

Q&A: The 2001 AUMF and Proposals for a New AUMF

- ✓ **Question:** What is an Authorization for the Use of Military Force?
- ✓ **Answer:** An Authorization for the Use of Military Force (“AUMF”) is the primary vehicle by which Congress has, in recent history, authorized the President to use military force to respond to external threats. While not technically declarations of wars, AUMFs have often been construed to provide domestic legal authority to use wartime military powers.¹

- ✓ **Question:** What does the 2001 AUMF say? What does it mean?
- ✓ **Answer:** The 2001 AUMF, passed into law days after the 9/11 attacks, provides 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 2001 AUMF has been construed by the executive branch and courts as providing authority for the war in Afghanistan, detention operations in Afghanistan and Guantanamo, and the targeted killing program.

- ✓ **Question:** What groups are covered by the 2001 AUMF?
- ✓ **Answer:** The Obama administration has construed the 2001 AUMF as covering al Qaeda, the Taliban, and “associated forces” that are engaged in hostilities against the United States—a formulation that has been accepted by Congress for purposes of military detention. While the Obama administration has not said which groups count as “associated forces,” it has said such groups would need to meet the following two requirements: (1) organized, armed group that has entered the fight alongside al Qaeda, and (2) co-belligerent with al Qaeda in hostilities against the United States or its coalition partners.² It is likely that Al Qaeda in the Arabian Peninsula (AQAP) has attained the status of an “associated force” (or is otherwise considered part of al Qaeda) under the 2001 AUMF, in the view of the Administration, because of operational ties to core Al Qaeda and hostilities directed at the United States and coalition partners. Experts say that many other groups that claim links to al Qaeda have neither established substantial operational connections with al Qaeda nor engaged in hostilities against the United States. They may not be covered by the AUMF, though the Obama administration has not publicly stated whether any has attained the status of an “associated force.”³

- ✓ **Question:** What about groups that do not fall within the 2001 AUMF? Is a new or updated AUMF necessary to allow the use of military force against threats from these groups?
- ✓ **Answer:** No. Under Article II of the Constitution, the President retains more than sufficient authority to use military force to repel any imminent threats from groups that are not covered by the 2001 AUMF. Such uses of force are common in our nation’s history, and have been used several times in response to terrorist threats. Should a threat rise to the level of armed conflict, Congress has demonstrated ability to act with alacrity to consider force authorization.

¹ Jennifer K. Elsea & Richard F. Grimmett, Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications, Congressional Research Service (March 17, 2011), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl31133.pdf>.

² Jeh Charles Johnson, General Counsel of the Department of Defense, Dean’s Lecture at Yale Law School: “National security law, lawyers, and lawyering in the Obama administration” (February 22, 2012), available at <http://www.cfr.org/national-security-and-defense/jeh-johnsons-speech-national-security-law-lawyers-lawyering-obama-administration/p27448>.

³ See also Greg Miller & Karen DeYoung, Administration Debates Stretching 9/11 Law To Go After New al-Qaeda Offshoots, WASH. POST, Mar. 7, 2013, at A1.

- ✔ **Question:** The 2001 AUMF is now 12 years old. It was designed for a different threat in a different context. Doesn't it make sense to update the AUMF to match today's threat environment?
- ✔ **Answer:** Congress has never passed a new AUMF without a request from the President to do so. So far, the President has not made any such request, and in 2011 the White House strongly objected to a new AUMF proposal on grounds that it would re-characterize the scope of the armed conflict and confuse standards governing counterterrorism operations.⁴ Congress should only "update" the AUMF if it truly intends to take the nation to war against any groups that the new AUMF would cover. Many so-called "emerging" terrorist threats—such as Boko Haram in Nigeria—have primarily local or regional ambitions and do not pose the same level of threat to the United States that al Qaeda did after the 9/11 attacks. Counterterrorism experts have advised that emerging terrorist threats are best dealt with by local security partners and by prioritizing diplomacy, law enforcement, and intelligence, reserving the use of military force.
- ✔ **Question:** Wouldn't "updating" the 2001 AUMF provide additional congressional oversight and transparency?
- ✔ **Answer:** Not necessarily. Unlike mechanisms such as the War Powers Resolution, AUMFs delegate substantial authority and discretion to the President to use force without prior congressional approval. Congress has many tools at its disposal—reporting requirements, hearings, funding restrictions, requests for information, etc.—to promote congressional oversight of ongoing executive branch activities, even during times of war. Congress should consider strengthening these tools as they relate to uses of force under the 2001 AUMF.
- ✔ **Question:** What are the risks associated with passing a new AUMF?
- ✔ **Answer:** A new AUMF could provide this or a future administration with authority to engage in prolonged, costly wars without prior congressional approval. A new AUMF could also undermine cooperation with allies who do not support the use of a "war" framework for counterterrorism. Further, if a new AUMF were to extend wartime authorities outside of active zones of combat to groups not engaged in hostilities against the United States, it would risk violating international law.
- ✔ **Question:** Would a new AUMF comply with international law?
- ✔ **Answer:** The answer in part depends on the particulars of any new AUMF. A new AUMF that was directed at "emerging threats" from groups that have not attacked the United States or do not present an imminent threat of attack would not be in compliance with international law for two reasons. First, international law only permits uses of force in self-defense from an armed attack or imminent threat of armed attack. It does not permit pre-emptive uses of force. As former Department of State Legal Adviser Harold Koh has said, "[a new AUMF would not] make actions in preemptive self-defense lawful under international law."⁵ Second, a new AUMF that authorizes wartime activities outside of active zones of combat against groups that are not currently engaged in hostilities with the United States would violate the laws of war (also known as "International Humanitarian Law") because the laws of war only apply in situations that rise to the level of armed conflict.

⁴ Statement of Administration Policy on H.R. 1540—National Defense Authorization Act for the Fiscal Year 2012 (May 24, 2011), available at http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr1540r_20110524.pdf; see also White Paper on Detainee Provisions in the National Defense Authorization Act ("By "updating" the 2001 AUMF, the legislation could encourage the view – held rightly or wrongly – that the United States is seeking to expand the scope of the armed conflict, make that conflict permanent, and/or claim authorities unknown to international law. Moreover, many international observers will wonder why the United States has chosen this time to reaffirm a state of armed conflict with the Taliban, given efforts to promote transition and reconciliation in Afghanistan."), available at http://www.politico.com/static/PPM156_detainee_provisions.html.

⁵ Harold Hongju Koh, "How to End the Forever War?", Oxford Union, Oxford, United Kingdom (May 7, 2013), available at <http://www.lawfareblog.com/2013/05/harold-kohs-speech-at-the-oxford-union/>.