



**Statement Before the
Senate Foreign Relations Committee**

***“A New Authorization for the
Use of Military Force”***

A Testimony by:

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Chairman Corker, Ranking Member Cardin, and distinguished members of the committee, I appreciate the opportunity to testify before you today. The subject of this hearing – authorization for the use of military force (AUMF) – is a critical one that fails to receive the attention it deserves. Open deliberations over the decision to use military force have been foundational to our democracy since its establishment. I will focus this written statement on the imperative for a new authorization for counterterrorism operations, the essential constitutional role Congress must play in exercising its war powers through passage of a new AUMF, and the factors Congress should consider in developing an effective provision. I approach this issue not as a lawyer but as a former defense policy maker, evaluator, and implementer, including on decisions involving the use of U.S. military forces in counterterrorism.

The Need for a New AUMF

The United States faces an array of threats from violent extremist groups that necessitate counterterrorism operations in disparate parts of the world. Current U.S. counterterrorism activities in Afghanistan, Iraq, Syria, Libya, Yemen and elsewhere generally operate under provisions of the 2001 AUMF, which was intended to sanction force against the individuals, groups, and states involved in the planning and execution of the September 11 attacks. To create a legal justification for U.S. military action taken against terrorist groups that have emerged since 9/11, notably including the Islamic State and Al Shabab, the executive branch has relied on an ever-expanding interpretation of the category of al-Qaeda “associated forces” provided for under the 2001 AUMF. Relying on a 16-year old authorization focused on countering “core” al-Qaeda for current or potential operations against the Islamic State and other emergent terrorist threats strains credulity. It jeopardizes our nation’s principled belief in the rule of law and thereby risks the legitimacy of the institutions designed to create, carry out, and enforce such laws.

Beyond the immediate issue of replacing the 2001 AUMF and repealing the 2002 AUMF, the need for revitalizing the whole of Congress’ war powers has never been more essential. As I testified before the Senate Armed Services Committee earlier this year, “The United States Congress, the nation’s statutes and courts, the professionalism of our armed forces, and the will of the people are critical safeguards against any perceived attempts to fundamentally alter the quality of civilian control of the military in this country.” The path to reviving the vigorous exercise of civilian control through congressional war powers should start by repealing and replacing the 2001 AUMF.

Civilian control of the military, deeply rooted in our nation’s history and constitution, is not just an end to itself. Military force must be tied to policy objectives and embedded in a broader foreign policy strategy if it is to succeed. In accordance with Clausewitz’s dictum that war is the continuation of politics by other means, Congress and the President are responsible for providing the strategic political leadership needed to shape the employment of arms. Yet the sixteen-year reliance on the 2001 AUMF--the longest-standing congressional authorization for the use of force in American history—suggests a failure on the part of the nation’s political leaders to execute this responsibility. A robust congressional role in use of force decisions can spur consideration of policy alternatives, raise important strategic considerations, and build the public

support necessary for sustainable national security strategy. It strengthens our democracy and our legitimacy.

Most members of Congress were elected after the 2001 AUMF and have not been party to a serious discussion on AUMF. Consequently, the American public has not had an opportunity to witness and participate in an open debate over the nation's approach to authorizing force in support of its counterterrorism objectives in some time. The Administration's submission of a strategy to defeat ISIS, in accordance with Congress's mandate in the FY2017 Omnibus..., is a critical associated element to set the stage for that public debate. Without an honest and frank national discourse, we run the risk of the executive branch's activities separating not only from the legal basis upon which its use of force rests, but also a disconnect between the will of the people and the military actions pursued by its duly-elected government.

Essential AUMF Elements

To be effective, AUMF should strike an appropriate balance between the national command authority's ability to rapidly respond to emergent national security threats and Congress's ability to exercise appropriate oversight. Specifically, Congress should ensure any AUMF it considers address key issues in the following areas:

- Targeted entities;
- Geographical limitations;
- Special US military force limitations, such as combat roles;
- Reporting requirements;
- Associated detention issues; and
- Sunset provisions.

There are several current proposals for AUMF addressing some or all of these issues. In particular, the Kaine-Flake provision serves as the most comprehensive starting point for developing an approach that balances oversight with the need for operational flexibility. The related proposals by Senator Young and Representative Schiff complement the Kaine-Flake proposal in key areas. Where a current proposal appears relatively advantageous, I attempt to highlight it below.

Targeted Entities

It is important that any proposed authorization clearly identify the targeted entities. I believe that those entities should include al-Qaeda, the Taliban, and the Islamic State of Iraq and Syria (ISIS). However, an authorization should not be limited to these entities. As in 2001, it must address the thorny issue of "associated forces." In addition to creating a group of "initial associated persons or forces," the proposed Kaine-Flake legislation provides a pathway for the President to identify additional entities while allowing the Congress to play a meaningful and appropriate oversight role. I believe this approach meets the principle of balancing prudent oversight and effective execution.

Use of force against nation-state belligerents, such as the U.S. naval and air strikes conducted against the Syrian regime, should be debated separately rather than contained under this AUMF.

Geographical Limitations

In addition to determining who the President is authorized to use force against, it would be wise for Congress to require the President to justify where he or she seeks to execute a use of force under the AUMF. The Kaine-Flake legislation authorizes force in Afghanistan, Iraq, Syria, Somalia, Libya, and Yemen and creates a straightforward procedure that allows the executive to expand operations into additional territories while providing the Congress with effective oversight. I believe this basic approach—geographic specification and a procedure to extend it—is appropriate and operationally feasible.

US Force Limitations

It would be unwise to constrain future military commanders unnecessarily in the options they could put forward to civilian leaders to achieve operational goals. At the same time, it is appropriate and indeed wise for Congress to create a framework that conveys the will of the American public regarding the parameters of such force employment.

Employing US forces in ground combat operations has been a persistent source of debate and concern for the American public. It is thus appropriate for a new AUMF to create a most stringent notification requirement for the President's use of ground forces in combating terrorist groups. Representative Schiff's proposed legislation allows the executive the ability to exercise an informed judgment on ground combat force deployments while also ensuring that Congress be notified of such an action as soon as possible, a faster reporting requirement than exists for other actions authorized by an AUMF. Significantly, the proposed legislation's definition of "ground forces in a combat role" provides needed flexibility by excluding a range of activities that have been generally accepted as below the threshold of greatest concern. I recommend the Senate consider adopting a provision into its AUMF along the lines that Representative Schiff has delineated.

It is reasonable for Congress to seek notification as soon as possible when *any* US combat mission—from the air, ground, or sea—is undertaken outside of acknowledged theaters of ongoing U.S. military conflict. I thus believe Congress should consider an "as soon as possible" notification requirement when the executive branch has used air or sea forces in a combat role outside of designated operational theaters but otherwise within the AUMF's scope. Such a requirement would be less geographically restrictive than the ASAP notification for ground force use in a combat role, allowing greater flexibility in designated operational theaters for air- and sea-based combat operations. Like the ground combat force notification, air and naval combat forces would need to be defined in a reasonable way to exclude special operations forces, intelligence, surveillance, and reconnaissance missions, and other roles that fall below a reasonable interpretation of the threshold for combat forces. Strikes from the air or sea conducted by U.S. conventional forces against targets in Yemen might constitute one example of an action otherwise authorized but about which Congress would want immediate notification.

Reporting and Disapproval Requirements

Beyond the ASAP notification for combat uses (globally for ground forces and geographically restricted for air and sea forces), any proposed AUMF should have a regular reporting requirement to ensure that there is not an unchecked expansion by the executive of military operations and to keep the public informed regarding the direction of operations. The requirements across the proposals currently before the House and Senate vary, but the specific provisions matter less than ensuring there is a meaningful reporting process in a new AUMF.

Authority for Detention

Congress should consider the detention implications of AUMF as it deliberates over possible provisions. It should be clearly understood how a President might interpret his authority for detention and judicial proceedings as it is associated with the AUMF.

Sunset

Finally, a new AUMF should include a sunset provision. Congress must not resign itself to an inability to legislate on use of force matters. The authority granted by the Flake-Kaine proposal expires after five years while the authority proposed by Representative Schiff expires after three years. The three- to five-year timeframe for sunset and passage of new authorization is appropriate for ensuring Congress is an active partner in use of force decisions, ensuring the authorization is aligned to changing geopolitical and other realities, and creating stability for military planners.

Conclusion

The time is ripe for reconsideration of the 2001 AUMF and congressional war powers. Congress's role in exercising civilian control of the military is fundamental to our government. Stakeholders across a broad political spectrum rightly support a new AUMF to create legal clarity and political legitimacy for the use of American military force. The range of current proposals originating from the Senate and House offer viable pathways for repealing and replacing the 2001 AUMF and repealing the 2002 AUMF. Our constitutional republic relies on a vibrant discourse between the executive and the legislative branches on issues of use of force. The public should expect it. Thank you for your efforts to draw attention to this matter, by calling hearings and engaging the executive branch, experts, and the public on the AUMF, war powers, and U.S. counterterrorism strategy.