

AUTHORIZATION FOR THE USE OF MILITARY FORCE AFTER
IRAQ AND AFGHANISTAN

Written statement of Michael B. Mukasey – May 21, 2014

First, I would like to thank the Committee, through its Chairman and its Ranking Member, for addressing an issue vital to the security of this country – namely, whether the Authorization for the Use of Military Force (AUMF), passed in the days following the attacks of September 11, 2001, still provides all the authority necessary to protect us. And thank you as well for the privilege of testifying on this subject.

The AUMF, as you will recall, authorized the President 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 11, 2001, or harbored such organizations or persons” Upon passage of the AUMF, all three branches of government understood that language to authorize force against al Qaeda – the organization that planned and carried out those attacks, and the Taliban, the organization that once controlled Afghanistan and harbored al Qaeda. The power to detain prisoners is not specified anywhere in the AUMF; it has been read into the statute as an implied power of the sort incident to a war.

Events since September 11, 2001, including successes of two administrations in combating both al Qaeda and the Taliban, have made the AUMF not only obsolete, but dangerously so; future events – including the current administration’s decision to cease

the war in Afghanistan by mid-December 2014 -- threaten to make it even more irrelevant.

What has been referred to colloquially as core al Qaeda has been diminished, and the Taliban no longer formally control Afghanistan. However, other groups loosely related to al Qaeda, or having the same goals, have sprung up across a broad arc of countries stretching from Asia to Africa, and perhaps in Latin America as well. Some call themselves al Qaeda – for example al Qaeda in the Arabian Peninsula and al Qaeda in the Islamic Maghreb; others do not – for example Ansar al Sharia in Libya and the al-Nusra Front in Syria. Their effects have been seen in conduct as diverse as the attack that killed our ambassador and three others in Benghazi, in plots to set off bombs in New York’s subways and in Times Square. They are inspired by a common ideology that claims to find authority in the Quran. That claim is one that will have to be resolved by Muslims, but Western civilization in general, and the United States in particular, is the focus of that ideology and it is not going away any time soon. Simply saying that there is no war will not fend off the violence generated by that ideology any more than the absence of a state of war before September 2001 prevented the attacks of 9/11.

In spite of the actual or potential lethality of these groups, it becomes increasingly difficult to identify them with any certainty as “affiliates” or “supporters” of al Qaeda, and we find ourselves going through increasingly fanciful contortions in order to fit them within the definitions in the AUMF so as to permit action to be taken against them.

There are some who have suggested that we can rely on the authority inherent in Article II's grant of "the executive power" -- all of it, to the President, to authorize any response to these people and groups. Even if that authority is sufficient to permit a President to act in an emergency, I think there is no way it can be sufficient politically to permit long-term action. I believe that a basis in legislation is necessary to confer that kind of political authority.

Although it might be possible to define the conduct of these groups in a comprehensive yet precise enough way to permit the President to act, there are bound to be close decisions to be made, and I do not think it is politically wise or even possible simply to delegate to the President the authority to determine who does and who does not fit the statutory definition.

As others have, I urge the committee to consider and send to Congress legislation that would designate some groups that we know about, and create a mechanism for designating others, perhaps in the way that the Secretary of State now designates groups as Foreign Terrorist Organizations, through a group drawn from the Departments of State, Defense, Justice and Homeland Security. I am certainly no fan of sunset provisions, and I do not believe that there is any sunset provision in any authority that inspires our enemies. However, I recognize that it may be politically difficult to authorize an open-ended use of force, particularly when the people and groups against whom it is used may expand with time. Accordingly I recommend that a rational but

limited deadline be established – perhaps ten years – beyond which the authority would expire unless extended.

You may also wish to address related issues, including criteria for targeting drone strikes against U.S. citizens abroad away from the battlefield and a requirement that at least the number of such strikes and the estimated number of victims, both intentional and collateral, be reported.

These suggestions subsume many issues and invite many questions, and I would be happy to explore those issues and attempt to answer some of those questions in my oral testimony. Again, I am grateful to the Committee for allowing me to participate in its important work.