted. Every President since Jimmy Carter has

taken the position that the War Powers Resolution is unconstitutional as a violation of the separation of powers provided for in the Constitution, yet none have challenged it in court and Presidents have filed about 130 reports of the use of armed forces abroad as required by the law.

Because of the Armed Forces Resolution, it is arguably necessary to have an AUMF in place in order to have the laws of war rather than the laws of civilian society govern interactions between our troops and the enemies they encounter on the battlefield. The laws of war permit the detention and interrogation of enemy fighters without the need for formal charges or the conventional warnings to the detainee as to the right to remain silent or to counsel. Moreover, detention may continue for the duration of the conflict in which the detainee participated, or until the detainee ceases to present a danger to the United States.

The importance of detention is obvious. When someone is captured participating in terrorist activities against the United States, the first requirement is to protect against resumption of those activities. Catch and release is not an acceptable formula. The importance of interrogating captured terrorists cannot be overstated. Signals intelligence is useful, even important. But with increased successful use of encryption and other devices of concealment by terrorist networks, reliance human intelligence is vital if we are not to “go dark” in attempting to track and frustrate terrorist plans. Further, General Michael V. Hayden, former Director of the CIA, has likened intelligence activities to trying to assemble a jigsaw puzzle. Signals intelligence can provide many pieces,

although it is not even clear which of them belong in the puzzle one is attempting to assemble; human intelligence can provide a look at the picture on the box, and show where all the pieces fit.

II. The Current AUMF

It has become increasingly apparent, certainly since 2001 if not before, that whether we acknowledge it or not, those who adhere to a militant Islamist ideology regard themselves as at war with the West in general, and the United States as the principal embodiment and defender of Western values. Our constitutional system, on the other hand, does not appear to permit the authorization of force simply against adherents to an ideology, but only against particular state or non-state actors who adhere to that ideology. That limitation requires us to assure that the AUMF is current as to the identity of those state and non-state actors who regard themselves as being at war with us, and with whom we are, through no choice of our own, at war as well.

The current AUMF, passed in the immediate aftermath of the attacks of September 11, 2001, authorizes the use of armed force against those persons and entities responsible for those attacks, and against Iraq. The authorization of force against Iraq is irrelevant; the authorization of force against those persons and entities responsible for the attacks is likely inadequate and has necessitated the tracing of the lineage of current terrorist groups, including ISIS, to either Al Qaeda or the Afghan Taliban, which are specified in the current AUMF. ISIS is arguably an offshoot of Al Qaeda, but using this

tracing of origins – terrorist DNA, as it were – is an inefficient way to determine whether a particular group is covered. For example, the current AUMF specifies that it applies to the Afghan Taliban, which created the anomaly that Faisal Shahzad, apprehended in connection with an attempted bombing in New York’s Times Square in 2010, was not subject to it because he received support from the Pakistani Taliban rather than the Afghan Taliban. As a result, he received the perverse benefit of treatment as an ordinary criminal. The same can hold true for members of Al Shabab or even of AQAP.

The identification of state and non-state actors in the AUMF should be as broad as possible, so as to avoid coverage being lost as the result merely of a change of name by a group, for example, but not so inclusive so as to sweep in state or non-state actors with whom we have no conflict – Iraq, for example.

Another shortcoming of the current AUMF, although it does not appear in text of the law, arises from its having been passed more than 15 years ago, before many now in Congress were serving, and before many now voting were of age. Quite simply, many now in Congress have no stake in the current AUMF. That leaves them free to criticize steps taken under the current law even as they deny any responsibility for the law itself. That state of affairs, coupled with an electorate that includes many who were not eligible to participate politically at the time of enactment of the original AUMF, results in a lack of commitment among Members of Congress and the public to decisions vital to this country’s defense.

In addition, it might be useful for an AUMF to address issues of detention so as to make it clear that those captured may be detained for the duration of the struggle against the groups to which they belong, or until they no longer present a danger to the United States.

III. A New AUMF

A new AUMF should correct the deficiencies noted above, insofar as the current law is both over-inclusive (for example, by including Iraq among its targets), and under-inclusive (for example, for not including the Pakistani Taliban). A new statute should also embody a legislative recognition that long-term detention of unlawful combatants is necessary and appropriate.

I have not been a fan of sunset provisions in authorizing legislation for intelligence gathering measures or other activities relating to our defense in our struggle with Islamist militants. However, I recognize the need for periodic adjustment of laws that enable us to conduct that defense so as to meet current needs, as well the need for periodic recommitment to that defense by our citizens and our legislators. Therefore, I would recommend a five-year sunset provision that would assure that adjustment and recommitment, even as we acknowledge that the struggle is not likely to end within the sunset period.

Finally, I believe that if a new AUMF better specified who the enemy is and what is necessary someone to qualify as an enemy combatant, there is no reason why it should not include authorization for the use of force against Americans who travel abroad to participate in terrorist activity against the United States. I believe it would be anomalous for example, if we were to authorize the use of lethal force against a terrorist leader abroad, but refrain simply because that leader is in the company of an American who travelled abroad to help him. The Supreme Court has already held, more than once, that Americans who join our foreign enemies have no claim to protection superior to the protection given those foreign enemies. Our legislation should recognize that.