

FOR OFFICIAL USE ONLY  
UNTIL RELEASED BY THE SENATE FOREIGN RELATIONS COMMITTEE

Prepared Statement

of

Stephen W. Preston  
General Counsel  
Department of Defense

on

The Framework Under U.S. Law for Current Military Operations

Committee on Foreign Relations  
United States Senate

May 21, 2014

Thank you, Chairman Menendez, Ranking Member Corker, and members of the Committee, for this opportunity to testify about the framework under U.S. law for ongoing military counterterrorism and detention operations. Following up on the remarks of my colleague from the Department of State, I will discuss (i) the Executive branch's interpretation of the 2001 Authorization for the Use of Military Force (AUMF); (ii) how the AUMF is being applied by the Department of Defense in the armed conflict against al-Qa'ida, the Taliban, and associated forces; and (iii) other domestic legal authority available to defend our country against terrorist threats.

#### I. Interpretation of the AUMF

The AUMF, enacted one week after the attacks of September 11, 2001, authorizes 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, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons." The Executive branch interprets the AUMF to authorize the use of force against al-Qa'ida, the Taliban, and associated forces. This interpretation has been embraced by the courts in the context of habeas corpus litigation involving detainees at the Guantanamo Bay detention facility, and by the Congress when it codified the interpretation, for the purposes of detention, almost word-for-word in Section 1021 of the National Defense Authorization Act for Fiscal Year 2012.

Although the AUMF makes no express mention of specific nations or groups, it was clearly intended to authorize the use of force against al-Qa'ida, the "organization" that "planned, authorized, committed, and aided the terrorist attacks that occurred on September 11, 2001," as well as the Taliban, which "harbored" al-Qa'ida. The concept of an "associated force" is based on the well-established concept of co-belligerency in the laws of war.

FOR OFFICIAL USE ONLY  
UNTIL RELEASED BY THE SENATE FOREIGN RELATIONS COMMITTEE

As the Administration has stated publicly on numerous occasions, to be an “associated force,” a group must be both (1) an organized, armed group that has entered the fight alongside al-Qa’ida or the Taliban and (2) a co-belligerent with al-Qa’ida or the Taliban in hostilities against the United States or its coalition partners. Before a group may be targeted for direct action under the AUMF, it is evaluated against this standard based on its current and historical activities. The determination that a particular group is an “associated force” is made at the most senior levels of the U.S. Government, following reviews by senior government lawyers and informed by departments and agencies with relevant expertise and institutional roles, including all-source intelligence from the U.S. intelligence community. It is not the case in law or in practice that the concept of an “associated force” is open-ended or otherwise provides the Administration with unlimited flexibility to define the scope of the AUMF. A group that simply embraces al-Qa’ida’s ideology is not an “associated force,” nor is every group or individual that commits terrorist acts.

## II. Current Application of the AUMF

The Department of Defense relies on the AUMF in three contexts: for ongoing U.S. military operations in Afghanistan; for our ongoing military operations against al-Qa’ida and associated forces outside of the United States and the theater of Afghanistan; and for associated detention operations in Afghanistan and at the detention facility at Guantanamo Bay, Cuba.

### Operations in Afghanistan

In Afghanistan, the U.S. military currently conducts operations pursuant to the AUMF against al-Qa’ida, the Taliban, and other terrorist and insurgent groups that are engaged alongside al-Qa’ida and the Taliban in hostilities against the United States or its coalition partners. In addition, the International Security Assistance Force and U.S. rules of engagement permit targeting of hostile personnel in Afghanistan based on the threat they pose to U.S., coalition, and Afghan forces or to civilians.

Beyond 2014, assuming we are able to conclude the Bilateral Security Agreement (BSA) with the Afghan government on an acceptable timeline, the United States would seek to retain a small military presence in Afghanistan to conduct two narrow missions. First, to provide limited non-combat support to train, advise, and assist the Afghan National Security Forces under a North Atlantic Treaty Organization regional framework. And, second, to provide a U.S. national capability to disrupt terrorist activity in that region. The continued presence of U.S. forces in Afghanistan would be conditioned not only on the conclusion of the BSA, but also on the timely and smooth political transition to a post-Karzai administration sometime this year.

### Counterterrorism Operations Outside the United States and Areas of Active Hostilities

For operations outside Afghanistan, as the President announced in his speech at National Defense University on May 23, 2013, he has issued Presidential Policy Guidance to formalize and strengthen the Administration’s rigorous standards and procedures for reviewing and approving operations to capture or employ lethal force against terrorist targets outside the United

FOR OFFICIAL USE ONLY  
UNTIL RELEASED BY THE SENATE FOREIGN RELATIONS COMMITTEE

States and outside areas of active hostilities. Pursuant to this Guidance, when the U.S. military takes lethal counterterrorism action beyond the Afghan theater, it does so only against targets that both are lawful military targets under domestic and international law and pose a continuing, imminent threat to U.S. persons. Thus, under the President's policy, no one is targeted with lethal military force outside Afghanistan based solely on membership in al-Qa'ida or an associated force. In addition, this Guidance requires near certainty that non-combatants will not be killed or injured before lethal action may be taken.

The U.S. military currently takes direct action (capture or lethal operations) under the AUMF outside the United States and areas of active hostilities in the following circumstances:

- *First*, in Yemen, the U.S. military has conducted direct action targeting members of al-Qa'ida in the Arabian Peninsula (AQAP), which is an organized, armed group that is part of, or at least an associated force of, al-Qa'ida. The determination that the AUMF authorizes the use of force against AQAP is based on information about both AQAP's current and historical connections to al-Qa'ida and the fact that AQAP has repeatedly launched attacks against the United States, including the December 2009 "underwear bomber" attack and the 2010 "printer cartridge" attack. In addition, AQAP continues to plan and attempt attacks against U.S. persons, both inside and outside Yemen.
- *Second*, the U.S. military has also conducted capture or lethal operations under the AUMF outside of Afghanistan against individuals who are part of al-Qa'ida and targeted as such. For example, in Somalia, the U.S. military has conducted direct action against a limited number of targets who, based on information about their current and historical activities, have been determined to be part of al-Qa'ida. (Some of these individuals are also part of al-Shabaab, a group that is openly affiliated with al-Qa'ida.) In Libya, in October 2013, in reliance on the AUMF, U.S. forces captured longtime al-Qa'ida member Abu Anas al Libi.

The fact that an al-Qa'ida-affiliated group has not been identified as an "associated force" for purposes of the AUMF does not mean that the United States has made a final determination that the group is not an "associated force." We are prepared to review this question whenever a situation arises in which it may be necessary to take direct action against a terrorist group.

Detention Operations

Lastly, in our ongoing armed conflict against al-Qa'ida, the Taliban, and associated forces, the U.S. military relies on the authority of the AUMF to hold enemy belligerents in military detention in Afghanistan and at the detention facility at Guantanamo Bay, Cuba.

III. Other Domestic Legal Authority

For more than 12 years, the AUMF has provided authority to defend against certain known terrorist threats to our country – those posed by al-Qa'ida, the Taliban, and associated

FOR OFFICIAL USE ONLY  
UNTIL RELEASED BY THE SENATE FOREIGN RELATIONS COMMITTEE

forces – notably, those groups and associated forces in Afghanistan, AQAP in Yemen, and individuals who are part of al-Qa’ida elsewhere such as Somalia and Libya. However, the AUMF is not the only authority the President has to use force in order to keep us safe. For example, the President has authority, under the U.S. Constitution, to use military force as needed to defend the nation against armed attacks and imminent threats of armed attack. (This inherent right of national self-defense is also recognized in international law.) Thus, although we are strongest when Congress and the Executive branch are acting together, the President has the authority to respond to emerging threats, should it become necessary to do so.

\* \* \*

A central question looking forward is what future legal framework will provide the authorities necessary in order for our government to meet the terrorist threat to our country, but will not greatly exceed what is needed to meet that threat. As was made clear in the President’s NDU speech last year, the answer is not legislation granting the Executive “unbound powers more suited for traditional armed conflicts between nations.” Rather, the objective is a framework that will support “a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America.” The challenge is to ensure that the authorities for U.S. military counterterrorism and detention operations are both adequate and appropriately tailored to the threat.

It is also essential that we strive for clarity in the legal authority for, and associated restrictions on, the use of military force. Such clarity is necessary to ensure the lawfulness of our government’s actions, first and foremost, and in efforts to explain the legal framework on which we would rely to the American public and to the United States’ partners abroad.

I look forward to answering your questions.