Drone Debate Spotlights Military Force Law

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The debate over the Obama administration's use of armed drone strikes is reviving calls for the overhaul — or repeal — of the Authorization for Use of Military Force law, enacted in the wake of the Sept. 11 terrorist attacks in 2001.

"That was 12 years ago. It's time now to take another look at that," said Philip Zelikow, a National Security Council staffer during the George H. W. Bush administration who now serves on the president's Intelligence Advisory Board.

Legal experts and lawmakers argue that justifying the targeted killings, which began under President George W. Bush and have increased under President Barack Obama, with the 2001 law puts them on wobbly legal ground.

Steve Vladeck, an American University law professor who specializes in national security issues, said armed drones are being used "increasingly at the margins of the authority that Congress authorized in 2001," raising the public's interest in them and the calls for reform.

"Drones are being used in Yemen. Drones are being used in Africa. Drones are being used in Pakistan," he said. "So I think part of the interest in drones is the extent to which it illuminates just how unclear we are what the geographic limits of the AUMF are, what the organization limits of the AUMF are, what the citizenship limits of the AUMF are."

Since it was enacted in the days following the Sept. 11 attacks, the AUMF has already been expanded to include "associated forces" of Al Qaeda in its scope. But lawyers say it's now being stretched to the point of irrelevance as the administration pursues targets in countries like Somalia, Yemen and Pakistan, where the United States is not formally at war.

While the legal footing of armed drone operations has been debated in Washington, Americans surveyed have been supportive of the strikes on foreign soil. In March, a Gallup poll found that 65 percent of Americans said they supported the use of drones to kill suspected terrorists abroad. But that support dropped to 41 percent when those surveyed were asked about using drones on U.S. soil.

U.S. officials have leaned heavily on the 2001 military force authorization to justify the program — including strikes in North Africa and the Middle East on groups that are not technically tied to Al Qaeda. Many of the groups being targeted didn't exist when the 2001 authorization law was passed, experts argue.

The law specifically says the president as commander in chief can attack "nations, organizations or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on Sept. 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."

Speaking at Yale University's Law School before he stepped down, Jeh Johnson, then the Pentagon's top lawyer, argued there was "nothing in the wording of the 2001 AUMF or its legislative history that restricts this statutory authority to the 'hot' battlefields of Afghanistan," suggesting a vast interpretation of the law.

"The legal point is important because, in fact, over the last 10 years Al Qaeda has not only become more decentralized, it has also, for the most part, migrated away from Afghanistan to other places where it can find safe haven," Johnson said in the speech.

Still, lawmakers and legal experts say they're concerned the law's authority may be too broadly interpreted or misused entirely.

"Even better," suggested Benjamin Friedman, a fellow at the Cato Institute, "with the war winding down in Afghanistan, Congress might simply put an end date on the AUMF and say, 'Look, you can rely on existing authorities which are pretty plentiful.' … That way, if the president wants to bomb people with drones or whatever in Mali or Yemen he needs to come to Congress and get permission which would hopefully spark debate."

Last month, a Senate Judiciary subcommittee held a hearing on the legality of targeted killings overseas. And Democrats and Republicans alike voiced their concerns that the administration was using the AUMF too broadly to provide legal cover for the strikes that have even killed a few U.S. terrorist suspects abroad.

Senate Majority Whip Dick Durbin (D-Ill.), who chairs the subcommittee, said things look far different now than they did right after the Sept. 11 attacks when Congress authorized the military to pursue the Taliban, Al Qaeda and affiliated forces.

"I don't think there's a single senator who would say they envisioned 12 years later that we would be ending the longest war in our history and that we had created an authorization for an ongoing warlike effort against Al Qaeda operatives and their associates," Durbin said.

"It was a little different time and place after 9/11," he said. "Now, we're looking back at it from a different perspective."

Another member of the panel, Sen. Lindsey Graham (R-S.C.), homed in on the nontraditional battlefield the U.S. increasingly is fighting on.

"There is … no capital to conquer. There is no air force to shoot down. There is no navy to sink. We're fighting an ideology that is transforming itself all over the globe," Graham said. "We need to look at the AUMF anew. We need to broaden the ability to go after the enemy because it's changing day by day."

Senators on both sides of the aisle opened voiced their frustration that the administration did not send a witness to the subcommittee hearing. And they have long bemoaned the fact the administration has provided few details — even in a classified fashion — about its policy of targeted killings. Instead, they questioned legal experts and former military officials about the legal justification for such strikes.

Ilya Somin, a George Mason University law professor, told the Senate panel he doesn't believe Congress should do away with the AUMF, but that the authorization should be "clarified to more clearly delineate what, if any groups beyond those listed are the legitimate targets."

With so little information about the legal justification for targeted killings available — even to lawmakers who sit on the House and Senate Intelligence Committees — Somin said it's hard to tell where drone strikes fall.

And Rosa Brooks, a former Pentagon adviser and Georgetown law professor, told the Senate panel she believes Congress should repeal the resolution that authorized the use of military force as the president already has "ample power as the commander and chief … to use military force when it is necessary to protect the United States from an imminent threat, an imminent and grave threat."
There’s “nothing inherently wrong” with using armed drones as a counterterrorism tool, she argued, but such use outside of customary battlefields goes “well beyond … what the drafters of the AUMF and those who voted for it could have ever imagined as we have stretched it from Al Qaeda and from the actual language of the authorization.”

“We’ve begun to shift … to those who are further and further down the terrorist food chain — not so much senior operatives, but militants and suspected militants,” she said. “We’ve also shifted to focusing on organizations that it’s not so clear would fit that AUMF definition … in terms of any link to the 9/11 attacks or in terms of capability, capacity and inclination to focus on the United States.”