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“Reviewing Congressional Authorizations on Use of Force”

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Mr. Chairman, Ranking Member Cardin, and members of the Committee, thank you for inviting me to testify today about congressional authorizations regarding the use of military force against terrorist groups. It’s a privilege for me to appear again before this distinguished committee.

Mr. Chairman, I especially want to commend you for your perseverance to reach a consensus on a new Authorization to Use Military Force against ISIS. And I applaud the very valuable contributions by Senators Flake and Kaine in S.J. 43 and by Senator Young in S.J. 31.

To start with my bottom line, I believe it is very important as a legal matter that Congress pass a new AUMF against terrorist groups that repeals the 2001 Authorization to Use Military Force against terrorist groups and the 2002 Authorization to Use Military Force in Iraq and replaces them with a comprehensive new AUMF that authorizes the use of force against the Taliban, Al Qaida, ISIS, and associated groups.

I have spent much of my time in government working on legal issues relating to fighting terrorism and specifically arising under the 2001 and 2002 AUMFs. I served as the Legal Adviser to the National Security Council from 2001 to 2005 and later as the Legal Adviser to the Department of State from 2005 to 2009, a position to which I was

confirmed by the Senate. I was in the White House Situation Room during the 9-11 attacks and was later involved in drafting both the 2001 and 2002 AUMFs. Between 2001 and 2009, I engaged on an almost daily basis in discussions about legal issues relating to the use of military force, including detention, arising under both AUMFs.¹

As the Committee knows, the 2001 AUMF, which was passed by Congress on September 14, 2001 only days after the 9-11 attacks and signed by President Bush on September 18, 2001, authorizes the President to “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, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”

The 2002 AUMF focused on Iraq and the failure of Saddam Hussein to comply with Iraq’s obligations under a series of U.N. Security Council Resolutions. The 2002 AUMF, which was signed by President Bush on October 16, 2002, authorized the President to “to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to (1) defend the national security of the United States against the continuing threat posed by Iraq; and(2) enforce all relevant United Nations Security Council resolutions regarding Iraq.

On the one hand, the 2001 AUMF is very broad. It authorizes “ALL necessary force” (emphasis added) without restriction as to type of force or geography. It also has no termination date. But it has one important limitation: it authorizes force ONLY against nations, organizations, and persons who planned, authorized, committed, or aided the 9-11 attacks

¹ I previously served as Counsel for National Security Matters in the Criminal Division of the Department of Justice (1997-2001); Of Counsel, Select Committee on Intelligence, U.S. Senate (1996); General Counsel, Commission on the Roles and Capabilities of the U.S. Intelligence Community (1995-1996); and Special Assistant to Director of Central Intelligence William Webster (1988-1991).

(or harbored such organizations or persons). In other words, the 2001 AUMF requires a nexus to the 9-11 terrorist attacks.

For the last sixteen years, the 2001 AUMF has provided statutory authority for a very broad range of U.S. counterterrorism operations against persons and terrorist groups in at least seven countries, including the invasion of and continued military operations in Afghanistan; more than 500 drone strikes in Afghanistan, Pakistan, Yemen, Somalia, Syria, Iraq, and Libya; and detention of thousands of individuals in Afghanistan, Guantanamo Bay, and elsewhere.

The 2001 AUMF continues to serve a very important legal purpose. But as time passes, it is becoming increasingly outdated. It does not provide clear legal authority to use force against terrorist groups that have been formed or expanded after the 9-11 attacks, such as ISIS. When considering whether a potential counterterrorism action is authorized by the 2001 AUMF, Executive branch lawyers have spent countless hours debating whether the targeted individual or group is associated or affiliated or co-belligerents with the organizations that committed the 9-11 attacks, which principally means Al Qaida.

For more than a decade, including while I was still in government and since leaving government, I have advocated revising the 2001 AUMF in order to update it to address terrorist threats that have emerged after 9-11 and to clarify its parameters. Nearly seven years ago, in 2010, I wrote an op-ed in the Washington Post entitled “A Counterterrorism Law in Need of Updating,” in which I argued that the 2001 AUMF should be updated because it provides “insufficient authority for our military and intelligence personnel to conduct counterterrorism operations today and inadequate protections for those targeted or detained, including U.S. citizens...As U.S. forces continue to target terrorist leaders outside Afghanistan, it is increasingly unclear whether these terrorists, even if

they are planning attacks against U.S. targets, are the same individuals, or even part of the same organization, behind the Sept. 11 attacks.”²

Of course, the President has ample authority as Chief Executive and Commander-in-Chief under Article II of the Constitution to order the use of military force to defend the United States, U.S. nationals, and U.S. interests against terrorist threats. Although I will not try to explain the legal basis for every counterterrorist action by the last three Presidents, it is likely that all or most of their actions could have been legally justified under Article II alone, without reliance on congressional authorization. But every constitutional lawyer will agree that the President has stronger legal authority -- as well as greater political legitimacy -- when he orders the use of military force with the explicit authorization of Congress, rather than based solely on his inherent constitutional authorities.

The need to update the 2001 AUMF has become even clearer after the rise of ISIS in 2014. It is not clear that the 2001 AUMF authorizes the use of force against ISIS because ISIS did not exist (in its current form) in 2001 and was not the group that committed the 9-11 attacks. And it is questionable whether ISIS is associated with or a co-belligerent of Al Qaida, given that Al Qaida has repudiated ISIS.

When President Obama first ordered air strikes against ISIS in Iraq in August 2014, in his report to Congress pursuant to the War Powers Resolution, he initially cited only his Article II authority as the legal basis for the use of force.³ In September 2014, however, faced with the War Powers Resolution’s 60-day termination provision, the White House announced that the use of US Armed Forces against ISIS actually

² John B. Bellinger III, “A Counterterrorism Law in Need of Updating,” Washington Post, November 26, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/25/AR2010112503116.html>

³ Letter from the President -- War Powers Resolution Regarding Iraq, August 8, 2014, <https://obamawhitehouse.archives.gov/the-press-office/2014/08/08/letter-president-war-powers-resolution-regarding-iraq>

was specifically authorized by Congress in the 2001 AUMF against Al Qaida and the 2002 AUMF against Iraq because ISIS, while not associated with Al Qaida, was a descendant of Al Qaida.⁴ This interpretation relieved Congress from having to vote on a new AUMF against ISIS before the 2014 mid-term elections, but the Administration's reliance on the 2001 and 2002 AUMFs as specific congressional authorization was widely viewed as a very strained legal interpretation.⁵

In February 2015, while continuing to insist that existing congressional authorizations provided all the authority he needed to use military force against ISIS, President Obama submitted a draft congressional authorization to Congress that would specifically authorize the use of force against ISIS.⁶ The President's proposal did not limit the use of force to specific countries, but it did include two significant restrictions. First, it did not authorize "enduring offensive ground combat operations" (a term that was not defined). Second, it terminated three years after the date of enactment. President Obama's proposal was also limited to authorizing use of force against ISIS. It did not repeal or revise the 2001 or 2002 AUMFs. In his submittal letter to Congress, President Obama stated "Although my proposed AUMF does not address the 2001 AUMF, I remain committed to working with the Congress and the American people to refine, and ultimately repeal, the

⁴ White House Press Briefing, September 11, 2014, <https://obamawhitehouse.archives.gov/the-press-office/2014/09/11/press-briefing-press-secretary-josh-earnest-9112014>. In December 2014, the White House issued a more detailed explanation of its legal rationale entitled "Report on the Legal and Policy Frameworks Guiding the United States Use of Military Force and Related National Security Operations." https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf

⁵ Bruce Ackerman, "Obama's Betrayal of the Constitution," *New York Times*, September 12, 2014, https://www.nytimes.com/2014/09/12/opinion/obamas-betrayal-of-the-constitution.html?_r=1; Ben Wittes, "Not Asking the Girl to Dance," *Lawfare*, September 10, 2014, <https://www.lawfareblog.com/not-asking-girl-dance>

⁶ Letter from the President -- Authorization for the Use of United States Armed Forces in connection with the Islamic State of Iraq and the Levant, February 11, 2015; <https://obamawhitehouse.archives.gov/the-press-office/2015/02/11/letter-president-authorization-use-united-states-armed-forces-connection>

2001 AUMF. Enacting an AUMF that is specific to the threat posed by ISIL could serve as a model for how we can work together to tailor the authorities granted by the 2001 AUMF.”

President Obama’s proposal was not passed by either the Senate or the House. Members of Congress raised different concerns about the proposal, but in general terms, some members thought that it was too broad because it authorized open-ended use of the US military without geographic limits. Other members objected that the sunset provision and prohibition on “enduring offensive ground combat operations” imposed restrictions on the President that did not previously exist in the 2001 AUMF.

Need for an Updated Comprehensive Counterterrorism AUMF

Sixteen years after the enactment of the 2001 AUMF and three years after the beginning of the U.S. conflict with ISIS, Congress should repeal the outdated 2001 AUMF and replace it with a comprehensive new Authorization to Use Military Force that authorizes the use of force against named terrorist groups including Al Qaida, the Taliban, ISIS, and associated groups, with appropriate limitations. Congress should also repeal the 2002 AUMF, which is no longer necessary. An updated AUMF is legally necessary to ensure that our military has clear statutory authorization to use force against new terrorist groups that threaten violence against the United States and to ensure that U.S. military operations, including detention, withstand legal challenges in U.S. courts.

An updated AUMF should remove the limitation in the 2001 AUMF to organizations that committed the 9-11 attacks. As I have discussed above, it is increasingly difficult to demonstrate that new terrorist groups that have emerged in the last few years, such as ISIS, are associated with Al Qaida. A new AUMF should authorize the use of force against new groups that pose significant threats of violence to the United States whether they are associated with Al Qaida or not.

A new AUMF is especially important if the United States detains members of new terrorist groups such as ISIS.⁷ If members of such groups are able to challenge their detention in US courts, they will undoubtedly argue that ISIS is not covered by the 2001 AUMF. A new AUMF that specifically authorizes the use of force against ISIS would provide a clear legal basis for detention of members of ISIS.

Members of Congress have understandable and valid concerns about approving a broad new authorization and extending what many view as a “Forever War.” However, I am convinced that Congress can come together to agree on a new AUMF that provides our military the clear legislative authorization, with appropriate limitations, they need to defend the United States against Al Qaida, ISIS, and associated terrorist groups.

A updated AUMF should authorize the President to use all necessary force against named terrorist groups and associated organizations that have attacked or have an intention to attack the United States or U.S. persons. The AUMF should include a list of specific groups (which would presently include at least the Taliban, Al Qaida, and ISIS, and may include other named groups) but allow the President to use force against additional organizations if he notifies Congress (in either public or classified form) that he has determined that the additional organizations are associated with one of the named organizations and are engaged in hostilities or plan to engage in hostilities against the United States.

Potential Limitations

Geography. A new AUMF should not be limited geographically to certain countries. Although I fully appreciate that many members of

⁷ See Jack Goldsmith, “The Practical Legal Need for an ISIL AUMF,” Lawfare, February 8, 2017. <https://www.lawfareblog.com/practical-legal-need-isil-aumf>

Congress may be reluctant to vote to authorize the use of force in a potentially unlimited number of countries, terrorist groups move easily from country to country and will simply move to countries where Congress has not authorized the use of force. Even if a new AUMF does not limit the use of force to certain countries, the United States is still required by international law to limit its use of force in or against other countries, as I discuss in further detail below.

Sunset. President Obama's draft ISIS-specific AUMF proposed a three-year sunset, and several congressional drafts AUMFs have also included sunsets of varying duration. As a former executive branch lawyer, I would oppose a sunset provision from a legal perspective. A sunset creates legal uncertainty for the President and the military. Moreover, a sunset provision may telegraph a lack of political resolve to the terrorist groups who threaten us. It would have been unthinkable for Congress to have limited its declarations of war against Germany and Japan to a term of years. Having said this, I appreciate that many members may be highly uncomfortable voting to approve an open-ended authorization, especially in light of the wide range of counterterrorism activities that have been conducted pursuant to the 2001 AUMF over the last sixteen years. I can understand that some kind of a sunset or review provision may be politically necessary to achieve consensus on a new AUMF.

Scope of Military Force. As an executive branch lawyer, I would oppose provisions in a new AUMF that would seek to restrict or micromanage the use of force by the President and the military, such as an absolute prohibition on ground combat operations. The President and the military need flexibility to conduct necessary military operations to defend the United States. That said, I can understand that Congress would not want to authorize in a counterterrorism AUMF the invasion and occupation of additional countries, such as happened in Afghanistan and Iraq. The prohibition in President Obama's proposed 2015 AUMF on "enduring offensive ground combat operations" seemed very vague to me. If a limitation is necessary, I would support a clearer prohibition, such as "This authorization does not include authorization for the ground

invasion and occupation of any sovereign country or part thereof without further congressional authorization.” A restriction on occupation could also be a useful signal that the United States does not seek to seize sovereign territory or resources of any Islamic country.

Use of Force Against Americans. Although not strictly necessary, a new AUMF might include certain restrictions on the use of lethal force or detention of U.S. citizens who join terrorist groups such as Al Qaida and ISIS. It is clearly legally permissible for the U.S. military to target without judicial approval U.S. citizens who have joined a foreign terrorist organization outside the United States, but Congress might reasonably require certain due process standards within the Executive branch, such as that the specific targeting of a U.S. citizen require the approval of the Attorney General based on a determination that the individual poses a serious threat to the United States.

Detention. Although the 2001 AUMF does not specifically mention authority to detain, it is now well accepted by U.S. courts that the words “all necessary and appropriate force” include the authority not only to kill but to detain. Although not strictly necessary as a legal matter, I believe it would still be legally helpful, both for the military and for potential detainees, for a new AUMF to specifically authorize detention of terror suspects captured by the military outside the United States and should specify some basic parameters, such as who can be detained and for how long and certain basic procedural safeguards against mistaken or unnecessary detention.⁸

Transparency and Reporting. It would also be reasonable and valuable for Congress to include reporting requirements in a new AUMF that would require the President to report, in public and classified forms, the

⁸ I also made this argument when I recommended updating the 2001 AUMF in 2010. John B. Bellinger III, “A Counterterrorism Law in Need of Updating,” Washington Post, November 26, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/25/AR2010112503116.html>

counterterror activities conducted pursuant to the new AUMF, including information regarding additional groups against which the President plans to use force and countries where he plans to use force under the AUMF, specific terror suspects targeted, captured or killed, and numbers of civilians killed.

International Law

It is important for Congress to understand that the AUMF only authorizes the use of force under U.S. domestic law. The United States must separately comply with international law rules governing the use of force. The U.N. Charter, a treaty to which the U.S. is a party, prohibits the use of force in or against another U.N. member state unless the state has consented, the U.N. Security Council has authorized the use of force, or the use of force is in self-defense in response to an armed attack or imminent armed attack. It is important that the United States observe international law rules governing the use of force not only because the U.S. has agreed to be bound by the U.N. Charter but because we want other countries like Russia and China to follow the same rules. As I explained in the Sixth Annual Lloyd Cutler Rule of Law Lecture last November:

If the United States violates or skirts international law regarding use of force, it encourages other countries -- like Russia or China -- to do the same and makes it difficult for the United States to criticize them when they do so. If the United States ignores international law, it also makes our friends and allies who respect international law -- such as the UK, Canada, Australia, and the EU countries -- less likely to work with us. Unlike Russia and China, the United States has many friends and allies who share our values,

including respect for the rule of law. But we lose our friends when we do not act consistent with law and our shared values.⁹

Updating the War Powers Resolution

In addition to revising and updating the AUMF against terrorist groups, Congress should also make it a priority to revise and update the War Powers Resolution, which has been increasingly ignored or stretched by recent Presidents. President Obama, for example, claimed that U.S. military actions in Libya did not constitute “hostilities” for purposes of the War Powers Resolution.¹⁰

Congress should review the very valuable report of the National War Powers Commission, a bi-partisan commission chaired by former Secretaries of State James Baker and Warren Christopher, which issued a report in 2008 that called the War Powers Resolution “impractical and ineffective.”¹¹ The Commission stated that no President has treated the Resolution as mandatory and that “this does not promote the rule of law.” They recommended the Resolution be repealed and replaced with a mandatory consultation process. In 2014, Senators McCain and Kaine introduced the War Powers Consultation Act of 2014 to implement the Commission’s recommendations; their bill was referred to this Committee.¹²

In addition to updating the 2001 AUMF, I hope that this Committee will recognize the need to update the War Powers Resolution. Any general reform of the War Powers Resolution must address contemporary

⁹ John B. Bellinger III, “Law and the Use of Force: Challenges for the Next President,” Sixth Annual Lloyd Cutler Rule of Law Lecture, <http://lawfare.s3-us-west-2.amazonaws.com/staging/2016/Lloyd%20Cutler%20Lecture.pdf>

¹⁰ “White House Defends Continuing U.S. Role in Libya Operation,” The New York Times, June 15, 2011, <http://www.nytimes.com/2011/06/16/us/politics/16powers.html>

¹¹ <http://web1.millercenter.org/reports/warpowers/report.pdf>

¹² <http://thehill.com/blogs/floor-action/senate/195704-senate-bill-amends-war-powers-act>

conflicts and take into account increasing congressional reluctance to vote to authorize the use of force.

Conclusion

I appreciate the opportunity to appear before the Committee today. I hope that the Committee and the Senate will be able to reach consensus on a revised and updated Authorization to Use Military Force against terrorist groups engaged in hostilities against the United States.