Testimony of Michael B. Mukasey Before House Armed Services Committee

July 26, 2011

Thank you Chairman McKeon, ranking member Smith and members of the Committee for inviting me to testify at this hearing, addressed to how this country can best address the most consequential threat to face it in modern times – the threat of Islamist terrorism.

Although attacks signaling that Islamists considered themselves at war with this country began as early as 1990, when a right-wing Israeli politician named Meir Kahane was assassinated in New York by El-Sayyid Nosair, and continued through the first World Trade Center bombing in 1993, a later plot to blow up landmarks in New York inspired by the so-called blind sheikh, Omar Abdel Rahman, the declaration of war by Osama bin Laden in behalf of al Qaeda in 1996, the 1998 bombing of U.S embassies in Kenya and Tanzania, and the bombing of the USS Cole in Aden in 2000, it was not until after the attacks of September 11, 2001 that Congress responded by passing the Authorization for the Use of Military Force (AUMF), mandating the use of force outside the criminal justice system. Just as the threat had evolved before 9/11, with early involvement by groups such as Gama ‘at al Islamia, Egyptian Islamic Jihad, and others, so too it has evolved after 9/11, with al Qaeda branching out into what appear to be franchised groups such as Al Qaeda in the Arabian Peninsula (AQAP), Al Qaeda in the Islamic Maghreb (AQIM), and the even more loosely affiliated but nonetheless lethal al

Shabab, operating in the failed state of Somalia, as well as Taliban organizations in Afghanistan and Pakistan.

Although the AUMF authorizes the use of "all necessary and appropriate force against those nations, organizations, or persons [whom the President] determines planned, authorized, committed, or aided the terrorist attacks . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons," the fact is that we have fought and captured enemy fighters not only in Afghanistan and Iraq, but also in Somalia, Yemen and Pakistan, and continue to detain hundreds. The AUMF, however, does not explicitly authorize detention, let alone prescribe standards for who should be detained, on what basis, where and for how long. Yet both the Bush and Obama administrations have had to rely on that statute not only to wage a ground war in Afghanistan, but also to use lethal force in the form of drones against al Qaeda leaders in Pakistan, Yemen and Somalia, and to capture suspected al Qaeda and Taliban in Pakistan, Yemen and Somalia and to detain them.

The statute has come to apply to a struggle that has evolved against different people in different places presenting problems different from those that confronted us in the immediate wake of 9/11. It should be amended to make clear to all involved, from troops to lawyers to judges – and to our enemies -- that detention of suspected terrorists is authorized, and to set forth standards for detaining and/or killing terrorists, even those who are affiliated with groups other than those directly responsible for the 9/11 attacks.

Moreover, part of any consideration of detention will have to involve as well considering where categories of detainees are to be held, and where charges should be brought against any who should be tried criminally.

I. Detention

The need to face these issues was cast in bold relief by three recent events. One was the testimony before the Senate Armed Services Committee at the end of June from Vice Admiral William McRaven, who supervises special operations for the entire military. He testified that at present there is no clear policy as to how to deal with captured detainees, and that options range from holding them aboard naval vessels, to sending them to third countries that will accept them, to bringing them to the United States for trial in civilian courts, to releasing them for want of any other option; he said he understands that detention and trial at Guantanamo Bay is "off the table." Soon afterward, it was disclosed that a Somali man, Ahmed Abdulkadir Warsame, had been captured in April and held and debriefed for over two months aboard a naval vessel, and would be brought to the United States to face terrorism-related charges in U.S. District Court for the Southern District of New York. And in mid-July, it was disclosed that the Administration planned to turn over to the Iraqis a senior Hezbollah commander now in U.S. custody in Iraq, apparently as soon as Friday July 23, when the attention of the nation was focused on the budget dispute and other issues. The commander, Ali Mussa Daqduq, acting at the behest of Iran, had trained Iraqis in Iran to use explosively formed penetrators and other terrorist devices to kill U.S. troops. The Administration relented

only after 20 United States senators, including John McCain, Mitch McConnell, and Joseph Lieberman, blew the whistle in an urgent letter dated July 21, urging that Daqduq be tried before a military commission at Guantanamo Bay and in any event not be released from U.S. custody.

Admiral McRaven's testimony illustrates that there is simply no coherent policy on who U.S. troops are to detain, on what standards, where, and for what purpose. In the process, valuable intelligence opportunities can be squandered and dangerous terrorists returned to the fight. The Warsame case makes it obvious that the Administration remains committed to trying captured terrorists in civilian courts rather than in military commissions, regardless of where they are captured, and also points up problems presented by the termination of the CIA's interrogation program. Warsame was held for two months aboard a ship, but any technique used to question him would have to have been limited by the techniques specified in the Army Field Manual. The Daqduq episode shows that some would prefer to turn over a trainer of terrorists to Iraqi authorities even with no clear commitment or reason to believe that he can or would be prosecuted under Iraqi laws, rather than keep custody of that person and try him before a military commission at Guantanamo Bay or elsewhere. The current statute's limitation to certain specified groups has been overtaken by events, and limits our military response across the board – as to use of force, apprehension, detention and trial.

Quite simply, we need a coherent detention policy. The absence of one means that we are must choose among unsatisfactory alternatives. One is to default to the use of

drones that allow us to strike lethally but not to exploit the intelligence value of detainees, to say nothing of the harsh result inherent in a lethal strike. Another is to seek to detain dangerous people in third countries, where the durability of detention protocols is doubtful, the ability to obtain intelligence from detainees limited, and the humaneness of conditions of confinement uneven at best. Yet another is to simply permit ad hoc detention overseen by judges who have no fact-finding resources and no political accountability. And of course a final one is, as acknowledged by Admiral McRaven, simply to release people we do not wish to release for want of an available alternative.

II. Prosecution

There is in place a Military Commissions Act that prescribes trial before military commissions for those accused of acts of terrorism. There is available as well a detention facility at Guantanamo Bay, Cuba. I have visited that facility in 2008 when I was Attorney General, and can attest that in compares favorably with medium security prisons that are part of the federal system and that I had occasion to visit when I was a district judge. It includes a courtroom unequaled anywhere, including in the mainland United States, for its suitability to try such detainees before military commissions. It includes technology for handling classified information, accommodations for the press to insure open access while maintaining security for data and people, and other features for holding fair and open trials without risk to the security of court personnel or detainees. The refusal to use Guantanamo as a place to hold and, when appropriate to try them before military commissions, appears to arise simply from ignorance.

Based on my own experience as a trial judge and as Attorney General, I have concluded that Article III courts are not ideally suited for trying many or most of these cases. For starters, human beings have spent the last several hundreds of years trying to civilize the laws of war. We have devised rules such that combatants who wear uniforms, carry their arms openly, follow a recognized chain of command, and do not target civilians, may be confined in humane conditions for the duration of hostilities. It seems downright perverse to tell people who violate every one of these rules that they are entitled to even better treatment, to appointed counsel, to a trial in a courtroom that they can use as a platform to spread their views.

Beyond that, such trials can present difficult evidentiary problems, particularly when defendants are apprehended on the battlefield where there is no capability for observing the niceties of a criminal investigation, whether to preserve a chain of custody or to administer Miranda warnings. We recently saw the prosecution of a defendant charged with participation in the 1998 bombing of our embassies in Kenya and Tanzania nearly fail because the judge suppressed the testimony of a witness who was perfectly willing to testify, on the ground that his identity had been learned from coercive interrogation of the defendant. The result was an acquittal on the hundreds of murder charges that were brought, and conviction simply on one count of participating in a conspiracy to destroy government property with resulting fatality.

In addition, high profile prosecutions present challenges to the security of the court and of witnesses, jurors and lawyers that are nearly impossible to overcome. I had

the experience of trying such a case with a panel of jurors identified only by juror number, and yet two of them found reporters waiting at their doors the day the verdict was delivered. They were terrified, and it was only by dint of strong persuasion and removing them from their homes for a time that their anonymity was preserved.

Finally, the cost of maintaining security for such trials, and for those involved in them, is enormous, including the costs borne by communities surrounding the courthouses where such trials are held, which may find commerce and daily existence severely disrupted.

In any event, the default preference given the current legislative scheme should be for trials before military commissions rather than Article III courts, unless and until a special purpose tribunal such as a national security court is created by Congress. Certainly, military commissions should be given a chance to work and should be supported with necessary funding and personnel, including experienced prosecutors assigned from the Justice Department to assist in the presentation of cases.

DISCLOSURE FORM FOR WITNESSES
CONCERNING FEDERAL CONTRACT AND GRANT INFORMATION

INSTRUCTION TO WITNESSES: Rule 11, clause 2(g)(4), of the Rules of the U.S. House of Representatives for the 112th Congress requires nongovernmental witnesses appearing before House committees to include in their written statements a curriculum vitae and a disclosure of the amount and source of any federal contracts or grants (including subcontracts and subgrants) received during the current and two previous fiscal years either by the witness or by an entity represented by the witness. This form is intended to assist witnesses appearing before the House Armed Services Committee in complying with the House rule.

Witness name: Michael B. Mukasey

Capacity in which appearing: (check one)

✓ Individual

___ Representative

If appearing in a representative capacity, name of the company, association or other entity being represented: _____

FISCAL YEAR 2011

federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant
None			

FISCAL YEAR 2010

federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant
None			

FISCAL YEAR 2009

Federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant

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Number of contracts (including subcontracts) with the federal government:

Current fiscal year (2011):_____;
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Federal agencies with which federal contracts are held:

Current fiscal year (2011):_____;
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List of subjects of federal contract(s) (for example, ship construction, aircraft parts manufacturing, software design, force structure consultant, architecture & engineering services, etc.):

Current fiscal year (2011):_____;
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Aggregate dollar value of federal contracts held:

Current fiscal year (2011):_____;
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Number of grants (including subgrants) with the federal government:

Current fiscal year (2011):_____;
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Federal agencies with which federal grants are held:

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List of subjects of federal grants(s) (for example, materials research, sociological study, software design, etc.):

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Aggregate dollar value of federal grants held:

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