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2001 Authorization for Use of Military Force: Issues Concerning Its Continued Application

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Summary

In response to the September 11, 2001, terrorist attacks against the United States, Congress enacted the Authorization for Use of Military Force (2001 AUMF; P.L. 107-40; 50 U.S.C. §1541 note) to authorize the use of military force against those who perpetrated or provided support for the attacks. Under the authority of the 2001 AUMF, U.S. Armed Forces have conducted military operations in Afghanistan since October 2001. As armed conflict against Al Qaeda and the Taliban progressed, and U.S. counterterrorism strategy evolved, U.S. use of military force has expanded outside Afghanistan to include Al Qaeda and Taliban targets in Pakistan, Yemen, Somalia, Libya, and most recently, Syria.

The 2001 AUMF is not the sole authority for all U.S. uses of military force in furtherance of U.S. counterterrorism objectives; other legislation and presidential powers under Article II of the Constitution are invoked to carry out U.S. counterterrorism activities globally. Nevertheless, the Obama Administration still finds itself relying on 2001 AUMF authority not only for continuing U.S. military operations in Afghanistan, but also for beginning a new campaign against the Islamic State in Iraq and Syria, with the possibility of expansion to other countries if the Islamic State or Al Qaeda groups or associates effectively expand their reach and pose a threat to U.S. national security and interests. At the same time, the President has requested that Congress enact new authority for U.S. operations to counter the Islamic State and has expressed a continued commitment to “working with the Congress and the American people to refine, and ultimately repeal, the 2001 AUMF.”

As the United States has engaged in counterterrorism and other military operations against Al Qaeda, the Taliban, and other terrorist and extremist groups over the past 13-plus years, many Members of Congress and legal and policy analysts have questioned the continuing reliance on the 2001 AUMF as a primary, effective authority for U.S. military action in a number of countries. Some have asserted that the 2001 AUMF has become outdated, unsuited to the challenge of countering terrorism and extremism in a changed world, at times claiming that the executive branch has relied on the 2001 AUMF for military action outside its intended scope.

Congress has for several years considered a number of legislative proposals to change the authority in the 2001 AUMF (by amending or repealing the law), the manner in which it is used, and the congressional role in its oversight and continuing existence. This process continues in the 114th Congress, and deliberations over the future of the 2001 AUMF have become entwined with consideration of proposals to enact a new authorization for use of military force to respond to the turmoil caused by the actions of the Islamic State in Iraq and Syria. Debate in Congress over the status of the 2001 AUMF may evolve in response to numerous developments overseas and U.S. policy responses. For further information on the Islamic State crisis, the U.S. response, and proposals to enact a new AUMF targeting the Islamic State, see CRS Report R43612, *The “Islamic State” Crisis and U.S. Policy*, by Christopher M. Blanchard et al., and CRS Report R43760, *A New Authorization for Use of Military Force Against the Islamic State: Issues and Current Proposals in Brief*, by Matthew C. Weed.

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Introduction

In response to the September 11, 2001, terrorist attacks against the United States, Congress enacted the Authorization for Use of Military Force (2001 AUMF; P.L. 107-40; 50 U.S.C. §1541 note) to authorize the use of military force against those who perpetrated or provided support for the attacks. President George W. Bush identified Al Qaeda as the group that carried out the attacks, and the Taliban, then in control of the governance of Afghanistan, as harboring Al Qaeda within the territory of that country. Under the authority of the 2001 AUMF, in October 2001 President Bush sent U.S. Armed Forces to Afghanistan to conduct military operations “designed to disrupt the use of Afghanistan as a terrorist base of operations and to attack the military capability of the Taliban regime.”¹ More than 13 years later, in December 2014, President Obama declared the end of the combat mission in Afghanistan. Despite this announcement, U.S. Armed Forces remain in Afghanistan and are reportedly authorized to target Al Qaeda and the Taliban.²

As armed conflict against Al Qaeda and the Taliban has progressed, and U.S. counterterrorism strategy has evolved, U.S. use of military force has expanded outside Afghanistan. After the U.S. invasion of Afghanistan, many members of Al Qaeda moved out of the country and into Pakistan. In response, the United States has conducted unmanned aerial vehicle (UAV) missile strikes against Al Qaeda and Taliban targets in Pakistan. The United States has identified other groups in the Middle East and Africa that it considers “associated forces” of Al Qaeda, that is, organized forces that have entered alongside Al Qaeda in its armed conflict with the United States and its coalition partners. The United States has used force against these Al Qaeda associates in a number of other countries, including Yemen, Somalia, Libya, and most recently, Syria. In addition, the President has relied in part on the 2001 AUMF as authority for his campaign against the Islamic State (also known as ISIS or ISIL) in Iraq and Syria, and against the Khorosan Group of Al Qaeda in Syria. Since 2001, counterterrorism activities involving deployment of U.S. Armed Forces, if not always the use of military force, have steadily increased, taking place in countries around the world, although it is not clear whether the 2001 AUMF has provided authority for these activities.

The 2001 AUMF, as many have argued and the executive branch has agreed, does not seem to authorize all uses of military force in furtherance of U.S. counterterrorism objectives. Although some presidential reporting to Congress suggests a wide interpretation of the scope of 2001 AUMF authority, the Obama Administration, as recently as May 2014, has stated that the 2001 AUMF authorizes only those uses of military force against Al Qaeda, the Taliban, and their associated forces, and, when such actions are taken outside of Afghanistan, only in cases of imminent threat of attack against the United States.³ Because the 2001 AUMF covers only some uses of military force to counter terrorist threats, other legislation and presidential powers under Article II of the Constitution provide authority to carry out U.S. counterterrorism activities globally. Some observers and Members of Congress have argued that the 2001 AUMF, focused as

¹ Jim Garamone, *America Launches Strikes Against Al Qaeda, Taliban*, American Forces Press Service, October 7, 2001, <http://www.defense.gov/news/newsarticle.aspx?id=44680>.

² Mark Mazzetti and Eric Schmitt, “In a Shift, Obama Extends U.S. Role in Afghan Combat,” *The New York Times*, November 21, 2014, <http://www.nytimes.com/2014/11/22/us/politics/in-secret-obama-extends-us-role-in-afghan-combat.html>.

³ It is not clear whether the President’s decision in 2014 to use military force against the Islamic State and the Khorasan Group in Iraq and Syria pursuant to the 2001 AUMF, among other authorities, occurred pursuant to a specific determination of an “imminent threat” to the United States.

it is on those who perpetrated and supported the September 11, 2001, terrorist attacks, is outdated and should be repealed, as it has been stretched and perhaps distorted to fit uses of force that were not contemplated when the 2001 AUMF was enacted. Others assert that the 2001 AUMF should be updated to reflect the evolution of the terrorist threat since 2001 and the continued need to authorize the use of military force against this threat, perhaps with greater oversight and procedural requirements from Congress.

The Obama Administration has indicated its willingness to address concerns about the 2001 AUMF and continued uses of military force in support of counterterrorism goals, in the past arguing that the 2001 AUMF must remain in force until combat operations end in Afghanistan. By the end of 2014, the United States and Afghanistan had finalized a bilateral security agreement, and the combat mission in Afghanistan had been declared complete. The Obama Administration, however, still finds itself relying on 2001 AUMF authority not only for continuing U.S. military operations in Afghanistan, but also for beginning a new campaign against the Islamic State in Iraq and Syria, and possibly expanding operations to other countries if the Islamic State or Al Qaeda groups or associates effectively expand their reach and pose a threat to U.S. national security and interests. The President, in his February 11, 2015, letter to Congress concerning his draft proposal for a new authorization for use of military force against the Islamic State, stated, “I remain committed to working with the Congress and the American people to refine, and ultimately repeal, the 2001 AUMF.”⁴

In the face of these issues, Congress has for several years considered a number of legislative proposals to change the authority in the 2001 AUMF, the manner in which it is used, and the congressional role in its oversight and continuing existence. This process has continued in the 114th Congress, and deliberations over the future of the 2001 AUMF have become entwined with consideration of proposals to enact a new AUMF to respond to the actions of the Islamic State in Iraq and Syria.

2001 AUMF Enactment, Interpretation, and Use

Generally considered a broad authorization for the President to use military force against the terrorist threat posed by Al Qaeda after the September 11, 2001, terrorist attacks, the 2001 AUMF is nonetheless limited in scope, targeting only those who perpetrated or supported those attacks. Because of this limitation, the two most recent Administrations have instituted procedures to determine which actors are lawful targets of military force and in which parts of the world such force might be used under different circumstances. The effect has been U.S. uses of military force or other deployment activities in several countries, and varying as to type and scope.

Legislative Background

Shortly after the September 11, 2001, terrorist attacks on the United States, Congress enacted and President George W. Bush signed into law the 2001 AUMF. The 2001 AUMF authorizes the President to use U.S. Armed Forces to combat the nations, groups, and individuals who

⁴ President Barack Obama, 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, <http://www.whitehouse.gov/the-press-office/2015/02/11/letter-president-authorization-use-united-states-armed-forces-connection>.

perpetrated the September 11, 2001, attacks and those who harbored such perpetrators. Section 2(a) of the 2001 AUMF authorizes the use of force in response to the September 11 attacks:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

. . . .

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL.—That the President is authorized 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 authorizing language is broad in its scope concerning prevention of any future acts of terrorism perpetrated against the United States, but is circumscribed by authorizing the targeting only of those nations, organizations, or persons involved in perpetrating the September 11 attacks or harboring those who perpetrated the attacks. Although President Bush identified the terrorist group Al Qaeda and individuals within that group as the perpetrators of the attacks, and the Taliban then governing Afghanistan as the entity that harbored Al Qaeda, these actors were not specifically named in the 2001 AUMF’s language. The 2001 AUMF represented a novel approach to modern-era military force authorizations, because it empowered the President to target non-state actors, even to the individual level, instead of only states.

In contrast to the authorization enacted by Congress in the 2001 AUMF, the legislation originally proposed by the Bush Administration in the wake of the September 11, 2001, attacks would have provided the authority to use military force not only against Al Qaeda and the Taliban, but also to counter all terrorist threats generally, without necessitating a connection to the attacks:

Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled—

That the President is authorized to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, harbored, committed, or aided in the planning or commission of the attacks against the United States that occurred on September 11, 2001, ***and to deter and pre-empt any future acts of terrorism or aggression against the United States.***⁵

Because Congress did not accept this broader authorization language, it can be argued that Congress deliberately chose to limit presidential authority to respond to the threat posed by those who carried out and supported the September 11, 2001, attacks, and not to other persons, nations, or groups. The continuing application of 2001 AUMF authority and its perceived expansion has led to arguments over the proper scope of 2001 AUMF authority and calls for legislative clarification of such scope.⁶

⁵ Bold, italicized emphasis added. Senator Robert Byrd, reading President’s proposal into the record in the Senate, *Congressional Record*, daily edition, October 1, 2001, pp. S9949-S9951.

⁶ See “Expanding Interpretation of 2001 AUMF Outside Original Scope,” below.

Interpretation

Because Congress limited the use of force to targets associated with the September 11, 2001, attacks, while according broad discretion to the President regarding whom to target, implementing the 2001 AUMF has required the creation of frameworks and procedures to determine which uses of force fall under the 2001 AUMF's authority.

Interpretation Prior to Summer 2014 Islamic State Crisis

Prior to the U.S. military campaign against the Islamic State that began in summer 2014, executive branch officials made statements that included certain interpretations⁷ concerning the 2001 AUMF:

- The 2001 AUMF is primarily an authorization to enter into and prosecute an armed conflict against Al Qaeda and the Taliban in Afghanistan.
- The 2001 AUMF authorizes the President to use military force against Al Qaeda and the Taliban outside Afghanistan, but such uses of force must meet a higher standard of threat to the United States and must use limited, precise methods against specific individual targets rather than general military action against enemy forces.
- Because the 2001 AUMF authorizes U.S. involvement in an international armed conflict, the international law of armed conflict informs the authority within the 2001 AUMF. This law permits the use of military force against forces associated with Al Qaeda and the Taliban as co-belligerents; such forces must be operating in some sort of coordination and cooperation with Al Qaeda and/or the Taliban, not just share similar goals, objectives, or ideologies.

According to the Obama Administration, this interpretation of the scope of 2001 AUMF authority fits within the overall framework of presidential power to use military force against those posing a threat to U.S. national security and U.S. interests. In situations where the 2001 AUMF or other relevant legislation does not seem to authorize a given use of military force or related activity, the executive branch will determine whether the President's Article II powers as Commander in Chief and Chief Executive, as interpreted by the executive branch itself, might authorize such actions. In this way, similar U.S. military action to meet U.S. counterterrorism objectives might be interpreted to fall under different authorities, of which the 2001 AUMF is just one, albeit important, example.

Interpretation Applied to Military Campaign Against the Islamic State

In seeming contrast to the interpretation described above, Obama Administration officials and the President's September 2014 notifications⁸ to Congress for airstrikes and other actions in Iraq and

⁷ See testimony of Mary McLeod and Stephen W. Preston, General Counsel, Department of Defense, before the Senate Committee on Foreign Relations, hearing on the Authorization for Use of Military Force, 113th Cong., 2nd sess., May 21, 2014, <http://www.cq.com/doc/congressionaltranscripts-4481556?5>.

⁸ Available at <http://www.whitehouse.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-iraq>; <http://www.whitehouse.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-syria>.

Syria stated that the 2001 AUMF authorizes the President to order certain U.S. military strikes against the Islamic State in Iraq and Syria,⁹ as well as the Khorasan Group of Al Qaeda in Syria. This reliance on 2001 AUMF authority might represent a shift in the Administration's previously stated interpretation of that authority in at least two ways. First, the military campaign against the Islamic State seems to represent an expansion of the scope of military operations undertaken previously outside Afghanistan under 2001 AUMF authority. Second, the reasons for the military campaign seem to rest as much on (1) current U.S. policy goals for Iraq's stability; (2) the stability of the region; and (3) support for moderate rebel groups in their fight against the Islamic State, other extremist groups, and the Asad government in Syria, as they do on responding to an imminent threat to the United States, its citizens, or its personnel and facilities abroad.

Authorization for Use of Military Force Against Iraq Resolution of 2002

Separate from the 2001 AUMF enacted after the September 11, 2001, terrorist attacks, Congress enacted the Authorization for Use of Military Force Against Iraq Resolution of 2002 (2002 AUMF; P.L. 107-243) prior to the 2003 U.S. invasion of Iraq that toppled the government of Saddam Hussein, with U.S. military deployments to and operations in Iraq continuing until December 2011. The 2002 AUMF authorizes the President to use U.S. Armed Forces to enforce relevant United Nations Security Council resolutions and to "defend the national security of the United States against the continuing threat posed by Iraq..." Although the 2002 AUMF has no sunset provision and Congress has not repealed it, it can be argued that after the establishment of a new Iraqi government, the restoration of full Iraqi sovereignty, and the U.S. withdrawal from Iraq, the 2002 AUMF no longer has force. The President has nonetheless stated that U.S. military action against the Islamic State in Iraq and Syria is authorized pursuant to the 2002 AUMF as well as the 2001 AUMF. Despite this reliance, the President included a provision to immediately repeal the 2002 AUMF in his February 11, 2015, draft authorization for use of military force against the Islamic State.

Uses of Force Pursuant to 2001 AUMF Authority

Acting under 2001 AUMF authority, U.S. Armed Forces began operations in Afghanistan on October 7, 2001, to neutralize the terrorist threat in that country by targeting Al Qaeda elements and infrastructure and removing the Taliban from power. The U.S. combat mission continued in Afghanistan until December 2014, including as part of NATO's International Security Assistance Force (ISAF). U.S. military action in Afghanistan continues in a reduced form in 2015.

In addition, since 2001, U.S. military action against terrorist groups has expanded to several other countries. Past comments from Obama Administration officials have indicated that military actions taken under the 2001 AUMF outside Afghanistan had nonetheless been limited in scope, at least until the current military campaign against the Islamic State. For example, in May 2014, an Administration official stated that 2001 AUMF-authorized military actions had included strikes in Yemen against Al Qaeda in the Arabian Peninsula (AQAP), considered either part of or associated with Al Qaeda, and operations to kill or capture Al Qaeda members in other countries, including Yemen and Somalia.¹⁰ Drone strikes and other military operations in other countries, such as Pakistan and Libya, are also considered to be carried out under 2001 AUMF authority.

According to information provided at intervals by the executive branch in the 13-plus years since the 2001 AUMF was enacted, the United States has engaged in counterterrorism operations

⁹ The President also relied on the Authorization for Use of Military Force Against Iraq Resolution of 2002 (2002 AUMF; P.L. 107-243) as authority for military action against the Islamic State.

¹⁰ See Testimony of Stephen W. Preston, General Counsel, Department of Defense, before the Senate Committee on Foreign Relations, hearing on the Authorization for Use of Military Force, 113th Cong., 2nd sess., May 21, 2014, http://www.foreign.senate.gov/imo/media/doc/Preston_Testimony.pdf.

including the use of military force in a number of other countries. Since the 2001 AUMF's enactment, presidential notifications¹¹ to Congress have reported uses of military force, military deployments, and other activities in a number of countries and for a number of purposes, including to

- deploy U.S. Armed Forces and conduct military operations in several countries in a number of regions of the world, including most recently in Iraq and Syria against forces of the Islamic State and the Khorosan Group of Al Qaeda;
- counter generally the terrorist threat against the United States following September 11, 2001;
- engage terrorist groups “around the world”;
- engage terrorist groups “on the high seas”;
- detain individuals at Guantanamo Bay, Cuba, and to take other actions related to detention decisions; and
- conduct trials of terrorist suspects in military commissions.¹²

These presidential notifications include language invoking either the authority or requirements of the 2001 AUMF, often in conjunction with the authorities and requirements of the War Powers Resolution (P.L. 93-148; 50 U.S.C. §§1541-1548), which requires the President to report military deployments and the introduction of U.S. Armed Forces into hostilities, with or without congressional authorization such as that provided in the 2001 AUMF. Some notifications state that certain military actions are taken pursuant to the President's authority as Commander in Chief and Chief Executive, including the authority to carry out the 2001 AUMF's provisions. While referencing the 2001 AUMF, such notifications often simply state that such reporting is “consistent with” the requirements of the 2001 AUMF, which directs the President to make reports periodically of U.S. military actions taken pursuant to the 2001 AUMF. Several notifications reference the 2001 AUMF at the beginning or end of a longer section on counterterrorism operations, which then lists a number of activities in several countries¹³ without explaining each list item's connection to 2001 AUMF authority. As a result, it is often difficult to determine which military actions and which countries have been determined by the executive branch to fall within 2001 AUMF authority.

¹¹ Notifications of this type can be found in the *Federal Register* and the *Compilation of Presidential Documents*.

¹² After the Supreme Court found military commissions operating solely under 2001 AUMF authority to violate the Uniform Code of Military Justice (see *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)), Congress passed the Military Commissions Act of 2006 (P.L. 109-366) to continue trying terrorist suspects before these commissions. For more information, see CRS Report R41163, *The Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues*, by Jennifer K. Elsea.

¹³ For example, President Bush's notification of September 20, 2002 mentions new or ongoing deployments to the Philippines, Georgia, and Yemen, in addition to Afghanistan and Guantanamo Bay, Cuba. The President stated that these actions had been taken according to his “constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive,” but also states the actions were “consistent with P.L. 107-40.” President George W. Bush, *Letter to Congressional Leaders on the Deployment of Forces in Response to the Terrorist Attacks of September 11*, 38 W.C.P.D. 1588, 1589 (September 20, 2002).

Current Executive Branch Policy

President Obama and his Administration have publicly expressed support for possibly amending and eventually repealing the 2001 AUMF, in order to change the stance of the United States, as President Obama has termed it, “from a perpetual war-time footing.”¹⁴ According to Administration officials, the primary importance of the 2001 AUMF has been to authorize U.S. Armed Forces to enter into armed conflict with those who carried out or supported the September 11, 2001, terrorist attacks, namely Al Qaeda and the Taliban.¹⁵ U.S. military operations against Al Qaeda and the Taliban occurred for more than a decade primarily in Afghanistan, and some U.S. Armed Forces currently remain there. Although the President announced the end of the U.S. military mission in Afghanistan in December 2014, he notified Congress in December 2014 that certain U.S. military operations against Al Qaeda in Afghanistan will continue pursuant to 2001 AUMF authority, and such operations have been reported in 2015.¹⁶

The United States and Afghanistan concluded a bilateral security agreement and status of forces agreement in late 2014, providing the basis under international law to remain in Afghanistan in a post-conflict role. The Obama Administration has stated that with the end of the U.S. combat mission in Afghanistan, it intends to work with Congress to either amend or repeal the 2001 AUMF. Administration officials have stated that any change to the 2001 AUMF should not, however, constrain the President’s authority in a way that frustrates his ability to protect the United States from terrorist attacks and to meet U.S. counterterrorism objectives generally. The President has also maintained that he will oppose any attempt to legislate wider executive branch war-making authority. Instead, the Administration has proposed modernizing the counterterrorism authorities of the 2001 AUMF to precisely authorize the President to meet the current challenges posed by terrorist groups and networks around the world. Some Members of Congress have espoused this approach as well.

More recently, however, these stated Administration goals for the reform or repeal of the 2001 AUMF have been thrown into doubt by statements from the President and Administration officials in connection with U.S. military operations conducted against forces of the Islamic State and the Khorasan Group of Al Qaeda in Iraq and Syria. The President, in his August 2014 notifications to Congress, indicated that his powers as Commander in Chief and Chief Executive under Article II of the Constitution gave him authority to undertake deployments and airstrikes in Iraq against IS forces. The President’s September 2014 notifications to Congress for airstrikes and other actions in Iraq and Syria, however, stated that the 2001 AUMF provides authorization¹⁷ for certain U.S. military strikes against the Islamic State. Due to Al Qaeda’s February 2014 disavowal of any remaining ties with the Islamic State, and the Islamic State’s seeming lack of connection with the September 11, 2001, terrorist attacks, some experts have questioned whether

¹⁴ President Barack Obama, Remarks by the President at the National Defense University, May 23, 2013, <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

¹⁵ Testimony of Mary McLeod and Stephen W. Preston, General Counsel, Department of Defense, before the Senate Committee on Foreign Relations, hearing on the Authorization for Use of Military Force, 113th Cong., 2nd sess., May 21, 2014, <http://www.cq.com/doc/congressionaltranscripts-4481556?5>.

¹⁶ See Letter from President Barack Obama—Six Month Consolidated War Powers Resolution Report, December 11, 2014, <http://www.whitehouse.gov/the-press-office/2014/12/11/letter-president-six-month-consolidated-war-powers-resolution-report>.

¹⁷ As mentioned above, the President has also cited 2002 AUMF authority for these military actions.

the Islamic State can be targeted under the 2001 AUMF.¹⁸ The Obama Administration has stated that the Islamic State can be targeted under the 2001 AUMF because its predecessor organization, Al Qaeda in Iraq, communicated and coordinated with Al Qaeda; the Islamic State currently has ties with Al Qaeda fighters and operatives; the Islamic State employs tactics similar to Al Qaeda; and the Islamic State, with its intentions of creating a new Islamic caliphate, is the “true inheritor of Osama bin Laden’s legacy.”¹⁹ This interpretation seems to suggest that the Islamic State could be treated either as part of Al Qaeda that has splintered from the main group, or as an associate of Al Qaeda; under either interpretation, the Islamic State would arguably be targetable under the 2001 AUMF.

Prior to the wider military campaign against the Islamic State, the Obama Administration had stated that it will use limited force against individuals and groups outside Afghanistan under 2001 AUMF authority only when they are legally defined military targets that “pose a continuing, imminent threat to U.S. persons....”²⁰ With regard to the current crisis in Iraq and Syria, the Administration has indicated that the Islamic State’s threat to U.S. national security is one factor in the President’s decision to conduct the current military campaign against the group. Although it is not clear whether the Administration is still adhering to this policy of limited force, the Administration might have made a determination of a “continuing, imminent threat” from the Islamic State, thus plausibly placing the current military campaign within the limited scope of 2001 AUMF authority set out by the Administration prior to the Islamic State crisis. The ongoing, indefinite, large-scale military campaign against the Islamic State, outside the Afghanistan theater of operations, however, might be seen as an executive branch policy shift toward a more expansive interpretation of 2001 AUMF authority. Without a new authorization for use of military force specifically targeting the Islamic State, it seems the President would rely heavily on 2001 AUMF authority indefinitely to prosecute the military conflict against the group. Despite this, the President has continued to make statements confirming that Administration policy remains one of amending or repealing the 2001 AUMF, including in his February 11, 2015, letter to Congress accompanying his proposal for a new authorization for use of military force against the Islamic State.²¹

Issues Concerning the Continued Use of the 2001 AUMF

The executive branch’s reliance on the 2001 AUMF has raised a number of concerns among some Members of Congress and policy analysts. These concerns relate to Congress’s constitutional role in declaring and funding war, as well as several executive branch activities to counter terrorism

¹⁸ See, e.g., Robert Chesney, “The 2001 AUMF: From Associated Forces to (Disassociated) Successor Forces,” *Lawfare*, September 10, 2014, <http://www.lawfareblog.com/2014/09/the-2001-aumf-from-associated-forces-to-disassociated-successor-forces/>.

¹⁹ White House, “Press Briefing by Press Secretary Josh Earnest,” press release, September 11, 2014, <http://www.whitehouse.gov/the-press-office/2014/09/11/press-briefing-press-secretary-josh-earnest-9112014>.

²⁰ Testimony of Stephen W. Preston, General Counsel, Department of Defense, before the Senate Committee on Foreign Relations, hearing on the Authorization for Use of Military Force, 113th Cong., 2nd sess., May 21, 2014, http://www.foreign.senate.gov/imo/media/doc/Preston_Testimony.pdf.

²¹ President Barack Obama, 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://www.whitehouse.gov/the-press-office/2015/02/11/letter-president-authorization-use-united-states-armed-forces-connection>.

that are perceived as problematic. In contrast, Obama Administration officials have testified that the legal framework for the current conflict against Al Qaeda and associated forces, which includes the 2001 AUMF, remains valid and effective in meeting the U.S. military's requirements for conducting counterterrorism operations, even as they state that they remain open to working with Congress to amend or repeal it.²²

Constitutional Role of Congress in Authorizing the Use of Force

Some argue that Congress, since enacting the 2001 AUMF, has in some ways abdicated its role in directing the use of U.S. military force to counter terrorist threats. Congress, some contend, authorized the use of military force in haste during the initial reaction to the September 11 attacks, and has taken little legislative action since to tailor the use of such force to current circumstances. There are ongoing concerns that under the 2001 AUMF, especially regarding the use of unmanned aerial vehicles (UAVs), transparency in executive branch actions is lacking, and that Congress has neither voiced effective demands for information, nor asserted its role in decision-making through consultation and oversight. With the President's most recent reliance on 2001 AUMF authority to prosecute the military campaign against the Islamic State, calls to repeal the 2001 AUMF and terminate any newly enacted authority within three years seem to indicate that some in Congress are intent on using the legislative process to shape the course of ongoing counterterrorism and other military operations going forward.

Expanding Interpretation of 2001 AUMF Outside Original Scope

Observers assert that by its own terms, the 2001 AUMF over time has become obsolete, as it focuses directly on preventing the perpetrators of the September 11, 2001, attacks from carrying out further attacks against the United States, most of whom by now have been killed or captured.²³ It has been noted, however, that the 2001 AUMF remains central to the executive branch's justification for expanding efforts globally to counter terrorist threats, including continuing efforts against Al Qaeda. Administration officials assert that the 2001 AUMF is a key source of domestic legislative authority to conduct military operations against terrorist elements in any country where terrorist groups operate and plan to attack the United States or U.S. interests. The executive branch has targeted terrorist groups that are perceived by some to have only tenuous connections to those who perpetrated or supported the September 11, 2001, attacks.

In perhaps the most significant expansion of military action taken pursuant to 2001 AUMF authority, the President in September 2014 cited the statute as providing legal justification for U.S. military airstrikes and other operations against forces of the Islamic State and the Khorasan Group of Al Qaeda in Iraq and Syria. Many Members of Congress, however, claim that this is a new military campaign and requires a separate congressional authorization. Several proposals for a new authorization for use of military force targeting the Islamic State have been introduced, in

²² See statement of Robert Taylor, Acting General Counsel, Department of Defense, U.S. Congress, Senate Armed Services Committee, *The Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for Use of Military Force*, 113th Cong., 1st sess., May 16, 2013.

²³ See, e.g., Representative Adam Schiff, "Rep. Schiff Offers Amendment Sunsetting Authorization for Use of Military Force—'AUMF Never Intended to Authorize a War Without End'," press release, July 24, 2013, <http://schiff.house.gov/press-releases/rep-schiff-offers-amendment-sunsetting-authorization-for-use-of-military-force-aumf-never-intended-to-authorize-a-war-without-end/>.

both the 113th and 114th Congresses, and the President himself has proposed a new Islamic-State AUMF. None of these proposals have been enacted into law; the President continues to rely on 2001 AUMF and other authorities.

Broadening of Presidential Authority Through Multiple AUMFs

In addition to concerns about the perceived expanding scope of 2001 AUMF authority, maintaining the 2001 AUMF as current law might complicate congressional efforts to shape future authority granted to the President to use military force against other threats, such as the ongoing debate over authorizing military force against the Islamic State. Legislative proposals to authorize the use of military force against the Islamic State (“IS AUMF”) have so far included a number of different provisions to limit the scope and duration of presidential authority to conduct military operations. Some are concerned that leaving the 2001 AUMF in place, with its broadly interpreted authorizing language, could neutralize any provisions in a new IS AUMF that purport to limit or otherwise shape the authority granted to the President. It could be argued that this sort of interpretation of congressionally granted authority, where multiple AUMFs are combined into one larger authority to conduct wider military operations, has already occurred, with the President relying on both 2001 and 2002 AUMF authority to conduct the current campaign against the Islamic State.

In an attempt to prevent this cumulative approach to multiple AUMF authorities, at least one IS AUMF proposal introduced in the 113th Congress stated that it constituted the sole authority to target the Islamic State militarily: “The provisions of this joint resolution pertaining to the authorization of use of force against the Islamic State of Iraq and the Levant shall supersede any preceding authorization for the use of military force.”²⁴ This type of provision could prove less than effective, however, if Congress chooses to take no action to amend or repeal the 2001 AUMF’s authority, especially in light of the President’s position that the 2001 AUMF authorizes military action against the Islamic State.²⁵

Controversial Activities and Policies Subsumed Under 2001 AUMF Authority

In addition to concerns about the 2001 AUMF’s duration and scope, certain activities have also come under debate in connection with the 2001 AUMF.

Unmanned Aerial Vehicles

The Obama Administration’s increased use of UAVs to strike terrorist elements abroad, yet away from the conventional battlefield, is one of the controversial activities for which the President has invoked 2001 AUMF authority. Critics of such drone strikes state that the practice is not

²⁴ See Sec. 6 of the Authorization for the Use of Military Force against the Islamic State of Iraq and the Levant (S.J.Res. 47).

²⁵ It should be noted that even with a limited authorization in a new IS AUMF and a repeal of the 2001 AUMF, the President could continue military operations against the Islamic State under other authority, including Article II authority as well as any legislation that continues to approve such military action through authorizing the use of appropriated funds for such operations. See CRS Report R41989, *Congressional Authority to Limit Military Operations*, by Jennifer K. Elsea, Michael John Garcia, and Thomas J. Nicola.

sufficiently transparent, leaving the public and Congress without the information necessary to determine the propriety of the strikes through effective oversight. Moreover, critics argue that expanded UAV use targets far too many individuals, including low-level terrorist operatives as well as U.S. citizens abroad, raising constitutional due process concerns in the latter case. Collateral casualties and damage are also causes for concern. Because UAV strikes often are discrete incursions into foreign air space completed in short periods of time, and do not involve placing U.S. personnel in harm's way, some observers believe that the requirements of the War Powers Resolution for congressional consultation and authorization will become obsolete through the employment of this new remote warfare technology.

Detention of Terrorism Suspects and Individuals Designated as Enemy Combatants

Many observers object to the detention practices of the U.S. government regarding terrorism suspects and enemy combatants, including U.S. citizens, citing allegedly inhumane conditions at the Guantanamo facilities, the use of rendition to foreign governments, the indefinite nature of detention in many cases, the constitutional due process concerns such practices raise, and issues with the government's choices of military or civilian judicial venues for prosecution in different cases.²⁶

Possible Domestic Use of Military Force Under the 2001 AUMF

Some government officials have indicated in recent years that U.S. military uses of force on U.S. territory could be authorized under the 2001 AUMF, sparking criticism. It is argued that because the 2001 AUMF does not contain explicit authorizing language for the use of force "within the United States," it does not meet applicable legal requirements for using the U.S. military domestically under the Posse Comitatus Act, which states that the military cannot be used on U.S. territory to execute the law unless expressly authorized by the Constitution or an act of Congress.²⁷ Obama Administration officials have stated that they believe domestic uses of military force would be permitted only in the most extraordinary circumstances, and when such action is necessary to neutralize an identified domestically based threat to U.S. national security.²⁸ Although this eventuality remains unlikely, the issue of whether the 2001 AUMF or any other authorization for use of military force can be legitimately interpreted to authorize domestic military action without specific authorizing language could remain a concern.

²⁶ For legal analysis of detention issues, see CRS Report R40139, *Closing the Guantanamo Detention Center: Legal Issues*, by Michael John Garcia et al.; CRS Report R42143, *Wartime Detention Provisions in Recent Defense Authorization Legislation*, by Jennifer K. Elsea and Michael John Garcia; and CRS Report R42337, *Detention of U.S. Persons as Enemy Belligerents*, by Jennifer K. Elsea.

²⁷ See CRS Report R42659, *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law*, by Charles Doyle and Jennifer K. Elsea.

²⁸ Letter from Attorney General Eric Holder to Senator Rand Paul, March 4, 2013, available at <http://www.cq.com/pdf/govdoc-4231653>.

Arguments to Maintain, Repeal, or Amend/Replace the 2001 AUMF

Some Members of Congress have supported legislative options to repeal, amend, or replace the 2001 AUMF, while others defend leaving it as is. Some of the key arguments being made in support of or against these options are considered below.

Maintaining the 2001 AUMF Status Quo

According to the Department of Defense, the 2001 AUMF provides authority to meet all U.S. military requirements to respond effectively and flexibly to terrorist threats globally, and allows the military to meet threats in conformity with domestic law and the international laws of war. Proponents of maintaining the 2001 AUMF as it stands state that it is important to ensuring the United States can continue to respond with force to terror threats. Repealing or narrowing the 2001 AUMF might remove legal authority to conduct certain counterterrorism efforts, and could undo authority to detain enemy combatants at Guantanamo Bay and elsewhere. Proponents of the status quo state that because the threat of terrorism will continue years into the future, the broad congressionally mandated authority in the 2001 AUMF is important to ensuring political legitimacy and the public's support for counterterrorism efforts.²⁹

Some have argued, however, that counterterrorism operations will likely continue to expand in geographical and operational scope, and that Congress should take action to have a role in directing the course of using force against terrorist groups into the future. Others assert that maintaining the 2001 AUMF as is could provide an effective means of constraining presidential powers to conduct military operations against terrorist groups over time, for the very reason that its language is limited to those involved in the September 11, 2001, terrorist attacks, a list of groups and individuals that will arguably continue to dwindle as the numbers of those directly connected with the September 11, 2001, attacks diminishes. According to this view, if Congress were to leave the 2001 AUMF in place, uses of military force under 2001 AUMF authority will become increasingly constrained over time.

Repealing the 2001 AUMF Outright

Many argue that repealing the 2001 AUMF is necessary for a number of reasons:³⁰

- the President announced in December 2014 that the military combat mission in Afghanistan had ended, and in other circumstances Congress has passed legislation formally ending war authority for other conflicts;

²⁹ See Sara Sorcher, "Security Insiders: Narrow the Use-of-Force Act," *National Journal*, February 19, 2014, <http://www.nationaljournal.com/defense/insiders-poll/security-insiders-narrow-the-use-of-force-act-20140219> (citing arguments of 29% of security experts in a survey argued for leaving the 2001 AUMF as is).

³⁰ See, e.g., "Repeal the Military Force Law," *The New York Times*, March 9, 2013. A number of legislative proposals introduced over the last several Congresses would have repealed the 2001 AUMF. For 2001 AUMF repeal proposals made in the 114th Congress, see "Current Legislative Proposals Concerning the 2001 AUMF," below.

- the fight against terrorist groups has been improperly expanded and extended to the point that there are no effective restraints on presidential power in this area; and
- more emphasis should be placed on counterterrorism efforts that do not involve military force, such as disruption of terrorist financing and communications, economic development and assistance programs to populations vulnerable to terrorist influence, and law enforcement actions to arrest and prosecute terrorist suspects.

In addition, some argue that repeal would limit presidential authority to use force against terrorist groups to the powers contained in Article II of the Constitution and the international law of self-defense, standards that might in some cases be more restrictive than the authority in the 2001 AUMF. On the other hand, other observers claim that repeal would essentially ensure continued expansion of presidential Article II powers, as it would be expected that presidential uses of military force against terrorist groups would continue solely under Article II auspices. Some also oppose the repeal of the 2001 AUMF for reasons discussed in the prior section, including the belief that the 2001 AUMF is a necessary and appropriate measure to respond to ongoing terrorist threats.

Amending the 2001 AUMF or Replacing It with a New Authorization

Proposals to amend or replace the 2001 AUMF on the whole contemplate creating authority that is significantly more detailed than the general language of the 2001 AUMF, whether that detail restricts or expands presidential power to use force against terrorist elements globally.

Amending to Restrict Presidential Action

Proposals to restrict presidential power include setting out criteria that must be met to (1) introduce U.S. Armed Forces into another country; (2) conduct UAV strikes against terrorist targets, including U.S. citizens abroad; (3) detain and prosecute terrorist suspects; and (4) use military force in the United States. It has been suggested that a sunset clause should be included, as well as provisions to define the circumstances under which the threat of terrorist attack is neutralized and the authority to use force no longer adheres.³¹ Similar to the argument to repeal the 2001 AUMF, leaving the President with more limited Article II powers, are proposals for a new authorization that merely reiterates that the President's only powers to use force to counter terrorism emanate from these limited Article II powers to defend against imminent attack on the United States, or to international law of self-defense. Others respond to these recommendations by warning that any restrictions placed on the President to prevent perceived overreach might restrict the U.S. military's flexibility in responding to emerging and changing terrorist threats in the future.³²

³¹ See Bill French and John Bradshaw, *Ending the Endless War: An Incremental Approach to Repealing the 2001 AUMF*, National Security Network, Washington, DC, August 2014, <http://nsnetwork.org/report-ending-the-endless-war/>; Patricia Zengerle, "Amid new security threats, some in Congress look to update 9/11 law," *Reuters*, May 2, 2013, <http://www.reuters.com/article/2013/05/02/us-usa-congress-counterterrorism-idUSBRE94105V20130502>.

³² For analysis of the types of restrictions that might be included in a new AUMF targeting the Islamic State, and could (continued...)

Amending to Expand or Update Presidential Authorities

Alternatively, and not necessarily exclusive from proposals to restrict authority to use force, some Members recommend that Congress consider expanding or updating presidential authority to use force against terrorists.³³ These recommendations include updating language to detail new uses of force, such as UAVs and cyberwarfare, and specifying new terrorist groups that might not have ties to al Qaeda but still pose a threat to the United States.³⁴

Some counter, however, that any update or expansion of authorities would further enshrine in law the idea of perpetual authorized war. They argue as well that new authorities might encourage Presidents to expand uses of force in undesirable ways, or to use armed force as a first resort, and that a new congressional imprimatur to continue the “war on terror” might produce a negative reaction from the international community, including U.S. allies. Any expansion of authorities specifically granting presidential power to conduct preventive war, it is asserted, would set an unfortunate precedent for an unfettered executive branch with the authority to kill anyone associated with terrorism, no matter how remote the threat to the United States; invade any country harboring terrorists who might someday attack the United States; and detain people indefinitely without due process of law.³⁵

One set of recommendations³⁶ suggests providing a new authorization for the use of force against terrorist elements. This new authorization would set forth general legislative criteria for such uses of force, but it would also require the executive branch to identify targeted groups and geographic areas through an administrative process that includes congressional notification and waiting periods before becoming effective. This administrative process would operate much like the State Department’s Foreign Terrorist Organization identification process.³⁷ Any such authorization would include specific criteria for using force, as well as precise definitions for key terms, such as “belligerent” and “imminent threat.” Any such authorization would also require the executive branch to provide post-action reporting on any exercise of force under the authorization, and to assess a terrorist group’s designation on a regular basis.

(...continued)

similarly be included in amendments to the 2001 AUMF, see CRS Report R43760, *A New Authorization for Use of Military Force Against the Islamic State: Issues and Current Proposals in Brief*, by Matthew C. Weed.

³³ See, e.g., Andrew Cohen, “The Case for Congress Ending Its Authorization of the War on Terror,” *The Atlantic*, June 10, 2013, <http://www.theatlantic.com/politics/archive/2013/06/the-case-for-congress-ending-its-authorization-of-the-war-on-terror/276699/>.

³⁴ See Zengerle, *op cit*.

³⁵ See Rosa Brooks, “Mission Creep in the War on Terror,” *Foreign Policy*, March 14, 2013, <http://foreignpolicy.com/2013/03/14/mission-creep-in-the-war-on-terror/>.

³⁶ Robert Chesney et al., *A Statutory Framework for Next-Generation Terrorist Threats*, Hoover Institution Task Force on National Security and Law essay, February 25, 2013.

³⁷ Section 219 of the Immigration and Nationality Act, as amended (P.L. 82-414; 8 U.S.C. §1189), sets out the process for designation of terrorist organizations.

Current Legislative Proposals Concerning the 2001 AUMF

Over the past few Congresses, a number of legislative proposals contained provisions to sunset or repeal the 2001 AUMF, or to limit the use of appropriated funds to carry out the 2001 AUMF's provisions. These proposals were not enacted into law. With the advent of the Islamic State crisis and the U.S. military response, many proposals affecting the 2001 AUMF introduced late in the 113th Congress and early in the 114th Congress have been included in proposals for a new authorization for use of military force against the Islamic State or are otherwise related to that crisis.³⁸ Current proposals specifically concerning the 2001 AUMF include the following:

- On February 2, 2015, Representative Adam Schiff introduced the Authorization for Use of Military Force Against ISIL Resolution (H.J.Res. 27). The resolution would repeal the 2001 AUMF three years after the resolution's enactment.
- On February 10, 2015, Representative Barbara Lee introduced the Comprehensive Solution to ISIL Resolution (H.J.Res. 30), which would repeal the 2001 AUMF as well as the 2002 AUMF. Repeal would become effective 60 days after enactment.
- Senator Ben Cardin introduced the Sunset of the 2001 Authorization for Use of Military Force Act (S. 526) on February 12, 2015. The bill would repeal the 2001 AUMF three years upon enactment.
- On March 4, 2015, Representative Barbara Lee introduced the Repeal of the Authorization for Use of Military Force (H.R. 1303), which would repeal the 2001 AUMF 180 days after enactment.

Past enacted legislation concerning the 2001 AUMF has generally confirmed executive branch claims of authority under the 2001 AUMF, such as provisions included in the 2006 and 2009 acts related to military commissions,³⁹ and the National Defense Authorization Act, Fiscal Year 2012 (NDAA 2012; P.L. 112-81). Section 1021 of the NDAA 2012 includes the term "associated forces" with regard to detentions of terrorist suspects; some claim that term has been effectively adopted into the authorities of the 2001 AUMF to justify broader authority for military action against loosely affiliated groups.

³⁸ See CRS Report R43760, *A New Authorization for Use of Military Force Against the Islamic State: Issues and Current Proposals in Brief*, by Matthew C. Weed.

³⁹ Military Commissions Act of 2006 (P.L. 106-399); Military Commissions Act of 2009 (Title XVIII of the National Defense Authorization Act for Fiscal Year 2010, P.L. 111-84).

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