RESEARCH REPORT

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Secret War

How the U.S. Uses Partnerships and Proxy Forces to Wage War Under the Radar

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Introduction

Afghanistan, Iraq, maybe Libya. If you asked the average American where the United States has been at war in the past two decades, you would likely get this short list. But this list is wrong — off by at least 17 countries in which the United States has engaged in armed conflict through ground forces, proxy forces, or air strikes.[1]

For members of the public, the full extent of U.S. war-making is unknown. Investigative journalists and human rights advocates have cobbled together a rough picture of where the military has used force, but they rely on sources whose information is often incomplete, belated, or speculative. There is only so much one can learn about the United States' military footprint from trawling Purple Heart ceremonies, speaking with retired military personnel, and monitoring social media for reports of civilian harm.[2]

Congress's understanding of U.S. war-making is often no better than the public record. The Department of Defense provides congressionally mandated disclosures and updates to only a small number of legislative offices. Sometimes, it altogether fails to comply with reporting requirements, leaving members of Congress uninformed about when, where, and against whom the military uses force. After U.S. forces took casualties in Niger in 2017, for example, lawmakers were taken aback by the very presence of U.S. forces in the country.[3] Without access to such basic information, Congress is unable to perform necessary oversight.

It is not just the public and Congress who are out of the loop. The Department of Defense's diplomatic counterparts in the Department of State also struggle to understand and gain insight into the reach of U.S. hostilities. Where congressional oversight falters, so too does oversight within the executive branch.

This proliferation of secret war is a relatively recent phenomenon, and it is undemocratic and dangerous. The conduct of undisclosed hostilities in unreported countries contravenes our constitutional design. It invites military escalation that is unforeseeable to the public, to Congress, and even to the diplomats charged with managing U.S. foreign relations. And it risks poorly conceived, counterproductive operations with runaway costs, in terms of both dollars and civilian lives. So how did we get here?

Two sources of the government's ability to wage war in secret are already the subject of much discussion. The first is the 2001 Authorization for Use of Military Force (AUMF), which was enacted in the wake of the September 11 attacks. Notwithstanding the limitations in its text, the 2001 AUMF has been stretched by four successive administrations to cover a broad assortment of terrorist groups, the full list of which the executive branch long withheld from Congress and still withholds from the public. The second is the covert action statute, an authority for secret, unattributed, and primarily CIA-led operations that can involve the use of force.[4] Despite a series of Cold War–era executive orders that prohibit assassinations, the covert action statute has been used throughout the war on terror to conduct drone strikes outside areas of active hostilities.

But there is a third class of statutory authorities that enable undisclosed hostilities yet have received little public attention: security cooperation authorities. Congress enacted these provisions in the years following September 11 to allow U.S. forces to work through and with foreign partners. One of them, now codified at 10 U.S.C. § 333, permits the Department of Defense to train and equip foreign forces anywhere in the world. Another, now codified at 10 U.S.C. § 127e, authorizes the Department of Defense to provide "support" to foreign forces, paramilitaries, and private individuals who are in turn "supporting" U.S. counterterrorism operations.

While training and support may sound benign, these authorities have been used beyond their intended purpose. Section 333 programs have resulted in U.S. forces pursuing their partners' adversaries under a strained interpretation of constitutional self-defense. Section 127e programs have allowed the United States to develop and control proxy forces that fight on behalf of and sometimes alongside U.S. forces. In short, these programs have enabled or been used as a springboard for hostilities.

The public and even most of Congress is unaware of the nature and scope of these programs. The Department of Defense has given little indication of how it interprets §§ 333 and 127e, how it decides which § 333 partner forces to defend, and where it conducts § 127e programs. When U.S. forces operating under these authorities direct or engage in combat, the Department of Defense often declines to inform Congress and the public, reasoning that the incident was too minor to trigger statutory reporting requirements.

Notwithstanding the challenges Congress has faced in overseeing activities under §§ 333 and 127e, Congress recently expanded the Department of Defense's security cooperation authorities. Section 1202 of the National Defense Authorization Act (NDAA) for 2018 largely mirrors § 127e, but instead of supporting U.S. counterterrorism efforts, the partner forces it covers are intended to support U.S. "irregular warfare operations" against "rogue states," such as Iran or North Korea, or "near-peers," such as Russia and China. Far beyond the bounds of the war on terror,

§ 1202 may be used to engage in low-level conflict with powerful, even nuclear, states.

Through these security cooperation provisions, the Department of Defense, not Congress, decides when and where the United States counters terrorist groups and even state adversaries. Moreover, by determining that "episodic" confrontations and "irregular" warfare do not amount to "hostilities," the Department of Defense has avoided notification and reporting requirements, leaving Congress and the public in the dark.[5]

This report delves into the legal frameworks for conducting and overseeing security cooperation and identifies how those frameworks have inaugurated the modern era of secret war. It draws on public reporting and materials prepared by the Departments of Defense and State, as well as interviews with administration officials, congressional staffers, and journalists. Part I provides a brief history and overview of constitutional war powers and congressional oversight of the military; part II analyzes the suite of authorities under which security cooperation takes place; and part III identifies the constitutional defects of this secret war-making and proposes reforms to increase transparency and prevent abuse.

I. History and Overview of Constitutional War Powers

In the U.S. constitutional system, authority over military affairs is divided between Congress and the president. The Constitution explicitly grants Congress the power to declare war and the power to create, fund, and regulate the military. The Constitution also vests the president with a general "executive power" and provides that the president shall be the commander in chief of the military.

Based on Congress's responsibility for declaring war and making military appropriations, the Constitution was long understood to afford Congress substantial control over where and how the military operates.[6] Furthermore, a special limitation on the length of army appropriations — the Constitution's Two-Year Clause — was understood to demand Congress's regular and informed review of military affairs.[7] The president's role, by contrast, was narrow. Per the Supreme Court, the "power and duty" of the president was to "command [] the forces" and "direct the conduct of campaigns" after Congress had already "provide[d] by law for carrying on war."[8] Only in narrow circumstances, when defensive force was necessary to "repel sudden attacks" on U.S. soil and persons, was the Constitution understood to empower the president to act without congressional authorization.[9]

As discussed below, this balance of power was respected for most of the nation's history. But it began to unravel during the Cold War, a trend that has accelerated since September 11.

Early History

The precedent for congressional control and oversight of military operations was established early. Just 10 years after the Constitution's adoption, during the Quasi-War with France, Congress exercised its authority to limit the geographic scope of U.S. naval activity. Denying a request from President Adams, Congress restricted American vessels to defending the coastline rather than cruising the high seas and seeking confrontations with French vessels.[10] Congress additionally specified how American vessels would be armed, manned, and even provisioned — rations included one pound of bread each day and four ounces of cheese every other.[11]

Adams acknowledged Congress's wartime enactments, and the Supreme Court enforced them when American vessels exceeded their scope.[12] The Supreme Court affirmed Congress's power to wage a war "limited in place, in objects, and in time."[13]

Early presidents were careful not to overstep their authority, even when they acted unilaterally to defend the country from foreign threats. In 1801, while Congress was out of session, President Jefferson invoked his inherent constitutional authority to prevent the Barbary States from detaining and ransoming American merchants. The day after Congress returned, however, Jefferson dutifully apprised Congress of his deployment of American vessels to the Mediterranean, the circumstances that had given rise to the deployment, and the conduct of the vessels. He then sought and received Congress's express permission to "go beyond the line of defense" in countering the Barbary States.[14]

Presidential respect for Congress's power to authorize or foreclose American military action, and transparency about military operations, persisted well past the Founding Era. Half a century after Jefferson repelled the Barbary States, President Lincoln followed his model in countering the Confederacy. The Civil War began when Congress was out of session, with the Confederacy's bombardment of Fort Sumter. Lincoln called for a special legislative session and, as he waited for Congress to return, readied the nation for war and imposed a naval blockade to close the Confederacy's ports. When Congress reconvened, Lincoln publicly outlined what he had done and sought retroactive and continuing congressional approval for it.[15] To aid Congress in its deliberations, he and his administration promised to "stand ready to supply omissions, or to communicate new facts considered important for [Congress] to know."[16]

Even when American lives and the unity of the country were at stake, Jefferson and Lincoln acknowledged the limits of presidential unilateralism and embraced accountability to Congress. They understood that transparency enabled Congress to fulfill its constitutional role of legislating on military affairs and determining whether, when, and how war could be waged.

The Cold War

Even as the United States grew in size and military might, Jefferson's and Lincoln's understanding of the constitutional balance of powers prevailed throughout the 19th century and into the early decades of the 20th. The Cold War, however, ushered in a shift in presidential practice regarding Congress's authority to declare war and conduct military oversight.[17]

In 1950, President Truman unilaterally committed American forces to the Korean War, enmeshing the United States in a three-year conflict without prior congressional approval. Departing from the established balance of powers, Truman asserted a presidential prerogative to use the military "in the broad interests of American foreign policy."[18] President Eisenhower followed in Truman's footsteps, using the newly created CIA to engage in unauthorized and undisclosed hostilities in Latin America and Southeast Asia.

Eisenhower's secret war in Laos — a war that his successors would broaden in size and scope — was particularly noteworthy. The CIA's control of a "vast proxy army" of tens of thousands of Laotians, combined with its bombing campaign in support of those proxies, was a lurch, not a step, toward undoing the balance of powers envisioned in the Constitution and implemented by Jefferson and Lincoln.[19] Congress had not approved the "large scale operations," and legislators eventually excoriated the agency for acting "considerably beyond" its authority.[20] But Congress's condemnation came a full decade after the start of the secret war, as journalists finally broke the news on Laos by using "scraps of [] information picked up from irregular sources."[21]

Laos exemplified the dangers of secrecy in military affairs: by frustrating Congress's ability to conduct oversight, the president could usurp Congress's power to decide when, where, and how war would take place. The president could render Laos the "most heavily bombed nation in history," and Congress and the American public would scarcely know it.[22]

Perhaps because the constitutional balance of powers relied so heavily on military transparency, secrecy was on the rise. In 1960, Congress assessed that the Eisenhower administration had spurred "a growth of secrecy in the Federal Government unparalleled in American history," using "the excuse of military security" to conceal where U.S. forces were and what they were doing.[23] The trend accelerated under subsequent administrations. In 1969, President Nixon expanded the Vietnam War into neutral Cambodian territory without informing Congress, let alone requesting authorization. Congress learned of the incursion four years later, after an Air Force major blew the whistle on how he had "deliberately falsified the reports of at least two dozen secret B-52 [bomber] missions over Cambodia."[24]

The secret war in Cambodia pushed Congress to enact the War Powers Resolution, over Nixon's veto. In accordance with the Constitution's text and history, the War Powers Resolution reaffirmed the president's obligation to seek congressional authorization before engaging U.S. forces in hostilities beyond the line of defense.[25] It also required the president to notify and consult with Congress whenever combat-equipped U.S. forces were deployed and when they engaged in hostilities.[26] Consistent with Congress's power to limit war "in place, in objects, and in time,"[27] the War Powers Resolution set forth special procedures for Congress to terminate hostilities and compel the withdrawal of U.S. forces from the field.[28] Even without Congress's use of these special procedures, the War Powers Resolution directed that the president "shall terminate" any unauthorized hostilities after 60 days or, in cases of "unavoidable military necessity," 90 days.[29]

Presidents were not eager to comply with these new measures to rein in unilateralism and restore transparency. Immediately, Nixon challenged the constitutionality of the War Powers Resolution.[30] Subsequent administrations echoed his arguments while adopting strained interpretations of the law that neutered its reporting provisions and limitations on unauthorized hostilities. Thus, President Reagan maintained that his administration had acted in a manner consistent with the War Powers Resolution, even as it operated unauthorized paramilitary groups against Nicaragua's government and launched an unauthorized invasion of Grenada.[31]

But Congress did not let up. Lawmakers repeatedly brought suit under the War Powers Resolution to challenge unauthorized hostilities, whether those undertaken by Reagan or later by President Clinton in the former Yugoslavia. Congress also enacted legislation such as the Boland Amendments, which exercised Congress's military appropriations power to prohibit the use of funds for "supporting, directly or indirectly, military or paramilitary operations in Nicaragua."[32] During the Clinton administration, Congress enacted similar funding prohibitions to restrict the use of U.S. forces in Bosnia and Herzegovina, Haiti, Rwanda, and Somalia.[33]

September 11 and Its Aftermath

September 11 ushered in a new era of deference to the president. Congress quieted its efforts to preserve its constitutional role, and the War Powers Resolution lay dormant — even as new military authorities and technologies expanded the president's power to deploy the military without explicit congressional authorization or even knowledge.

Within a week of the attacks, Congress passed the 2001 AUMF to allow President George W. Bush to pursue those who had "planned, authorized, committed, or aided the terrorist attacks."[34] Shortly thereafter, the Bush administration concluded that the terrorist organization al-Qaeda had perpetrated the attacks and that the Taliban, the political leadership of Afghanistan, were providing al-Qaeda with safe harbor. So began the war in Afghanistan.

But the 2001 AUMF was not limited to Afghanistan. Indeed, it had no geographic or temporal limitation. As Bush said on September 20, 2001, two days after signing

the 2001 AUMF into law, "There are thousands of terrorists in more than 60 countries. . . . Our war on terror begins with al-Qaeda, but it does not end there." Contrary to the stated purpose of the 2001 AUMF — preventing those responsible for September 11 from perpetrating future acts of terrorism against the United States — Bush's purpose was to ensure that "every terrorist group of global reach has been found, stopped, and defeated."[35]

This vision of the war on terror has superseded the plain text of the 2001 AUMF. Successive administrations have interpreted the 2001 AUMF to cover al-Qaeda's "associated forces," despite those words not appearing in the statute. The executive branch has designated a broad array of terrorist groups, including those that did not yet exist on September 11, as associated forces. In doing so, presidents have unilaterally expanded the scope of the war on terror to organizations like al-Shabaab in Somalia, which was founded in 2006 and which threatens targets in East Africa, not the United States.

For much of the war on terror, Congress was unaware of the full list of associated forces or countries that the executive branch asserted were covered by the 2001 AUMF.[36] Only in 2013 did President Obama provide Congress with a list of such forces and describe the executive branch's rationale for designating them.[37] Even then, the list did not include the countries in which the Department of Defense countered adversaries. The Trump administration, too, refused to provide information on the geographic scope of the war on terror — despite Congress's enactment of a law specifically demanding it.[38] In March 2022, after years of delay, the Biden administration finally provided the congressional foreign affairs[39] and defense committees with a series of overdue reports on where and against whom U.S. forces have fought. These reports had lengthy classified annexes, were not provided to all congressional offices, and are not publicly available.

The AUMF, though, was not the end of the matter. On the day before he signed the 2001 AUMF into law, President Bush made a broad finding under 50 U.S.C. § 3093, the covert action statute, to grant the CIA "exceptional authorities" to kill or capture al-Qaeda targets around the world.[40] This finding granted the CIA powers "identical" to those wielded by the Department of Defense under the 2001 AUMF, including the "direct use of lethal force."[41] By 2011, the CIA controlled a "3,000 man covert army in Afghanistan,"[42] had used new drone technologies to conduct covert airstrikes in Yemen and Pakistan, and had killed upward of 2,000 militants and civilians.[43] Twenty percent of CIA analysts were dedicated to identifying and locating targets for future drone strikes.[44] Ostensibly a civilian agency, the CIA had the authorities and tools to act as a military force.

Even though the roles of the CIA and the military have converged, the executive branch maintains that the CIA is not subject to the same statutory reporting regime as the Department of Defense. When the CIA conducts hostilities, whether by directing a proxy force or conducting an airstrike, its hostilities are not reported to all of Congress or to the public. Indeed, they are not even reported to the congressional defense or foreign affairs committees. Instead, CIA activities are reported through highly classified notifications to the congressional intelligence committees. In some cases, the president limits these notifications to just eight senior lawmakers.[45]

Building on the 2001 AUMF and the covert action statute, Congress has enacted security cooperation statutes to allow the military to "support" foreign forces whose objectives align with those of the United States. The ways in which these authorities have enabled military operations without specific congressional authorization and with limited oversight are the focus of this report and detailed in the next part.

Finally, the creation, use, and misuse of these statutory authorities came on the heels of a dramatic increase in the president's claimed authority to conduct military operations without congressional authorization. In the years leading up to September 11, executive branch lawyers formulated a novel theory of self-defense, under which the president could initiate hostilities just shy of an all-out war to protect "important national interests."[46] The George H. W. Bush and Clinton administrations cited this theory in support of unilateral interventions in Somalia and Bosnia and Herzegovina. And the Obama and Trump administrations expanded the theory, using it as the basis for unilateral interventions in Libya and Syria.

These legal authorities — the 2001 AUMF, the presidential finding under the covert action statute, the security cooperation provisions, and the newly expanded conception of constitutional self-defense — coincided with the development of drone and cyber technologies, so-called light-footprint means of using force against adversaries without a clear U.S. presence.

Able to operate under these new authorities and with these new technologies, the Department of Defense, like the CIA, had the tools to conduct hostilities in ways that were nearly imperceptible to Congress and the public. So it did. The military extended the reach of the war on terror across the globe, combating adversaries Congress could not have foreseen in places ranging from the Philippines to Tunisia. At times, it became clear to Congress that the scope of these hostilities far exceeded what it had authorized or even understood.[47] But instead of invoking the War Powers Resolution or passing funding limitations,[48] Congress has allowed this unaccountable behavior to persist.[49]

II. Security Cooperation Authorities

According to Ambassador Stephen Schwartz, the United States "built" the Puntland Security Force in Somalia.[50] In the years following September 11, CIA agents recruited, trained, and paid fighters for the force.[51] After a decade, the CIA transferred management of the force to the Department of Defense, to which the force's 600 fighters reported directly.[52] For another decade, these fighters combated al-Shabaab, an al-Qaeda affiliate, and the Islamic State in Somalia (ISS) on behalf of and alongside U.S. special operations forces.[53] They were largely independent of the Somali government, despite being an elite armed brigade and one of Somalia's most capable special operations units.[54] And their relationship with U.S. forces was long kept secret, with U.S. officials disavowing the presence of military advisers in Somalia until 2014.[55]

In late 2020, President Trump ordered the withdrawal of U.S. forces from Somalia, leaving the Puntland Security Force on its own for the first time in its history. Without guidance — or salaries — from the Department of Defense, and without strong ties to the Somali government, the Puntland Security Force was rudderless. Its forces abandoned the fight against al-Shabaab and ISS, taking up arms against the local government instead.[56] A fight between Somali forces and the Puntland Security Force ensued, injuring civilians, shutting down schools, and rendering Puntland's commercial capital a ghost town.[57]

Undeterred, the Department of Defense asked President Biden to redeploy the military to Somalia, touting the supposed effectiveness of its work with local forces.[58] In addition to the Puntland Security Force, the Department of Defense wanted to continue its in-person direction of the Danab Brigade, a force of 1,000 fighters that the United States had "funded, recruited, trained, and partnered with" since 2011.[59] The Danab Brigade, for its part, had been accused of civilian harm and arbitrary arrests,[60] some of which allegedly took place on missions directed and supervised by U.S. forces.[61] And in 2017, U.S. forces logged their first combat death in Somalia since the 1990s while conducting a raid alongside the Danab Brigade.[62] President Biden approved the redeployment in mid-2022.[63]

Under what legal authority did the Department of Defense develop these proxy forces? The executive branch designated al-Shabaab an associated force of al-Qaeda, and thus a legitimate target under the 2001 AUMF, in 2016.[64] It made the same determination for ISIS in 2014,[65] and it has never publicly declared ISS an associated force.[66] In other words, the Department of Defense developed and fought alongside the Puntland Security Force and the Danab Brigade *before* the AUMF was deemed to authorize hostilities against al-Shabaab and ISIS, let alone ISS. It could not have relied on the AUMF, at least not primarily.[67]

Instead, the military's work with the Puntland Security Force and the Danab Brigade has been categorized as security cooperation under 10 U.S.C. §§ 333 and 127e, two authorities that Congress enacted early in the war on terror.[68] Using § 333, the Department of Defense sent U.S. forces to train and equip the Danab Brigade, which is a part of the Somali National Army.[69] Through § 127e, the Department of Defense trained and equipped the Puntland Security Force, put the Puntland Security Force and Danab Brigade on the United States' payroll, and directed both forces to pursue U.S. military targets and objectives.[70]

The Department of Defense is unequivocal that it does not treat §§ 333 and 127e as authorizations for use of military force.[71] The reality is not so clear. After all, U.S. forces have used these authorities to create, control, and at times engage in combat alongside groups like the Puntland Security Force and Danab Brigade.

This part investigates the text, implementation, and limitations of §§ 333 and 127e, explaining how these provisions have come to serve, by themselves or in combination with other authorities, as de facto authorizations for use of military force. It also addresses § 1202 of the 2018 NDAA, a new security cooperation provision that was modeled on § 127e and is used to counter state actors and their affiliates. For each of these authorities, this part discusses the relevant reporting regimes and the flow of information, or lack thereof, from the Department of Defense to Congress, other executive branch stakeholders, and the public.

10 U.S.C. § 333: The Global Train-and-Equip Authority

10 U.S.C. § 333,[72] often referred to as the "global train-and-equip authority," states:

> The Secretary of Defense is authorized to conduct or support . . . programs to provide training and equipment to the national security forces of . . . foreign countries for the purpose of building the capacity of such forces to conduct one or more of the following:
>
> (1) Counterterrorism operations.
> (2) Counter-weapons of mass destruction operations.
> (3) Counter-illicit drug trafficking operations.
> (4) Counter-transnational organized crime operations.
> (5) Maritime and border security operations.
> (6) Military intelligence operations.
> (7) Air domain awareness operations.
> (8) Operations or activities that contribute to an existing international coalition operation . . . .
> (9) Cyberspace security and defensive cyberspace operations.

It goes on to explain that § 333 programs can involve "the provision and sustainment of defense articles, training, defense services, supplies (including consumables), and small-scale construction."

On its face, § 333 appears modest in its scope. It authorizes the Department of Defense to choose foreign states' forces to receive U.S. assistance. The kind of assistance the Department of Defense can provide is limited and does not include running missions or combating adversaries. "Training" and "defense services" are defined as providing instruction and repairing equipment.[73] The Department of Defense hews to and works within these definitions.[74]

Moreover, § 333 programs are not secret. Information about § 333 programs is often unclassified,[75] and the Department of Defense occasionally issues public descriptions and evaluations of them.[76] The Department of Defense regularly apprises Congress of its § 333 programs through reports, notifications, and briefings. And it works closely with the Department of State in conceptualizing new programs.

The risk posed by § 333 is less about what the provision itself authorizes and more about how the authority can be used in combination with the executive branch's ever-growing notion of its constitutional powers. Throughout the war on terror, presidents have claimed a broad right to act in self-defense, including the collective self-defense of U.S. partner forces. This supposed right has the potential to transform the § 333 authority to choose *partner forces* into an authority to choose *adversaries* — even in the absence of congressional authorization.

While this report focuses on § 333, this provision is not the only authority that allows the Department of Defense to deploy U.S. forces to train and equip partners. Section 333 simply is the broadest of these train-and-equip authorities, affording the department wide latitude to initiate programs in the countries and with the partners of its choosing. The concerns raised by § 333, as discussed herein, may also be raised by similar programs under train-and-equip authorities that are more limited in scope.[77]

Section 333 in Practice and the Potential for Unauthorized Hostilities

In 2018, the Department of Defense ran or proposed § 333 programs in at least 52 countries across Africa, Asia, Europe, and Latin America.[78] Many of these programs aimed to build foreign forces' capacity to counter terrorist threats: a $27.8 million program to equip the Jordanian Border Guard with night vision devices and small arms; a $12.9 million program to train the Indonesian National Police on various weapons and medical equipment; a $10.1 million program to give the Kosovo Security Force vehicles and communications devices. Other programs, like a $22.1 million program in Ukraine, sought to enhance foreign forces' capacity to conduct military intelligence operations or manage border security.[79]

These programs were not operational. They did not authorize U.S. forces to accompany foreign forces on "real world" missions, off a base.[80] Instead, they allowed U.S. forces to transfer military equipment, repair equipment, and train partners on how to use that equipment. Congressional overseers' primary concerns about the § 333 authority centered on costs and efficiency.[81]

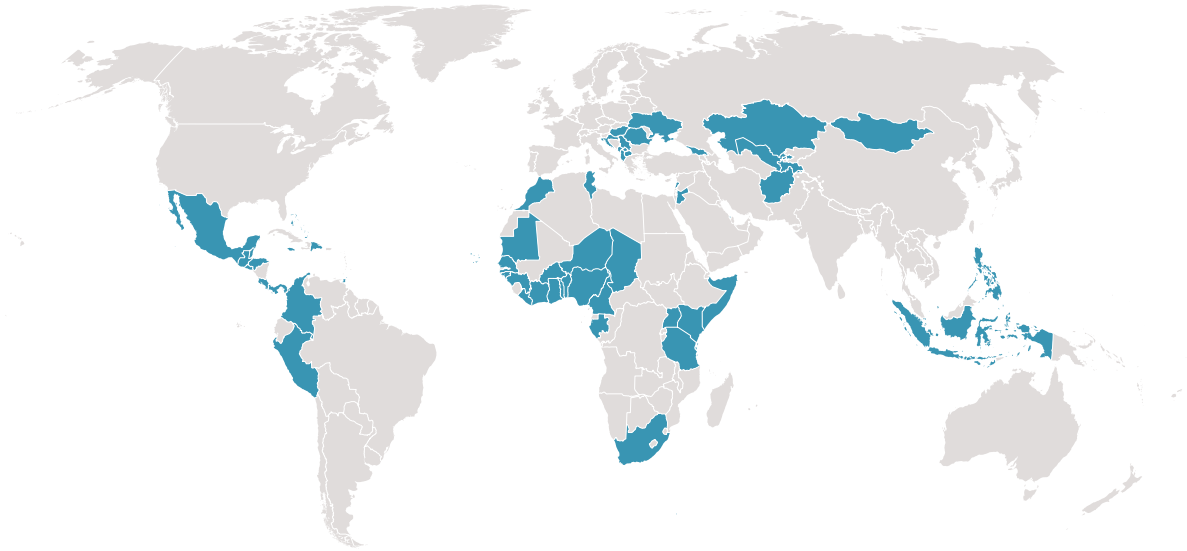
Yet these programs have resulted in U.S. forces engaging in combat — including against groups that the Department of Defense has no authority to target under any AUMF. By running train-and-equip programs in locations where U.S forces and their partners have foreseeably come under fire, the department has been able to rely on a broad view of constitutional authority to use force in "self-defense" without explicit congressional authorization.

To elaborate: the president has an inherent constitutional authority to repel sudden attacks on U.S. territory and persons. Based on this authority, the Department of Defense has established the concept of "unit self-defense," or the defense of U.S. forces in a given area.[82] Of course, U.S. forces must be able to protect themselves when confronted by adversaries. The concern arises, however, when U.S. forces are deployed to areas where § 333 partners are actively combating their own adversaries, who may not be covered by an AUMF. It is entirely predictable that U.S. forces may encounter or even be threatened by these

FIGURE 1

Train-and-Equip Programs

This map reflects a comprehensive list of § 333 programs proposed or running as of mid-2018. It may not reflect the full range of countries in which recent § 333 programs have been run.



Countries with § 333 programs: Afghanistan, Albania, the Bahamas, Bahrain, Belize, Benin, Burkina Faso, Cabo Verde, Cameroon, Chad, Colombia, Costa Rica, Côte d'Ivoire, Croatia, Dominican Republic, El Salvador, Gabon, Georgia, Ghana, Guatemala, Guinea, Guinea-Bissau, Honduras, Hungary, Indonesia, Jamaica, Jordan, Kazakhstan, Kenya, Kosovo, Lebanon, Liberia, Mauritania, Mexico, Mongolia, Montenegro, Morocco, Niger, Nigeria, North Macedonia, Panama, Peru, Philippines, Romania, Senegal, Serbia, Somalia, South Africa, Tajikistan, Tanzania, Togo, Trinidad and Tobago, Tunisia, Uganda, Ukraine, Uzbekistan

adversaries. Nothing in the Constitution permits the president to position U.S. forces in close proximity to potential adversaries and then claim self-defense when those adversaries open fire.

More troubling still, the Department of Defense argues that it has an inherent constitutional authority to engage in "collective self-defense," or the defense of designated foreign groups allied with the United States, without congressional authorization.[83] There is no basis for this argument in the Constitution's text or history.[84] Moreover, the department's concept of collective self-defense extends far beyond protecting partner forces in combined operations against common adversaries. Under the department's interpretation, it may combat a partner force's adversary even when there is no clear threat to U.S. personnel.[85]

Both unit and collective self-defense theories have enabled U.S. forces on train-and-equip assignments to engage in combat, despite the absence of congressional authorization. Nowhere is this more apparent than in the Philippines, where the Department of Defense has spent over $3.9 billion since 2001 on § 333 and related programs to help the Philippine military counter Abu Sayyaf and Jemaah Islamiyah[86] — terrorist groups that have never been publicly identified as "associated forces" under the 2001 AUMF.[87]

In the Philippines, U.S. forces were explicitly prohibited from engaging in combat, save for exercises of self-defense.[88] Nevertheless, by establishing forward operating bases in the "hotbed" of terrorist activity and then patrolling to secure those bases, U.S. forces predictably ended up exchanging fire with adversaries.[89] And when members of the Philippine military came under fire, U.S. forces would rescue them.[90] In 2011, Al Jazeera discovered that U.S. forces had engaged in direct combat with numerous groups hostile to the Philippine government, not just Abu Sayyaf or Jemaah Islamiyah.[91] This broad implementation of self-defense raised speculation that U.S. forces were breaking their rules of engagement and overstepping their authority.[92]

The Philippines is not the only country in which the Department of Defense has established risky forward operating bases for work with partner forces.[93] The war on terror prompted the United States to shift from large, traditional bases toward smaller, secretive sites located closer to potential adversaries.[94] In addition to those in the Philippines, researchers and investigative journalists have uncovered at least 34 forward operating bases in more than a dozen countries across Africa.[95] The Department of Defense views security patrols around these bases as a "very real part of the mission to help protect . . . the area."[96] The department

has also allowed U.S. forces to engage in collective self-defense to rescue partners in Africa from adversaries not covered by the 2001 AUMF.[97]

At least in the Philippines and Africa, the Department of Defense has seldom had occasion to engage in unit self-defense or collective self-defense against state actors, which may have a greater capacity to retaliate or escalate militarily. This cannot be taken for granted in other contexts, where the Department of Defense's partners are fighting foreign states or their proxies. Presidents Trump and Biden have both relied on unit and collective self-defense to directly combat Iran-backed militia groups in Iraq and Syria.[98] Separately, a congressional staffer suggested that U.S. forces running § 333 programs in Eastern Europe would have the authority to respond if they discovered a Russian threat while on assignment.[99]

The ability to pair § 333 and an expansive conception self-defense not only increases the likelihood of hostilities in places and against enemies Congress has not approved. It also creates the potential for intentional abuse. Although there is no evidence that this has happened, little prevents the Department of Defense from designing a § 333 program for the purpose of engaging an adversary without seeking congressional authorization. The department could simply launch a program to train and equip foreign partners that *are* fighting that adversary, thus placing U.S. forces in a position where combat is likely to occur. At that point, the department's broad interpretation of constitutional self-defense could serve as the legal justification for U.S. military operations.

The risks of § 333 are not limited to circumstances in which the Department of Defense invokes constitutional self-defense. Section 333 can also overlap with the department's broad reading of its AUMF authorities in ways that increase the chances of U.S. forces engaging in combat.

The overlap between § 333 and the 2001 AUMF explains the 2017 Niger incident, wherein U.S. forces deployed to run a § 333 program were ambushed and took casualties in the field. Although the § 333 team was primarily engaged in train-and-equip activities on a base, a standing order[100] — one that, according to a former senior Department of Defense official, was "kind of pursuant to the [2001] AUMF"[101] — allowed it to pursue targets off the base. Using this overlapping operational authority, the § 333 team and its Nigerien trainees undertook a mission to kill or capture a leader of the Islamic State in the Greater Sahara (IS-GS) near the border with Mali.[102] The mission failed. The § 333 team and its partners lost their target and were confronted by IS-GS fighters outside the border town of Tongo Tongo. Four Americans and four Nigerien partners were killed in the ensuing shoot-out.[103]

In the wake of the ambush, lawmakers and the Department of Defense scrambled to understand what had happened. Congress organized hearings about the incident and the Department of Defense's authority to use force. The secretary of defense testified that the ambushed team had been in Niger "in a train and advise role," not under the 2001 AUMF in a combat role.[104] Later, the Trump administration would acknowledge that the team, though deployed to Niger for train-and-equip purposes, had conducted its mission pursuant to the 2001 AUMF.[105] A Department of Defense investigation into the ambush found that U.S. forces deployed to run § 333 programs "have the authority to conduct [counterterrorism] operations with partner Nigerien forces."[106]

When Congress enacted the 2001 AUMF, it did not envision the authority being used in Niger. Nor did Congress envision the 2001 AUMF being used against ISIS, much less IS-GS. Neither group existed on September 11, and IS-GS has never been publicly identified as one of al-Qaeda's "associated forces" under the 2001 AUMF.[107]

But lawmakers who believed that U.S. forces were deployed for a nonoperational § 333 assignment had little reason to ask questions: the § 333 program gave the Department of Defense cover for running these AUMF operations under the radar. Moreover, if not for the § 333 program and partners, it is unclear whether U.S. forces would have been deployed to Niger and had the resources to undertake such a risky mission in the first place.

Checks and Constraints

There are five primary constraints on the Department of Defense's ability choose partner forces and run train-and-equip programs: (1) the types and purposes of assistance enumerated in § 333; (2) the human rights vetting regime outlined in the so-called Leahy Law (10 U.S.C. § 362); (3) the need for the Department of State's consent; (4) any limitations imposed by host countries; and (5) Congress's preferences. In practice, these constraints are relatively weak and have not prevented § 333 programs from being run in locations and in ways likely to expose U.S. forces to combat. Nevertheless, they have some potential to head off or rein in abuse.

The clearest constraints on § 333 programs come from the text of the provision. Section 333 allows the Department of Defense to "provide training and equipment" to foreign forces, for specific purposes. As discussed, the types of permissible training are defined and do not include conducting operations or using force. The enumerated purposes can be broad, such as "building the capacity of [foreign] forces to conduct . . . [c]ounterterrorism operations," but they are not boundless. Importantly, § 333 does not permit the Department of Defense to assist a foreign force simply because it fights a "rogue state" like Iran or "near-peer" like China. To some extent, this limits the potential for a § 333 program to escalate tensions with a state adversary.

Six of the enumerated § 333 purposes still allow the Department of Defense to partner with a foreign force that

counters state actors. Specifically, a § 333 program can build a foreign force's ability to conduct operations regarding weapons of mass destruction, maritime and border security, military intelligence, air domain awareness, international coalition work, or cyberspace security and defense. But a § 333 program cannot provide training or equipment for other kinds of operations against state actors.

For this reason, the Department of Defense, in providing assistance under § 333 to Ukraine before Russia's 2022 invasion, was limited to running an "imagery capability" program.[108] Even though the Department of Defense's overarching aims were explicitly to "deter Russia" and enable Ukraine to "control [] its internationally-recognized borders,"[109] its § 333 program had to be tailored to building Ukrainian intelligence capacity. The program could not be used to train and equip Ukrainian forces to combat Russian proxies in the Donbas or Crimea.[110]

The Leahy Law presents another constraint on the Department of Defense's ability to choose partner forces. The Leahy Law is a human rights vetting provision that prohibits the Department of Defense from assisting forces credibly accused of gross violations of human rights. Although Leahy vetting has an imperfect track record,[111] it still is regarded as an "important tool" for ensuring that the Department of Defense does not partner with the worst offenders.[112] Notably, the Department of Defense does not assess prospective partners on its own; the Leahy Law requires the Department of Defense to consult with the Department of State.[113]

Beyond Leahy vetting, the Department of State is involved in selecting § 333 partner forces through a statutorily required concurrence and coordination process.[114] Section 333(b) provides that its programs "shall" be jointly developed and planned with the Department of State. It also requires that the secretary of state approve any program before it is initiated and then coordinate with the Department of Defense to implement it.

Department of Defense officials have referred to the secretary of state's role in developing § 333 programs as "critical and deliberate."[115] Furthermore, the Department of State agrees that the concurrence and coordination procedures for § 333 programs, which include a review by Department of State lawyers, are the Department of Defense's "most robust" interagency procedures.[116] The Department of State's involvement in designing and implementing § 333 programs can prevent the Department of Defense from choosing partner forces without considering foreign policy implications and legal constraints.[117]

Although nothing in the law explicitly requires their approval, two additional stakeholders have the power to limit § 333 programs: foreign governments and Congress. Section 333 authorizes the Department of Defense to train and equip the "national security forces" of a foreign country, not irregular forces or individuals. This requires the Department of Defense to negotiate with foreign governments on whether, when, where, and how U.S. forces can be deployed.

In practice, negotiations over § 333 programs take place at a high level,[118] and foreign governments can set limits on the U.S. rules of engagement. The Philippines, for instance, prohibited U.S. forces from pursuing the Moro Islamic Liberation Front, a separatist group, because it did not want U.S. forces to disrupt ongoing peace talks.[119]

Congress, too, may be able to prevent § 333 programs from being abused. Section 333(e) establishes a "Notice and Wait" period, requiring the Department of Defense to inform Congress of new § 333 programs at least 15 days before program launch. This notice does not give Congress veto power, but it does give lawmakers the opportunity to raise concerns. One congressional overseer described the Department of Defense as "willing to listen to concerns [and] respond to concerns to make sure we're satisfied."[120] In some instances, the Department of Defense has even "waited for [Congress] when we ask them to delay until we're comfortable."[121]

Congress's informal review-and-revise process relies on norms, not law. It also requires Congress to know what questions to ask and what concerns to raise. Still, if congressional overseers understand how § 333 can be used in combination with operational authorities, they can challenge plans to establish forward operating bases or engage in liberal exercises of collective self-defense.

Oversight Regime

Section 333 and related provisions establish an array of reporting and notification requirements that notionally enable congressional oversight of § 333 programs. These requirements demand information on new and ongoing § 333 programs, the efficiency and effectiveness of § 333 programs, and invocations of unit and collective self-defense. Based on the regularity with which the Department of Defense provides information to Congress, some view § 333 as the "gold standard" for oversight.[122]

The reporting and notification regimes for § 333 programs are indeed more robust than those for other security cooperation provisions. But they still provide a patchwork of information to the relevant congressional overseers and largely exclude the public from conversations about when, where, and how the military is deployed. Moreover, the Department of Defense's compliance with its reporting requirements is often spotty or incomplete.

The clearest reporting and notification requirements can be found in the text of § 333 itself. Section 333(e) requires the Department of Defense to provide "the appropriate committees of Congress"— defined as the House and Senate committees on armed services, foreign affairs, and appropriations[123] — with advance notification of any new § 333 program. Notifications must specify the country and unit that will receive training and equipment. They also

must describe the amount, type, and purpose of the support, as well as any such support previously provided to the country.

As discussed, § 333 notifications give Congress an opportunity to weigh in on the Department of Defense's planned programs. But Congress can provide valuable input only if it has a full picture of the risks and implications of a given program. In practice, several aspects of the notification process obscure Congress's view.

First, the Department of Defense submits its § 333 notifications in tranches, which can include tens of programs for congressional overseers to review in the 15-day notice-and-wait period.[124] One congressional staffer said these tranches can be "overwhelming," particularly given the geographic breadth of the Department of Defense's programs.[125] The few congressional staffers responsible for analyzing § 333 programs are unlikely to have deep familiarity with the security threats and implications of Department of Defense involvement in places as far-flung as Honduras, Romania, and Tajikistan.[126]

Second, § 333 notifications often omit information critical to understanding these threats and implications. Notifications rarely identify the adversaries that partner forces are likely to encounter. Across four notifications from 2018, for $52.25 million worth of counterterrorism programming in the Philippines, not one mentioned Abu Sayyaf or Jemaah Islamiyah.[127] And few if any notifications specify the part of the country in which the Department of Defense intends to engage in training. In a 2018 notification for a Ukrainian program, Congress was not told whether training would be limited to bases in western Ukraine or would instead take place at bases in or near the Donbas and Crimea. Although § 333(e) does not explicitly require this information, Congress cannot assess the risk of U.S. forces ending up in combat without it.

Moreover, the Department of Defense sometimes omits information that § 333(e) explicitly requires. For instance, notifications do not always identify the specific partner force that the Department of Defense intends to train and equip. Instead of identifying a "specific unit," as required by the law, notifications may refer generally to a country's national-level security forces.[128] Despite the plain text of § 333(e), Congress may not be notified of the partners the Department of Defense has chosen and purports to have an inherent right to defend.

Section 333(f) also requires the Department of Defense to provide quarterly reports to the appropriate committees of Congress. These reports, however, focus on logistical details regarding the delivery of training and equipment. The Department of Defense submits spreadsheets with minimal narrative explanation to satisfy this requirement.[129] The spreadsheets do not shed light on how § 333 programs are conducted or whether U.S. and partner forces have engaged in hostilities.

Nor does the Department of Defense's monitoring and evaluation of its security cooperation programs provide Congress with a sense of how § 333 programs are conducted. In 2016, after years of Department of Defense officials telling Congress that § 333 was one of the "most important tools in the counterterrorism fight,"[130] Congress for the first time required the Department of Defense to perform formal reviews of its § 333 programs.[131] The resulting law, 10 U.S.C. § 383, instructs the Department of Defense to assess programs' risks, monitor their implementation, evaluate their efficiency and effectiveness, and identify lessons learned to improve future programs. It also requires the Department of Defense to submit an annual monitoring and evaluation report to the "congressional defense committees" — defined as the House and Senate committees on armed services and appropriations[132] — and to publish summaries of each program evaluation.[133]

Nothing in § 383, however, obligates the Department of Defense to share its findings on programmatic risks — which could include the risk of U.S. forces engaging in unit or collective self-defense — with Congress or the public. The § 383 reports need only describe the steps the Department of Defense has taken to conduct monitoring and evaluation, as well as list lessons learned. Meanwhile, the public summaries only address programs' efficiency and effectiveness, and the statute allows the Department of Defense to "omit any information that the Secretary [of Defense] determines should not be disclosed."[134] Six years after the adoption of § 383, the Department of Defense has published only two public summaries, neither of which addresses programmatic risks.[135] Department of Defense officials and congressional overseers alike describe § 383 monitoring and evaluation as a "work in progress" and a "fairly new" practice.[136]

To some extent, Congress is aware that its §§ 333 and 383 reporting and notification regimes are insufficient. In recent years, Congress has enacted a series of additional laws requiring the Department of Defense to promptly report exercises of unit and collective self-defense.

In 2013, Congress enacted 10 U.S.C. § 130f, which requires the Department of Defense to submit notifications of "sensitive military operations" to the congressional defense committees. Amendments followed in 2016, 2018, and 2021, each one clarifying what Congress was seeking — and strongly suggesting that the department's submissions under the previous formulations had not satisfied overseers.[137] In its current form, § 130f makes clear that it covers any "operation conducted by the armed forces in self-defense or in defense of foreign partners, including during a cooperative operation."[138]

In parallel, Congress in 2018 enacted a requirement that the Department of Defense notify the congressional defense committees when designating a partner force as

eligible for the provision of collective self-defense.[139] That same year, Congress obligated the Department of Defense to submit a report discussing § 333 and "the domestic and international legal bases for the use of United States military personnel to provide collective self-defense in support of designated foreign partner forces."[140] The following year, Congress obligated the Department of Defense to provide the defense committees with a report outlining its policy for exercising collective self-defense.[141] And in 2021, Congress obligated the Department of Defense to provide it with "monthly briefings outlining . . . the use of military force under the notion of collective self-defense of foreign partners."[142]

The Department of Defense's compliance with these reporting and notification requirements has been lackluster. Congress has repeatedly had to amend its requirements to demand more information, and members have complained about the Department of Defense's lack of transparency. In a 2019 hearing, Rep. Rick Larsen asserted that the department had not "complied consistently" with § 130f, faulting both the timing and contents of § 130f notifications.[143] That same year, Rep. Jason Crow asked the secretary of defense why the department had "not fulfilled its obligation and submitted the congressionally mandated report" covering § 333 and collective self-defense.[144] In 2021, Congress contemplated withholding part of the Department of Defense's funding until it submitted an overdue report on collective self-defense.[145]

Even if the Department of Defense regularly complied with these reporting and notification requirements, relevant lawmakers — to say nothing of the public — would still be excluded from conversations about when, where, and against whom the United States uses force. The law directs the Department of Defense to disclose information only to the "congressional defense committees," a term that omits the House and Senate committees on foreign affairs. Thus, the congressional overseers with shared responsibility for § 333 and primary responsibility for declaring war and authorizing the use of force would still lack critical information regarding the extent of the Department of Defense's hostilities.

Only one law, the War Powers Resolution, is designed to provide information about the Department of Defense's actual and anticipated hostilities to all of Congress and, in turn, the public.[146] Section 4(a)(1) of that law requires the president to notify the speaker of the House and president pro tempore of the Senate within 48 hours of any unauthorized introduction of U.S. forces into "hostilities" or situations leading to "imminent involvement in hostilities."[147]

But presidents have largely ignored § 4(a)(1).[148] As early as the Reagan administration, which failed to disclose hostilities in El Salvador and Nicaragua,[149] presidents have refused to submit required reports. Noncompliance has worsened since the war on terror began. Between 1973 and 2001, presidents submitted 26 reports on unilateral military action.[150] In the two decades since 2001, despite the greatly increased U.S. military footprint, presidents have submitted just 12 reports.[151] None of these reports discloses acts of unit or collective self-defense undertaken by U.S. forces deployed on § 333 or other training assignments. The last § 4(a)(1) report on activity in the Philippines was submitted in 1989, when President George H. W. Bush dispatched U.S. forces in response to a coup attempt in the country.

The absence of § 4(a)(1) reports reflects a deliberate choice. Executive branch lawyers have defined "hostilities," the circumstances that trigger the War Powers Resolution, in a way that excludes much of modern warfare. For instance, they argue that "sporadic military or paramilitary attacks," as well as instances in which U.S. forces are "simply acting in self-defense," fall outside the scope of the law.[152] There is no textual basis for this interpretation, and the legislative history tends to contradict it.[153] But it has allowed successive administrations to avoid congressional oversight, seemingly without penalty.

By not reporting on hostilities that fall short of "full military engagements,"[154] the White House and the Department of Defense have prevented much of Congress — and the public — from understanding the risks that inhere in the § 333 authority. Without such an understanding, these risks will continue to go unaddressed.

10 U.S.C. § 127e: Surrogate Forces to Counter Terrorism

The year before Congress enacted § 333, it passed 10 U.S.C. § 127e,[155] an authority at the center of controversy regarding the geographic reach of the war on terror. Section 127e states:

> The Secretary of Defense may . . . expend up to $100,000,000 during any fiscal year to provide support to foreign forces, irregular forces, groups, or individuals engaged in supporting or facilitating authorized ongoing military operations by United States special operations forces to combat terrorism.

The statutory language is no model of clarity. Key terms are undefined, as § 127e neither enumerates nor limits the types of "support" that can be provided to or expected from partner forces. Moreover, the provision is circular: by its text, § 127e permits U.S. forces to "support" partner forces who are "supporting" U.S. forces.

As vague and convoluted as § 127e may be, three parts of the provision gesture toward the authority's purpose and

use. First and most obvious, § 127e programs must contribute to U.S. efforts to "combat terrorism." Unlike § 333, which can be used for a variety of purposes across state and nonstate contexts, § 127e requires partner forces to be "engaged in" supporting ongoing counterterrorism work.

Second, § 127e programs must advance "authorized ongoing military operations" by U.S. forces. In other words, U.S. forces must already be pursuing permissible military objectives in a country before a § 127e program can be established. Furthermore, partner forces must be pursuing these objectives as well. This is a substantial departure from § 333, which is not predicated on U.S. forces conducting operations and instead builds the capacity of partner forces to achieve their own military objectives.[156]

Third, § 127e permits the Department of Defense to partner with any state or nonstate actor, including private individuals. This, too, distinguishes § 127e from § 333, which limits support to formal national security forces.

Altogether, the text allows the Department of Defense to recruit foreign individuals or groups to assist U.S. forces in achieving U.S. counterterrorism objectives that are authorized under other laws. It does not provide any independent authority for the Department of Defense to pursue additional counterterrorism objectives. Reflecting this understanding, Department of Defense officials have characterized § 127e in public statements as a funding or train-and-advise authority rather than an authorization for use of military force.

Still, questions abound as to what kind of support the Department of Defense provides and receives under § 127e, as well as whether the Department of Defense sends partner forces on missions that U.S. forces have no authority to undertake themselves. And, as with § 333, there is a risk that U.S. forces will invoke unit or collective self-defense when working with § 127e partners. These questions and risks are all the more pressing given the inadequate oversight regime for § 127e programs.

Section 127e in Practice and the Potential for Unauthorized Hostilities

The origins of § 127e date back to the early years of the war on terror. The Department of Defense quickly realized that U.S. forces lacked the cultural competence and local knowledge necessary for locating and combating al-Qaeda and Taliban forces in Afghanistan.[157] Furthermore, the department lacked the legal authority to induce Afghans to fill these gaps.

Not so for the CIA. The Department of Defense enlisted the CIA to pay Afghans to support and even conduct U.S. operations. But the two agencies had diverging mandates and priorities, and in 2002, the Department of Defense began drafting a legislative proposal that would empower it to pay local groups and individuals directly.[158]

Out of the gate, the proposal was controversial. Some officials worried that it would enable U.S. forces to develop paramilitary groups without oversight. Nevertheless, the proposal advanced. In 2004, the Department of Defense made it a top legislative priority, sending Secretary of Defense Donald Rumsfeld to lobby Congress for its adoption.[159] Based on the department's aggressive advocacy, Congress enacted § 127e, originally known as the § 1208 authority.[160]

From that point onward, Department of Defense officials would refer to § 127e as "the single most important authority we have in our fight against terrorism."[161] They would also, as some had feared, use the authority to create shadowy proxy forces around the world.

Department of Defense officials refer to § 127e programs as a part of their "by-with-through operational approach" — an approach they define as "led *by* our partners, state or nonstate, *with* enabling support from [U.S. forces], and *through* U.S. authorities and partner agreements."[162] They refer to missions undertaken as a part of § 127e programs as "advise, assist, accompany" missions.[163] But "by-with-through" fails to fully convey the approach behind § 127e programs. The programs do not provide mere enabling support to partner forces. Instead, they allow the United States to recruit the partner forces, train them, equip them, sustain them, and pay their salaries.[164] Nor do § 127e programs involve operations led by partner forces in any meaningful sense. Fundamentally, § 127e programs seek to develop surrogate forces who pursue military objectives chosen by U.S. forces.[165] In interviews with *Politico*, current and former Department of Defense personnel described "directing" partner forces and having them do "our bidding."[166]

Similarly, "advise, assist, accompany" fails to capture the extent of U.S. involvement in running missions with § 127e partner forces. Department of Defense policies permit U.S. forces to integrate with partner forces at "all phases" of an advise, assist, accompany mission.[167] Even "advise and assist" missions, with no "accompany" component, allow U.S. forces to join partner forces in the field until the moment of final assault.[168]

Whether U.S. forces fully participate in a mission or are tasked with staying at the last covered and concealed position, they can end up in direct combat. In 2017, U.S. forces took casualties on what the Pentagon characterized as an "advise and assist" mission in Somalia.[169] And the International Crisis Group documented a 2017 mission in Cameroon in which U.S. forces, though stationed 300 meters behind their partner forces, ended up shooting and killing an adversary.[170]

In short, § 127e programs have involved creating partner forces, controlling them, and at times engaging in combat through and alongside them. Given that § 127e is not an authorization for use of military force, this raises the question of what legal authority justifies these actions. After all, § 127e programs must support "*authorized* ongoing military operations." For several reasons, however, § 127e

programs can result in U.S. forces engaging in military operations that they could not — or simply would not — undertake under existing authorities.

The contours of operations conducted through and with § 127e partners are established by execute orders, or EXORDs.[171] EXORDs are orders to initiate and conduct military operations, issued at the direction of the secretary of defense or the president.[172] They are akin to agency rules,[173] insofar as they have the force of law and implement relevant statutory or constitutional frameworks.[174] EXORDs may allow U.S. forces to engage in combat in a particular area, against a particular adversary, or under particular circumstances, in furtherance of either an authorization for use of military force or self-defense.[175] Alternatively, they may limit U.S. forces to influencing a situation without firing weapons.[176]

As a legal matter, EXORDs cannot themselves serve as an authorization for the use of force. In practice, though, there is reason for concern that they are serving as de facto authorizations. Many EXORDs do not specify the authority under which they are promulgated,[177] and many are "very broad and very brief in [their] descriptions."[178] A Department of Defense official explained that "nebulous" EXORD language can make it "very difficult" to ensure that U.S. forces and their § 127e partners are pursuing lawful targets, particularly when there are multiple terrorist groups, some covered by the 2001 AUMF and some not, operating in a single area.[179]

Further complicating matters, Department of Defense officials do not always apply the limitations that EXORDs impose on U.S. forces to their § 127e partner forces. U.S. forces have commanded partner forces in combat even when the relevant EXORD did not authorize U.S. forces to engage in direct combat.[180] As one former senior Department of Defense official explained, U.S. forces can use § 127e partner forces to pursue objectives when they "don't have authorities to have people on the ground and operating in a specific geographical location."[181]

This mode of operating is problematic because the limitations contained in EXORDs may reflect a lack of legal authorization — for instance, restrictions on which groups U.S. forces can lawfully engage in combat. The reason for the EXORD limitation, however, might not be explained in the order itself. U.S. forces might think that the limitation stems from a host country agreement or political considerations,[182] not the inapplicability of the 2001 AUMF or constitutional self-defense. U.S. forces might then assume that they have the authority to engage in indirect combat through their § 127e partner forces. Nothing in the EXORD would indicate whether they are right or wrong.

Overall, the implementation of § 127e's "authorized ongoing military operations" requirement has troubled congressional overseers. One staffer lamented that the Department of Defense "seems to work backwards," using § 127e as the basis for operations rather than using operations as the basis for § 127e activity.[183] Another explained that the proliferation of § 127e programs had prompted "a lot of discussions" about whether U.S. forces are relying on appropriate authorities.[184] The staffer insisted that "there would not be a legal basis to have a partner force take action [if U.S. forces] would not be legally authorized to take that action."[185] This contradicts numerous Department of Defense officials' understanding that § 127e partners can be asked to take action beyond that permitted by the relevant EXORD.[186]

The use of § 127e as a de facto authorization for use of military force would explain the Department of Defense's early work with the Puntland Security Force and the Danab Brigade in Somalia, before the 2001 AUMF covered al-Shabaab and ISIS. It would also explain the Department of Defense's use of a § 127e program in Cameroon to pursue the leaders of Boko Haram, a terrorist group that operates in West Africa.[187] Boko Haram has never been publicly identified as an associated force of al-Qaeda, and thus a lawful target, under the 2001 AUMF.[188]

The breathtaking geographic reach of § 127e programs would make sense, as well, if § 127e were delinked from the 2001 AUMF. Researchers and reporters have uncovered § 127e programs not only in Afghanistan and Iraq but also in Cameroon, Egypt, Kenya, Lebanon, Libya, Mali, Mauritania, Niger, Nigeria, Somalia, Syria, Tunisia, and Yemen.[189] Within Somalia, researchers and reporters have found § 127e programs involving military contingents from Ethiopia, Kenya, and Uganda, as well as local forces.[190] These § 127e programs extend far beyond the list of countries for which AUMF activity has been disclosed.[191] And it is not a complete accounting of § 127e programs: investigative journalism has revealed that a § 127e program has been run in an Indo-Pacific country as well.[192] That country is likely the Philippines,[193] where U.S. forces have long combated terrorist organizations that do not fall within the scope of the 2001 AUMF.

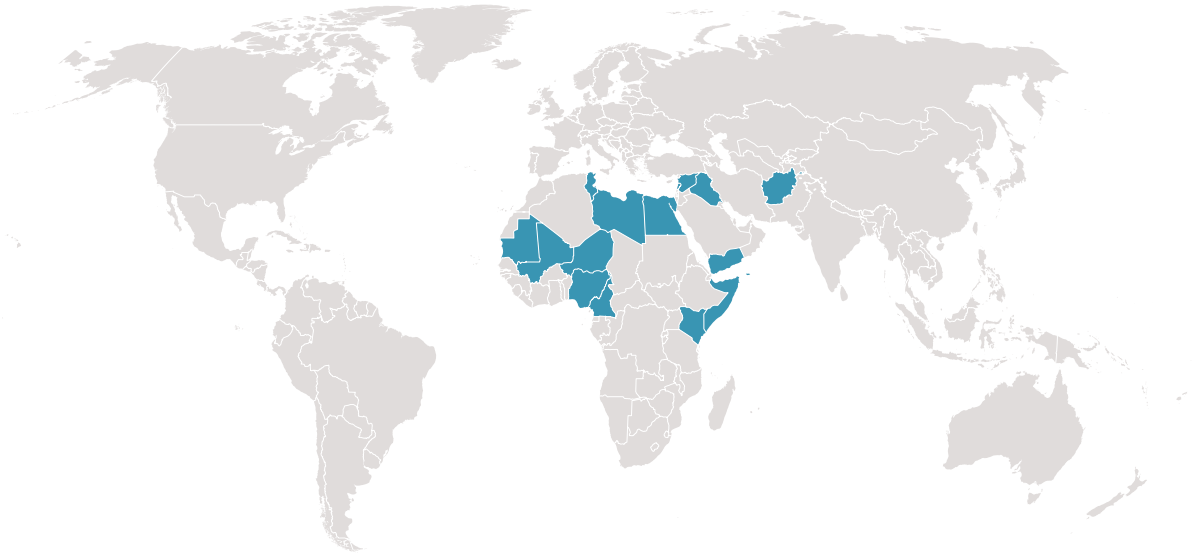
Instead of the 2001 AUMF, § 127e programs can be based on EXORDs implementing the president's inherent power under the Constitution — a power that, as discussed in the context of § 333, has been overextended through dubious invocations of unit and collective self-defense. One congressional overseer confirmed that § 127e activity has "most definitely" taken place on the basis of self-defense.[194]

The use of unit or collective self-defense as the basis for a § 127e program would be concerning in its own right. It would imply that the Department of Defense has put U.S. forces in a position where unit self-defense has become necessary or collective self-defense has been used. Moreover, the Department of Defense would have done so in a place where the 2001 AUMF does not apply against some or all potential adversaries. In other words, U.S. forces would be countering their partner forces'

FIGURE 2

Surrogate Forces to Counter Terrorism

This map reflects known § 127e programs based on publicly available information and Brennan Center interviews. It is not a comprehensive list of § 127e programs.



● **Countries with § 127e programs:** Afghanistan, Cameroon, Egypt, Iraq, Kenya, Lebanon, Libya, Mali, Mauritania, Niger, Nigeria, Somalia, Syria, Tunisia, Yemen

adversaries rather than entities that pose a threat to U.S. territory or persons. A former senior Department of Defense official confirmed that a § 333 or other training program run in a volatile area could lead to an invocation of constitutional self-defense and then to the initiation of a § 127e program.[195]

Countering a partner force's adversaries by creating and controlling new partners under § 127e could double the risk of hostilities based on dubious interpretations of constitutional authority. Section 127e partner forces, like § 333 partner forces, can be eligible for collective self-defense under Department of Defense policies. This appears to be the case even for irregular forces: in September 2016, U.S. forces invoked collective self-defense to launch a strike against one of the Puntland Security Force's rival militias.[196] After investigating the strike, the Department of Defense determined that it was a legitimate use of force that had protected its partners.[197]

Beyond unit and collective self-defense, there is one other theory of constitutional self-defense that warrants mention: the national-interest theory. As discussed above, presidents since the early 1990s have claimed and invoked an inherent authority to use force in protection of amorphous, undefined "important national interests." Although there is no indication that this theory has been used to support § 127e programs, nothing in § 127e would prevent the implementation of a program based on this unmoored doctrine.

Finally, even in situations in which there is a plausible legal basis for military action, the United States ordinarily might refrain from military operations for a host of reasons, including resource limitations and domestic political blowback. Put simply, Americans might not want to foot the bill for new overseas military adventures or incur casualties for opaque reasons in remote locales across Africa and Asia. Section 127e allows the Department of Defense to sidestep these democratic constraints by fighting wars through proxies and doing so largely in secret. The authority lowers the actual and political costs of military action, at least in the short term, in a way that nevertheless expands U.S. operations and hostilities.

Checks and Constraints

Few safeguards exist to prevent the use of § 127e as a de facto authorization for use of military force through proxies. The text of the provision is broad and vague, and the stakeholders involved in managing other security cooperation programs — the Department of State, host countries, and Congress — are largely cut out of § 127e decision-making. Through a series of questionable legal interpretations, the Department of Defense has assumed nearly unlimited discretion to create and control partner forces.

Section 127e imposes two limitations on the Department of Defense's ability to work with partner forces. The first, which the Department of Defense appears to respect, requires U.S. forces to run § 127e programs in support of

counterterrorism objectives. Section 127e programs generally cannot support operations against rogue states or near-peers like Iran or China.[198]

The second textual limitation, for which compliance is shakier, requires § 127e programs to support "authorized ongoing military operations." As discussed, these operations take place under EXORDs, which can implement authorities like the 2001 AUMF and constitutional self-defense. But U.S. forces have not always relied on EXORDs when proposing and conducting § 127e programs. One Department of Defense official explained that "in practice . . . there'd be misunderstandings," where the U.S. forces responsible for § 127e programs "didn't know that they needed the mission authority [provided by an EXORD] on top of the funding authority [provided by § 127e]."[199] Moreover, even when U.S. forces do rely on EXORDs for mission authority, there is no guarantee that those EXORDs were designed to implement the 2001 AUMF or constitutional self-defense. As detailed above, EXORDs often do not specify the authority under which they are promulgated, and it appears that the EXORDs themselves sometimes stand in for actual legal authorization.

The Department of Defense also abides by an unsupportable interpretation of the Leahy Law, which requires human rights vetting for "any training, equipment, or other assistance for a unit of a foreign security force." Section 127e programs provide an array of assistance to partner forces, ranging from salaries to training and equipment. Despite this, the Department of Defense maintains that the Leahy Law does not apply to § 127e programs.[200] This position is untenable, particularly in light of a 2019 law specifically requiring the Department of Defense to formulate a plan to vet "any foreign forces, irregular forces, groups, and individuals" — the types of partners explicitly listed in § 127e.[201] Instead of developing or implementing such a plan, the Department of Defense simply informed Congress that "[i]n a number of instances," it had conducted human rights vetting for irregular forces, groups, and individuals.[202]

Because the Department of Defense exempts § 127e programs from the Leahy regime, no law prevents U.S. forces from partnering with groups or individuals that are known to have committed serious human rights abuses.[203] Furthermore, the Department of Defense is under no obligation to consult with the Department of State about the human rights track record of its prospective partners.

Nor does the interagency process set forth in § 127e give the Department of State a meaningful ability to shape these programs. Section 127e requires only the "concurrence of the relevant Chief of Mission," the local ambassador, to launch a new program. The Department of State is not involved in conceptualizing or designing § 127e programs. Nor is it involved in overseeing their implementation. Department of State officials have assessed that the § 127e concurrence process does not lead to a "broad review" of proposed programs or effective consideration of potential unintended consequences.[204]

In 2021, Congress attempted to strengthen the Department of State's role in § 127e decision-making, requiring "each relevant chief of mission [to] inform and consult in a timely manner with relevant individuals at relevant missions or bureaus of the Department of State."[205] But this change, which still relies on local ambassadors rather than the secretary of state, is unlikely to produce robust interagency engagement or oversight. Ambassadors, whether career foreign officers or political appointees,[206] are not trained on military affairs and themselves say that they are "not well equipped" to assess § 127e programs.[207] Consistent with this assessment, journalist Wesley Morgan explained that ambassadors may not "understand the nuances of special operations forces" and may not "ask many questions" when it comes to military operations.[208] Additionally, former Department of State and Defense officials confirmed that the details of § 127e programs can be "lost in the handover" of information from an outgoing ambassador to an incoming one.[209]

Of course, some countries — like Somalia when the Puntland Security Force and Danab Brigade programs began[210] — maintain irregular relations with the United States and thus have no ambassador. Former Department of Defense and Department of State officials were uncertain what, if any, interagency protocol would be used for running § 127e programs in such countries.[211] A congressional overseer said that she "would be surprised if someone were going out of their way to figure that out in that circumstance."[212]

Host countries, too, have limited ability to serve as a check against improper or imprudent § 127e programs. Because the law permits the Department of Defense to partner with "irregular forces, groups, or individuals," not just formal forces, there is no requirement that the Department of Defense seek host country consent. Perhaps to comply with international law,[213] the Department of Defense nevertheless maintains an internal policy of seeking consent.[214] As a former Department of Defense official explained, however, the policy allows U.S. forces to seek approval "at a lower level" of government or the military. The process "could be as simple as [a foreign] commander being informed" that U.S. forces intend to do a mission with § 127e partner forces.[215]

The Department of Defense's loose policies for securing host country consent have resulted in § 127e programs that transgress foreign governments' expectations. In 2016, the Department of Defense had to shutter a § 127e program wherein U.S. forces worked with Ethiopian forces to counter al-Shabaab in Somalia.[216] The Ethiopian government was reportedly "uncomfortable" with the extent of U.S. control over § 127e partner forces.[217] Had high-level leaders been consulted at the outset, it is possible that the program would not have launched or would have been run differently.

Finally, Congress has little control over where or how § 127e programs are run. The law has a more flexible notice-and-wait period than § 333. Although the Department of Defense generally must give 15 days' notice to Congress before launching a § 127e program, it can bypass this period in "extraordinary circumstances."[218] If the secretary of defense identifies such circumstances, the department can instead notify Congress 48 hours after § 127e has been used. This post hoc notification strips Congress of its ability to ask questions and provide input in advance. Furthermore, even when the Department of Defense provides advance notice, the oversight norms for § 127e are far weaker than those for § 333. As a congressional staffer explained, the Department of Defense may take congressional feedback "into consideration," but members of Congress will "never be the operational commander making [a § 127e] decision."[219]

Oversight Regimes

Congress has struggled to oversee the Department of Defense's § 127e programs. The congressional reports and notifications required by § 127e are highly classified and narrowly circulated. Other required reports on § 127e and related topics — like EXORDs, the 2001 AUMF, and collective self-defense — are simply not produced. The Department of Defense has even policed the Department of State's ability to brief congressional offices on § 127e programs. As a result, few in Congress have a firm grasp on how § 127e works, where it is used, and what kind of combat in enables.

As discussed, § 127e requires the Department of Defense to notify Congress of new programs either 15 days in advance or, in exceptional circumstances, within 48 hours of program launch. Under § 127e(d)(2), each notification must contain an array of information: the identity of the partner force; a description of the partner's adversaries; the types of support U.S. forces will give and receive; the envisioned cost and duration of the program; an assessment of how the program aligns with U.S. national security objectives; and an explanation of the relevant legal and operational authorities, including EXORDs.[220]

Congress has only required such a comprehensive list of information in recent years. Before a 2019 amendment to § 127e, the Department of Defense was not required to notify Congress of the legal and operational authorities underlying a program.[221] Similarly, a 2021 amendment required the department, for the first time, to notify Congress of the groups against which § 127e partner forces are engaged in combat.[222] For a decade and a half, Congress attempted to understand and oversee § 127e programs without this foundational information. And during that period, it is unclear that the Department of Defense provided even the limited information that Congress requested. In 2019, Congress had to amend § 127e(d)(2) to clarify that when it had asked in 2016 for information on "[t]he type of support provided or to be provided to the recipient of [§ 127e] funds," it in fact wanted "[a] detailed description of the support."[223]

The biannual reports required by § 127e(i)(3), which must describe § 127e programs from the preceding and current calendar years, are no more illuminating than the notifications. These reports largely summarize and compile certain information from the notifications already provided. Questioning the value of the Department of Defense's written disclosures under § 127e, one congressional overseer lamented, "I'd see things in the [reports and notifications], and I'd know that's half the story."[224]

Whatever value these reports and notifications may have, most congressional offices do not receive them. The Department of Defense is required to submit these documents only to the congressional defense committees: the House and Senate committees on armed services and appropriations.[225] This excludes the House and Senate committees on foreign affairs, even though these committees have primary responsibility for deciding where and against whom the United States is at war.

Less intuitively, it also excludes lawmakers' own offices, even when those lawmakers serve on the congressional defense committees. The Department of Defense's § 127e reports and notifications tend to be classified and designated as sensitive compartmented information (SCI).[226] Committee staffers — those who work for committee offices rather than for individual members — may have the necessary clearance to view such materials. Few staffers in member offices, however, have such clearance,[227] and they are often denied access to § 127e materials.[228] Indeed, when the committee offices receive § 127e materials, they generally do not transmit them to, or even summarize them for, the member offices.[229] Unable to rely on their own staffers, most lawmakers choose not to engage with § 127e reports and notifications. According to one staffer, only a "handful" of lawmakers take it upon themselves to coordinate with the committee offices and read the materials that their staffers cannot.[230]

As an alternative to classified reports and notifications, select members of Congress can learn about § 127e activity through Department of Defense notifications and briefings under § 130f. Section 130f requires the Department of Defense to "promptly submit . . . notice" of, and "periodically brief the congressional defense committees" on, sensitive military operations including "lethal operation[s] or capture operation[s] . . . conducted by a foreign partner in coordination with the armed forces that target[] a specific individual or individuals."

On its face, § 130f is a poor substitute for compliant and appropriately distributed § 127e materials. Section 130f does not require an accounting of all § 127e programs or their legal bases. It only covers § 127e programs that have already been used to conduct missions; it does not address the prospect of future hostilities conducted through or

with partners. Furthermore, § 130f only covers missions targeting a "specific individual or individuals." Missions targeting other military objectives, like an enemy base or outpost, would be omitted, as would patrols by § 127e partners that involve the use of lethal force. Finally, as discussed, Congress has struggled to get the information that § 130f requires; it has amended the provision repeatedly over the years to clarify that lawmakers need to know more about U.S. and partner forces' hostilities.

Beyond §§ 127e and 130f, Congress has few avenues for learning about how the Department of Defense uses § 127e. As with § 333 programs (and largely for the same reasons), presidents have declined to file § 4(a)(1) hostilities reports for § 127e activity.[231] This is the case despite the War Powers Resolution's stipulation that U.S. forces engage in hostilities when they "command, coordinate, participate in the movement of, or accompany" partner forces in combat.[232] The Department of Defense also has adopted a dubious interpretation of 10 U.S.C. § 383[233] — which requires monitoring, evaluation, and reporting on "security cooperation and related activities" — under which it exempts § 127e programs from these requirements.[234] While Congress and the public receive some information on § 333 programs through the § 383 regime, they receive no information on § 127e programs.

Congress has legislated additional reporting requirements for § 127e and associated topics that the Department of Defense appears not to have met. In 2018, Congress required the Department of Defense to submit an unclassified report on advise, assist, accompany missions to the defense committees.[235] The report was meant to explain "accompany missions conducted by United States military personnel with foreign partner forces [under] section 127e" and to provide a review of "applicable execute orders."[236] But the report does not exist, at least as far as congressional staffers can tell.[237] The secretary of defense's own Freedom of Information Act office has been processing a request for the unclassified report for nearly a year.

In 2019, Congress required the Department of Defense to submit quarterly reports "identifying and summarizing all execute orders" to the congressional defense committees.[238] For two years, the Department of Defense ignored this law. In late 2021, Congress reiterated its demand for the list of EXORDs, this time prohibiting the Department of Defense from using part of its budget until it submitted its first quarterly report.[239] Instead of acknowledging Congress's constitutional role as military appropriator and overseer, President Biden invoked a contested executive privilege to excuse the department from having to comply fully.[240]

The executive branch has withheld information not only on EXORDs but also on their underlying legal bases: the 2001 AUMF and the president's expansive notion of constitutional self-defense. In 2017, Congress enacted 50 U.S.C. § 1549, which requires the president to describe his legal and policy framework on the use of force and to submit a list of groups covered by the 2001 AUMF.[241] Two and a half years later, advocates had to bring a mandamus lawsuit to force President Trump to produce an overdue § 1549 report.[242] Congress has had similar difficulties enforcing 50 U.S.C. § 1550, a 2019 law that requires the president to submit biannual reports disclosing the countries in which the 2001 AUMF has been used.[243] The Trump administration ignored it, and only in March 2022, ahead of a congressional hearing, did President Biden submit three backlogged reports.[244] Successive administrations have similarly failed to submit congressionally required reports regarding the Department of Defense's invocations of unit and collective self-defense.[245]

The information that Congress struggles to obtain through formal, legislative processes cannot readily be obtained through informal requests either. Congress enacted the 2019 law requiring the list of EXORDs after repeatedly requesting access to the orders underlying the 2017 Tongo Tongo ambush.[246] The Department of Defense promised to grant those requests but delayed actual compliance for more than a year.[247]

Informal requests to the Department of State have fared no better. In 2019, the Senate Committee on Foreign Relations requested that the Department of State catalog the security assistance it and the Department of Defense had provided in the African Sahel over the preceding three years.[248] The resulting report listed an array of Department of Defense programs but omitted any mention of § 127e[249] — even though the Department of Defense had run § 127e programs across the Sahel, in at least Cameroon, Mauritania, Niger, and Nigeria.[250] And when one member office scheduled a meeting with Department of State officials to discuss § 127e's interagency procedures, the Department of Defense intervened and demanded to be present.[251] The Department of Defense proceeded to engage in months of rescheduling before it canceled the meeting altogether, informing the member office's staffers that their clearances were insufficient.[252] Another congressional staffer explained that this approach to meetings is a "well known and widely used tactic" to "ice staff out."[253]

The bottom line is, if the Department of Defense treats § 127e as a de facto authorization for use of military force, Congress and the public will scarcely know it. The military, whether through or alongside § 127e partner forces, may pursue adversaries unknown to Congress in countries in which Congress could not have foreseen hostilities. This has been the case since the enactment of § 127e — and it will continue to be the case unless and until § 127e is rescinded or substantially reformed.

The § 1202 Authority: Surrogate Forces to Counter State Actors

When the Department of Defense first crafted its legislative proposal for § 127e, the authority permitted U.S. forces to provide and receive support for "unconventional warfare," or operations involving nontraditional weapons, tactics, or adversaries. As the proposal advanced, Congress narrowed it to "combating terrorism."[254] But today, the Department of Defense has the authority it originally sought, in the form of the § 1202 authority.

Enacted through the 2018 NDAA and subsequently expanded and extended,[255] § 1202 states:

> The Secretary of Defense may, with the concurrence of the relevant Chief of Mission, expend up to [$15,000,000] during each [] fiscal year[] through [2025] to provide support to foreign forces, irregular forces, groups, or individuals engaged in supporting or facilitating ongoing and authorized irregular warfare operations by United States Special Operations Forces.[256]

This language mirrors § 127e, though it broadens the scope of permissible use to all irregular warfare operations.

The definition of "irregular warfare" in § 1202 shows how expansive the authority is. Subsection (i) stipulates that irregular warfare is "competition . . . short of traditional armed conflict."[257] But nontraditional conflict — sometimes referred to as hybrid warfare or gray-zone conflict — includes combat through and with surrogate forces, so long as such combat falls short of "all-out war."[258] As the Department of Defense explains in its National Defense Strategy, irregular warfare "may employ the full range of military and other capabilities" and encompasses "proxy, guerilla, and covert operations."[259] And these military and other capabilities may be wielded against either state or nonstate actors.[260]

That irregular warfare includes action against foreign states is a feature, not a bug. Department of Defense officials have referred to § 1202 as "a highly useful tool for enabling irregular warfare operations . . . to deter and defeat . . . revisionist powers and rogue regimes."[261] They envision increasing § 1202 activity as the department begins to "prioritize[] great power competition."[262] Broadly speaking, the purpose of the § 1202 authority is to take the department's § 127e approach of creating and controlling partner forces and wield it against countries like China, Russia, Iran, and North Korea.[263]

As with § 127e, however, § 1202 is not itself a basis for conducting missions. To create and control partner forces against foreign powers, the Department of Defense needs an operational authority. No authorization for use of military force clearly covers China, Russia, Iran, or North Korea. Neither the 2001 AUMF nor the 2002 AUMF, the authority for the Iraq War, has been interpreted as allowing sustained hostilities against these potential adversaries.[264]

That leaves constitutional self-defense — including the defense of partner forces and, potentially, the defense of "national interests."[265] Although China, Russia, Iran, and North Korea present no clear and imminent threat to the American homeland, it is easy to see how the Department of Defense could wield constitutional self-defense against these states. The Department of Defense's tenuous theory of collective self-defense allows U.S. forces to protect partner forces from their adversaries, regardless of whether those adversaries are ISIS militants or Iran-backed militias. As one congressional overseer suggested, a strategically placed § 333 partnership in Eastern Europe could be spun off into a § 1202 program to counter Russian threats.[266] And, of course, coming up with a national interest to justify a § 1202 program there would be even easier.[267]

Separately, the Department of Defense can use operational authorities to launch § 1202 programs that do not anticipate combat, whether through U.S. forces or partners. Irregular warfare encompasses "information operations," or military efforts to "influence, disrupt, corrupt, or usurp the decision making of adversaries and potential adversaries while protecting our own."[268] This can include tampering with other states' democratic processes — activities that the Department of Defense believes "fall below the threshold of armed conflict."[269]

The Department of Defense has promulgated EXORDs that reflect previous or ongoing information operations against near-peers, such as the Ukraine Military Information Support Operations EXORD.[270] In an April 2022 hearing, a Department of Defense official appeared to acknowledge a program under this EXORD, stating that the department had used § 1202 to "expose" malign actors[271] and that it "can see the benefits of [the § 1202 authority] directly from Ukraine."[272] One Department of Defense official suggested that most or all § 1202 programs as of mid-2022 were information operations.[273]

It is unclear what authorities U.S. forces rely on to conduct these information operations, though a former senior Department of Defense official offered that 10 U.S.C. § 167 could serve as the basis.[274] This is a troubling suggestion. Section 167 simply defines the mandate and functions of special operations forces, explaining that special operations forces are the part of the military responsible for "Direct action," "Strategic reconnaissance," "Unconventional Warfare," and "Military information support operations."[275] Section 167 does not purport to authorize these activities. The Department of Defense recognizes this fact in the context of direct action, a term that covers kill-or-capture missions and other small-scale

offensives involving kinetic force.[276] Department of Defense policies do not allow direct action without a separate authorization for use of military force or constitutional self-defense.[277] To the extent that the Department of Defense relies only on § 167 for its information operations, it is claiming the ability to initiate information operations without any specific authority or congressional input.[278]

Whether U.S. forces use § 1202 partners to engage in combat or to advance information operations, it is clear that these programs risk serious consequences, up to and including military escalation with a nuclear power. Yet, as with § 127e, there are few significant checks or constraints on the § 1202 authority. Indeed, in some ways, the limitations on Department of Defense discretion are weaker for § 1202 than they are for § 127e.

Because § 1202 was designed to counter state actors, § 1202 programs are necessarily run without the input, much less consent, of all states implicated. Operations in Chinese or Russian territory, for example, would not have the same kind of negotiated host country consent that underlies and can set guidelines for § 127e programs.[279] Similarly, the interagency process may be less robust for § 1202 than it is for § 127e. Because the United States does not maintain diplomatic relations with Iran or North Korea, there is no "relevant Chief of Mission" who can reject or approve § 1202 programs. The Department of Defense's own guidance on § 1202 states that "written concurrence must come from the [chief of mission] for each country with which the U.S. Government maintains diplomatic relations."[280] The guidance does not direct the Department of Defense to secure the approval of the secretary of state or other Department of State officials when there is no ambassador.[281]

Congressional oversight, too, is likely weaker for § 1202 than it is for § 127e. Recent amendments to the criteria for § 127e notifications — including the 2019 requirement that notifications explain the legal basis for each program — have not been applied to § 1202. And the notifications and reports required by § 1202 suffer from the same classification and distribution problems that frustrate § 127e oversight.[282] Furthermore, the notifications and briefings on sensitive military operations required by § 130f are unlikely to cover some or all § 1202 programs, at least until the definition of "sensitive military operations" is expanded to cover information warfare. Perhaps realizing the insufficiency of the § 130f framework, Congress recently required quarterly briefings for "significant military operations," defined to include "all clandestine operations in the information environment."[283] The new framework, however, does not require notification of information operations when they begin, and it thus does not provide Congress with timely updates.

It should come as no surprise that congressional staffers who have worked on § 127e oversight and reform have little to no visibility into how § 1202 is interpreted and implemented.[284] Indeed, one staffer who is involved in § 127e oversight was surprised to learn that the parallel § 1202 authority even exists.[285]

Section 1202, in short, raises the same potential as § 127e for hostilities that Congress has not authorized, but with far graver consequences because the enemy could be a powerful nation. Congress cannot allow § 1202 to function as a de facto authorization for use of military force against China, Russia, Iran, North Korea, or their proxies. But under the law as it is, Congress is ill-equipped to prevent or even know about this kind of abuse.

III. The Need for Reform

Each of the security cooperation authorities addressed in this report can be or has been interpreted to allow combat against adversaries, including those who fall beyond the scope of any congressional authorization for use of military force. Each of the authorities carries the potential for abuse, in the form of the Department of Defense using them as a springboard for hostilities or a de facto authorization for use of military force through partners. And for each authority, inadequate reporting leaves lawmakers unable to assess the risk of security cooperation leading to armed conflict.

The Department of Defense asserts that §§ 333, 127e, and 1202 are among its most valuable tools in confronting U.S. adversaries. But it is impossible for the public and most members of Congress to assess the validity of this claim. The same secrecy that conceals the risks of these provisions conceals any successes. Moreover, even if these authorities have enabled the United States to accomplish its military goals through and with partners,[286] the question remains: Were these goals, and the department's manner of achieving them, consistent with what Congress has authorized? It is far from clear that Congress and the American people have knowingly endorsed U.S. forces' involvement in combat — successful or otherwise — in more than a dozen countries around the world.

The executive branch's use of security cooperation authorities to conduct hostilities raises serious constitutional questions. Only Congress, not the executive branch, has the constitutional authority to determine when, where, and against whom U.S. forces conduct hostilities. The president has no inherent right to order military action "beyond the line of defense." There is no workaround to this limitation. Nothing in the Constitution's design, text, or history suggests that the president may manufacture claims of self-defense by knowingly putting U.S. forces in harm's way. Similarly, nothing suggests that the president may circumvent Congress by conducting hostilities through partner forces.

Previous Congresses have understood the gravity of executive overreach through expansive claims of self-defense or the ability to work through partners. As early as 1848, the House of Representatives deemed the Mexican-American War "unnecessarily and unconstitutionally begun" based on its determination that the president had provoked the first attack by deploying U.S. forces into contested territory.[287] Abraham Lincoln, then a member of the 30th Congress, called the self-defense rationale for the initial hostilities "the sheerest deception."[288] More than a century later, in 1973, Congress reiterated Lincoln's understanding of the bounds of constitutional self-defense in the War Powers Resolution. The law restricts not only unauthorized combat but also unauthorized deployments of U.S. forces "into situations where imminent involvement in hostilities is clearly indicated by the circumstances."[289] The law, too, makes clear that U.S. forces engage in hostilities when they "command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country" in combat.[290] Having just uncovered the unauthorized use of foreign proxies in Laos, Congress knew that it had to regulate the use of partner forces to prevent further encroachments on its constitutional war powers.[291]

The current Congress should follow in the footsteps of its predecessors and reassert the balance of war powers set forth in the Constitution. Doing so will require substantial modification, if not outright repeal, of the Department of Defense's security cooperation authorities. More ambitiously, it will require substantial reform to the War Powers Resolution, which has been undermined through executive branch lawyers' dubious interpretations of its terms, presidential noncompliance, and congressional neglect.

This part proposes specific reforms that would rein in presidential war-making under the guise of security cooperation. The reforms fall into three categories: preventing unauthorized hostilities; improving congressional and public oversight; and restating and enforcing the balance of war powers.

Preventing Unauthorized Hostilities

As discussed, security cooperation programs can lead to congressionally unauthorized hostilities in a range of circumstances. Congress has several options for preventing this outcome, while still allowing the Department of Defense to work with partner forces as Congress sees fit.

The most straightforward way to address these risks is to repeal §§ 333, 127e, and 1202 outright. These standing authorities are not limited by geography or adversary. They afford the Department of Defense near-total discretion on where and how §§ 333, 127e, and 1202 programs

are run. By repealing these authorities, Congress can ensure that it has a role in deciding what foreign partners U.S. forces work with and what adversaries they pursue.

Repealing §§ 333, 127e, and 1202 would return the balance of power to where it stood before the war on terror. The Department of Defense would have to go to Congress for the authority to work with specific partners in, for example, Honduras, Lebanon, or Mongolia. It would have to convince Congress that deploying U.S. forces or building foreign proxies in those locations makes sense and is in the United States' foreign policy and national security interest.

The Department of Defense and Congress are perfectly capable of working together in this manner. In 2015, Congress created the Ukraine Security Assistance Initiative to allow the Department of Defense to provide training and equipment to Ukrainian forces on top of that permitted by § 333.[292] And in 2021, Congress adopted a law encouraging the Department of Defense to start § 333 programs focused on cybersecurity in Vietnam, Thailand, and Indonesia.[293] Having Congress legislate on individual programs, as it has done in these cases, would ensure that Congress understands and controls where U.S. forces are deployed, who they work with, and whether and against whom they engage in combat.

If §§ 333, 127e, and 1202 remain in place, Congress should amend these authorities to require that programs have the prior approval of the congressional armed services and foreign affairs committees. Although the White House has disclaimed the constitutionality of prior-approval provisions, arguing that they are proscribed legislative vetoes under the Supreme Court's 1983 *INS* v. *Chadha* decision,[294] Congress has held steadfast to the legislative mechanism and has continued to enact prior-approval provisions in various appropriations laws.[295]

These provisions are on solid legal ground. The *Chadha* decision struck down a true legislative veto that allowed either the House or the Senate to undo an agency action that Congress had otherwise empowered the agency to undertake. A prior-approval provision is cleanly distinguishable: unlike a legislative veto, a prior-approval provision does not attempt to exercise the legislative power to undo an agency action. Instead, it establishes a condition precedent for an agency to undertake an action.[296] No one disputes Congress's ability to condition the use of an authority on subsequent events. If Congress were to add prior-approval provisions to §§ 333, 127e, and 1202 — specifying that no funds could be used for these programs without committee approval — the subsequent events unlocking these authorities for the Department of Defense would be affirmative committee votes.

Even if executive branch lawyers are averse to this reasoning, Congress can enact its prior-approval provisions in a way that forces the Department of Defense to respect them. Namely, Congress can specify that the prior-approval provisions are not severable from the §§ 333, 127e, and 1202 authorities themselves. Any argument that a prior-approval provision is unconstitutional, and thus can be ignored or downgraded to a prior-notice provision, would open the door to these authorities being struck down in their entirety.

Requiring a vote in favor of specific security cooperation programs is just one of several ways that Congress can guard against unauthorized hostilities. Congress should also explicitly prohibit the Department of Defense from running nonoperational security cooperation programs, like those under § 333, in or near hostile territory. This would reduce the likelihood of U.S. forces encountering their partner forces' adversaries, thereby reining in avoidable exercises of unit self-defense and questionable invocations of collective self-defense.

With respect to operational security cooperation programs, Congress should require §§ 127e and 1202 partners to support "statutorily authorized" operations, not simply "authorized" operations. This small change would prevent the Department of Defense from using §§ 127e and 1202 programs to implement the executive branch's expansive view of constitutional self-defense. The United States could still invoke self-defense, but it would not be able to build and command surrogate forces to that end. In practice, this would have little to no effect on U.S. forces' ability to engage in true constitutional self-defense, as when U.S. forces are deployed far from known adversaries yet find themselves threatened. In this kind of circumstance, U.S. forces would not have the time to set up a §§ 127e or 1202 program as they respond to an unforeseen, sudden attack.

Congress should also take steps to prevent misunderstandings about how §§ 127e and 1202 partner forces may be used, consistent with the legal authorities available. First, Congress can specify that §§ 127e and 1202 partner forces are subject to EXORD limitations. This would prohibit the Department of Defense from asking partner forces to conduct missions that U.S. forces cannot lawfully conduct. Second, Congress can establish basic requirements for the information that EXORDs must contain. At a minimum, EXORDs permitting the use of force should specify the law under which force is authorized and name the groups against which force can be used.

Finally, Congress should reduce the likelihood that the Department of Defense misuses its authorities by subjecting §§ 127e and 1202 to a fulsome interagency process. Programs under these authorities, like those under § 333, should require the secretary of state's concurrence and Leahy vetting[297] — not just the concurrence of an ambassador. The Department of Defense itself has said that the § 333 interagency process "helps ensure [that its] proposals support the broad range of U.S. national security and foreign policy objectives" and has denied that the process "slows down implementation [] or interferes with opera-

tional priorities."[298] Aligning the interagency process for §§ 127e and 1202 with the established process for § 333 would thus add a critical layer of review with minimal operational cost.

Whether security cooperation authorities are repealed entirely or reformed along these lines, the changes would add much-needed guardrails to the current security cooperation regime. They would not end security cooperation or leave U.S. allies high and dry. Instead, they would ensure that Congress is consulted on where and how security cooperation takes place and would prevent such activities from serving as a gateway to unauthorized hostilities.

Improving Congressional and Public Oversight

One of the most striking features of the current security cooperation regime is how little anyone outside the Pentagon and the White House knows about U.S. programs with partner forces, particularly programs under §§ 127e and 1202. The Department of Defense's intense secrecy regarding these programs and the hostilities they involve or enable has frustrated Congress's checks and balances on the executive branch's use of the military. And it has prevented any semblance of public accountability. Congress should address these transparency shortfalls by increasing congressional and public access to key information on security cooperation.

Congress has both legislative and nonlegislative avenues for improving its own oversight of security cooperation programs. With respect to the former, Congress should reform the notification provisions for §§ 333, 127e, and 1202 to ensure that the relevant committees receive information sufficient to assess whether U.S. forces intend to conduct or are otherwise likely to end up in hostilities. At a minimum, this would require the Department of Defense to provide information on (1) where U.S. forces plan to deploy, and where potential adversaries operate, within a country; (2) the identities of all potential U.S. and partner force adversaries in a country, including whether such adversaries are covered by an authorization for use of military force; (3) whether applicable EXORDs permit U.S. forces to engage in combat against these potential adversaries, and on what legal bases; (4) whether the envisioned partner forces are currently or imminently engaged in hostilities with these potential adversaries; (5) whether the envisioned partner forces are or will be designated as eligible for collective self-defense; and (6) the risks identified in programmatic monitoring and evaluation. This information should be made available to Congress before U.S. forces launch a program.

To oversee ongoing programs, Congress should expand the reporting provisions in §§ 333, 127e, and 1202 to include whether (1) U.S. forces have engaged in combat; (2) partner forces have engaged in combat, including combat directed by U.S. forces; (3) the legal authorities, including EXORDs, have changed in the area; and (4) the previously identified programmatic risks have materialized or changed. Congress should also expand the briefing and notification regimes for sensitive and significant military operations, such that they capture information on *all* activities that involve or rise to the level of a use of force. Finally, Congress should modify the monitoring and evaluation regime in § 383 to ensure that it covers activities under §§ 127e and 1202, addresses war powers concerns, and regularly updates Congress on whether the Department of Defense's programs are safe, cost-effective, and meeting articulable benchmarks.

These reporting, briefing, and notification regimes should provide information not only to the congressional defense committees but also to the foreign affairs committees. Unauthorized hostilities, or the risk of them, are at the core of the foreign affairs committees' jurisdiction. Any action under the War Powers Resolution or any amendment to the authorizations for use of military force must originate with the foreign affairs committees. As long as these committees are left in the dark, Congress will not be fully empowered to respond to the Department of Defense's uses and misuses of its authorities.

Beyond legislative action, Congress can act internally to improve its security cooperation oversight. To start, the House should align its practices regarding access to sensitive compartmented information with the Senate's. In late 2021, the Senate announced that each member would be allowed at least one personal staffer with SCI access.[299] On the Senate side, this was a crucial step toward staffers being able to view §§ 127e and 1202 reports and notifications. Until the House expands SCI access for its members' staffers, §§ 127e and 1202 reports and notifications will continue to be out of reach. Relatedly, both the House and Senate should set the expectation that staffers on the congressional defense committees will inform the relevant member offices when the Department of Defense submits §§ 333, 127e, and 1202 materials. Even if personal staffers cannot view these materials themselves for lack of SCI access, they can recommend that their members go to the committee office to view them.

Notwithstanding the heavy classification of many security cooperation notifications and reports, the public — and staffers without SCI access — should have access to at least some information regarding security cooperation activities. At a minimum, the public should be told where, against whom, and under what authorities U.S. forces are engaged in hostilities through or with partners. The public should also be told how costly these hostilities are, in terms of not only dollars but also lives lost by U.S. soldiers, partner forces, and civilians. Finally, the public needs to know which partner forces the Department of Defense reserves

the right to defend, potentially deepening U.S. involvement in foreign conflicts. Without this information, Americans cannot understand the scope or risks of the wars carried out under these authorities, much less make demands of their representatives regarding them.

Lastly, Congress should revive the transparency principles enshrined in the Constitution's Two-Year Clause by taking decisive action when the Department of Defense unduly delays or withholds required reports. The 2022 NDAA establishes a model for doing just this: § 1048 of that law withheld 25 percent of the Department of Defense's operation and maintenance budget until the department submitted two overdue reports, one on EXORDs and another on civilian casualties.[300] Congress should continue to use this kind of mechanism to obtain overdue reports. Moreover, it can and should consider preemptively withholding funds to incentivize the Department of Defense's timely submission of reports.

Simply put, the lack of transparency on security cooperation is undemocratic and dangerous. Congressional oversight is sorely needed, particularly as the Department of Defense pivots to great power competition and conducting irregular warfare against nuclear states. The danger of these programs leading to unauthorized hostilities and military escalation will only continue until Congress and the public can secure greater transparency.

Restating and Enforcing the Balance of War Powers

Ultimately, no reforms will fully reassert Congress's control over military affairs — as enshrined in the Declare War Clause and the Constitution's enumerated powers to create, fund, and regulate the military — without a functional War Powers Resolution. This law has been systematically undermined through decades of executive noncompliance and congressional neglect. Separately, it is outdated. Its authors could not have anticipated the modern era of light-footprint warfare or the ever-growing breadth of the inherent powers claimed by the president.

Several legislative proposals, most notably the National Security Reforms and Accountability Act (NSRAA) in the House and the National Security Powers Act (NSPA) in the Senate, attempt to inject new life into the War Powers Resolution.[301] These proposals address some of the law's shortcomings, such as its failure to define "hostilities," that have been exploited by executive branch lawyers. They also work toward modernizing the War Powers Resolution by, among other things, explicitly stating that "advise, assist, accompany" missions with partner forces can rise to the level of hostilities.

But the NSRAA and NSPA do not go far enough. Neither bill refutes the specific theories of inherent power that executive branch lawyers have crafted and enlarged over the past several decades. Instead of allowing presidents to erode its war powers by articulating ever-expanding interpretations of what they may do without congressional authorization, Congress should denounce the collective self-defense and national-interest theories and withhold funding for activities conducted on those bases. Alongside passing the NSRAA or NSPA, such a step would be one of the strongest that Congress could take to reassert its vital role under the Constitution.

Conclusion

The war on terror is in its third decade. Americans who were not yet born on September 11 are fighting groups that did not yet exist on September 11. They are doing so in countries and with partner forces that the public and even most of Congress can hardly fathom. More dangerous still, the executive branch has set its sights on great power competition, preparing for potential confrontations with nuclear states.

This state of affairs is the result of a decades-long shift in the balance of power between Congress and the president. Under the Constitution, only Congress has the power to decide when, where, and against whom the country is at war. Yet since the Cold War, and particularly since 2001, this most democratic branch has ceded its power to the White House and the Pentagon, enabling them today to wage secret wars across Africa and Asia.

Congress must reclaim its constitutional role and ensure that the decision to use military force is made not just solemnly but also democratically. As war powers and good governance advocates have long argued, Congress should repeal or reform the outdated and overstretched AUMFs and the covert action statute. But those actions, while essential, are insufficient. Congress should also repeal or reform the Department of Defense's security cooperation authorities. Until it does so, the nation will continue to be at war — without, in some cases, the consent or even knowledge of its people.

Endnotes

1 Nick Turse, Amanda Sperber, and Sam Mednick, "Inside the Secret World of US Commandos in Africa," Pulitzer Center, August 11, 2020, https://pulitzercenter.org/stories/exclusive-inside-secret-world-us-commandos-africa (reporting that, as of 2017, U.S. special operations forces had engaged in combat in 12 countries across Africa, in addition to the U.S. intervention and subsequent involvement in Libya); Stephanie Savell, "The 2001 Authorization for Use of Military Force: A Comprehensive Look at Where and How It Has Been Used," Costs of War Project, Brown University Watson Institute for International and Public Affairs, December 14, 2021, https://watson.brown.edu/costsofwar/files/cow/imce/papers/2021/Costs%20of%20War_2001%20AUMF.pdf (identifying additional hostilities in Pakistan, Syria, and Yemen); Nick Turse and Alice Speri, "How the Pentagon Uses a Secretive Program to Wage Proxy Wars," *Intercept*, July 1, 2022, https://theintercept.com/2022/07/01/pentagon-127e-proxy-wars (discussing a proxy force program involving combat in Lebanon); and Linda Robinson, Patrick B. Johnston, and Gillian S. Oak, *U.S. Special Operations Forces in the Philippines, 2001–2014* (Santa Monica, CA: RAND Corporation, 2016), 53, 70, https://www.rand.org/content/dam/rand/pubs/research_reports/RR1200/RR1236/RAND_RR1236.pdf.

2 See, e.g., Kyle Rempfer, "How US Troops Survived a Little-Known al-Qaeda Raid in Mali Two Years Ago," *Military Times*, April 16, 2020, https://www.militarytimes.com/news/your-army/2020/04/16/how-us-troops-survived-a-little-known-al-qaeda-raid-in-mali-two-years-ago; Wesley Morgan, "Behind the Secret U.S. War in Africa," *Politico*, July 2, 2018, https://www.politico.com/story/2018/07/02/secret-war-africa-pentagon-664005; and "Methodology," Airwars, last accessed September 19, 2022, https://airwars.org/about/methodology.

3 Valerie Volcovici, "U.S. Senators Seek Answers on U.S. Presence in Niger After Ambush," Reuters, October 22, 2017, https://www.reuters.com/article/us-niger-usa/u-s-senators-seek-answers-on-u-s-presence-in-niger-after-ambush-idUSKBN1CR0NG.

4 Presidential Approval and Reporting of Covert Actions, 50 U.S.C. § 3093 (1991). Covert action, as opposed to clandestine activity, is not merely secretive. It is designed to be deniable, such that the United States will be neither blamed nor held responsible for the action. Michael E. DeVine, "Covert Action and Clandestine Activities of the Intelligence Community: Selected Definitions in Brief," Congressional Research Service, updated June 14, 2019, https://sgp.fas.org/crs/intel/R45175.pdf.

5 *Authorizations of Use of Force: Administration Perspectives, Hearing Before the Senate Committee on Foreign Relations*, 117th Cong., Senate hearing 117-256 (August 3, 2021) (testimony of Richard C. Visek), https://www.foreign.senate.gov/hearings/authorizations-of-use-of-force-administration-perspectives-080321.

6 Raoul Berger, *Executive Privilege: A Constitutional Myth* (Cambridge, MA: Harvard University Press, 1974), 13. See also Talbot v. Seeman, 5 U.S. 1, 28 (1801) ("The whole powers of war being by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry [into a disputed use of force].").

7 Publius [Alexander Hamilton], "Federalist No. 26," December 22, 1787, in *The Federalist Papers*, Avalon Project, Yale Law School, last accessed September 20, 2022, https://avalon.law.yale.edu/18th_century/fed26.asp.

8 Ex parte Milligan, 71 U.S. 2, 139 (1866); and Hamdan v. Rumsfeld, 548 U.S. 557, 592 (2006) (citing *Milligan* favorably, for its discussion of the "interplay" between Congress's and the president's constitutional war powers).

9 "Article 1, Section 8, Clause 11, Document 4," August 17, 1787, in *The Records of the Federal Convention of 1787*, ed. Max Farrand, vol. 2 (New Haven, CT: Yale University Press, 1937), 318, https://press-pubs.uchicago.edu/founders/documents/a1_8_11s4.html.

10 David Jeremiah Barron, *Waging War: The Clash Between Presidents and Congress, 1776 to ISIS* (New York: Simon & Schuster, 2016), 49; and Act of May 28, 1798, ch. 48, 1 Stat. 561 ("An Act More Effectually to Protect the Commerce and Coasts of the United States").

11 The Naval Act, ch. 12, 1 Stat. 350 (1794).

12 Little v. Barreme, 6 U.S. 170, 179 (1804).

13 Bas v. Tingy, 4 U.S. 37, 43 (1800).

14 Thomas Jefferson, "First Annual Message," December 8, 1801, American Presidency Project, UC Santa Barbara, https://www.presidency.ucsb.edu/documents/first-annual-message. Roughly contemporaneous statements from members of Congress suggested that a president who conducts military action before consulting Congress must then "embrace the earliest opportunity to explain the matter and obtain a justification." William C. Banks and Peter Raven-Hansen, *National Security Law and the Power of the Purse* (New York: Oxford University Press, 1994), 38.

15 Abraham Lincoln, "Message to Congress," May/June 1861, Abraham Lincoln Papers, Library of Congress, https://www.loc.gov/resource/mal.1054300/?sp=1&st=text. See also Helvidius [James Madison], "No. 4," September 14, 1793, James Madison Papers, Library of Congress, https://founders.archives.gov/documents/Madison/01-15-02-0070 ("[T]he executive has no right, in any case to decide the question, whether there is or is not cause for declaring war: that the right of convening and informing Congress, whenever such a question seems to call for a decision, is all the right which the constitution has deemed requisite or proper.").

16 Lincoln, "Message to Congress." In his public address, Lincoln omitted certain expenditures that his administration had made as it awaited the special legislative session. These expenditures came to light one year later, at which point Lincoln provided a full accounting of his decision-making and acknowledged that he would be "wanting equally in candor and in justice" if he refused responsibility for "whatever error, wrong, or fault was committed." "Letter to the Senate and House of Representatives," May 26, 1862, in *The Collected Works of Abraham Lincoln*, ed. Roy P. Basler, vol. 5 (New Brunswick, NJ: Rutgers University Press, 1953), https://quod.lib.umich.edu/l/lincoln/lincoln5/1:538?rgn=div1;view=fulltext;q1=last+best+hope.

17 David J. Barron and Martin S. Lederman, "The Commander in Chief at the Lowest Ebb — A Constitutional History," *Harvard Law Review* 121 (January 2008): 1057.

18 Adrian Fisher, "Authority of the President to Repel the Attack in Korea," Department of State Bulletin 23 (1950): 173–74.

19 Joshua Kurlantzick, *A Great Place to Have a War: America in Laos and the Birth of a Military CIA* (New York: Simon & Schuster, 2017), 13.

20 *Nomination of William E. Colby to Be Director of Central Intelligence, Hearing Before the Senate Committee on Armed Services*, 93rd Cong. (July 20, 1973) (statement of Sen. Stuart Symington), https://books.google.com/books/about/Nomination_of_William_E_Colby_Hearing_93.html?id=g_R7holhs3kC. Certain members of Congress received classified briefings on the CIA's operations in Laos. Even for these members, however, the CIA went to great lengths to portray its role as providing "food assistance and other humanitarian aid" to a "tiny" foreign force. In public hearings, CIA officials denied conducting operations in Laos altogether. Kurlantzick, *Great Place to Have a War*, 102, 104, 182.

21 Tillman Durdin, "News of War in Laos Comes in Bits," *New York Times*, February 15, 1971, https://www.nytimes.com/1971/02/15/archives/news-of-war-in-laos-comes-in-bits.html.

22 Scott Shane, "The Not-So-Secret War: Revisiting American Intervention in Laos," *New York Times*, February 3, 2017, https://www.nytimes.com/2017/02/03/books/review/great-place-to-have-a-war-joshua-kulantick.html.

23 Report from the Special Subcommittee on Government Information ("Moss committee"), cited in Kevin M. Baron, *Presidential Privilege and the Freedom of Information Act* (Edinburgh, UK: Edinburgh University Press, 2019), 85–86.

24 Seymour M. Hersh, "Inquiry Pressed in Secret Raids," *New York Times*, July 16, 1973, https://www.nytimes.com/1973/07/16/archives/inquiry-pressed-in-secret-raids-senator-asking-source-of-70.html.

25 War Powers Resolution, Pub. L. 93-148, § 2(c) (1973), https://www.govinfo.gov/content/pkg/STATUTE-87/pdf/STATUTE-87-Pg555.pdf.

26 War Powers Resolution, §§ 3, 4.

27 *Bas*, 4 U.S. at 43.

28 War Powers Resolution, § 5(c).

29 War Powers Resolution, § 5(b).

30 Richard Nixon, "Veto of the War Powers Resolution," October 24, 1973, American Presidency Project, UC Santa Barbara, https://www.presidency.ucsb.edu/documents/veto-the-war-powers-resolution.

31 Congressional Research Service, "The War Powers Resolution: Concepts and Practice," updated March 8, 2019, 12, 70, https://crsreports.congress.gov/product/pdf/R/R42699.

32 Pub. L. 98-473, § 8066 (1984), https://www.govinfo.gov/content/pkg/STATUTE-98/pdf/STATUTE-98-Pg1837.pdf.

33 Barron and Lederman, "Commander in Chief at the Lowest Ebb," 1088–89n617.

34 Authorization for Use of Military Force, Pub. L. 107-40 (2001), https://www.govinfo.gov/content/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf.

35 George W. Bush, "Address to a Joint Session of Congress and the American People," White House Archives, September 20, 2001, https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html.

36 See Brian Finucane, "Putting AUMF Repeal into Context," *Just Security*, June 24, 2021, https://www.justsecurity.org/77088/putting-aumf-repeal-into-context.

37 See White House, "Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations," December 2016, https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf.

38 50 U.S.C. § 1550(b)(1) (2019).

39 For the purposes of this report, the House Foreign Affairs Committee and Senate Foreign Relations Committee are referred to collectively as the *foreign affairs committees*.

40 Robert Chesney, "Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate," *Journal of National Security Law & Policy* 5 (2012): 563, https://jnslp.com/wp-content/uploads/2012/01/Military-Intelligence-Convergence-and-the-Law-of-the-Title-10Title-50-Debate.pdf.

41 Chesney, "Military-Intelligence Convergence," 564–65.

42 Bob Woodward, *Obama's Wars* (New York: Simon & Schuster, 2010), 8.

43 Greg Miller and Julie Tate, "CIA Shifts Focus to Killing Targets," *Washington Post*, September 1, 2011, https://www.washingtonpost.com/world/national-security/cia-shifts-focus-to-killing-targets/2011/08/30/gIQA7MZGvJ_story.html.

44 Miller and Tate, "CIA Shifts Focus to Killing Targets."

45 50 U.S.C.A. § 3093(c)(2) (West 2019).

46 Katherine Yon Ebright, "Unilateral Use of Force in the 'National Interest': Taiwan Doesn't Meet the Test," *Just Security*, November 12, 2021, https://www.justsecurity.org/79172/unilateral-use-of-force-in-the-national-interest-taiwan-doesnt-meet-the-test.

47 Finucane, "Putting AUMF Repeal into Context."

48 See generally Bruce Ackerman and Oona Hathaway, "Limited War and the Constitution: Iraq and the Crisis of Presidential Legality," *Michigan Law Review* 109 (2011): 447–517, https://repository.law.umich.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1164&context=mlr (contrasting Congress's historical use of its power over military appropriations against its post–September 11 use).

49 In 2019, Congress invoked the War Powers Resolution to curb U.S. intelligence-sharing with and jet refueling for Saudi Arabia in its conflict with the Houthi movement in Yemen. See Senate Joint Resolution 7, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/senate-joint-resolution/7/text (known as the Yemen War Powers Resolution). Since the start of the war on terror, Congress has not been similarly critical of conflicts initiated and fought by U.S. forces. For more on the Yemen War Powers Resolution, see generally Oona A. Hathaway et al., "Yemen: Is the U.S. Breaking the Law?," *Harvard National Security Law Journal* 10 (2019): 1–74, https://harvardnsj.org/wp-content/uploads/sites/13/2019/02/Yemen-Is-the-U.S.-Breaking-the-Law.pdf.

50 Stephen M. Schwartz, "The Way Forward for the United States in Somalia," Foreign Policy Research Institute, January 12, 2021, https://www.fpri.org/article/2021/01/way-forward-united-states-somalia.

51 Michael M. Phillips, "Caught in a Political Crossfire, U.S.-Trained Somali Commandos Suspend Fight Against Islamic State," *Wall Street Journal*, December 10, 2021, https://www.wsj.com/articles/caught-in-a-political-crossfire-u-s-trained-somali-commandos-suspend-fight-against-islamic-state-11639145293.

52 Phillips, "Caught in a Political Crossfire."

53 Abdulkadir Khalif, "Security Forces' Clash in Somalia's Bossaso Port City Threaten [*sic*] Peace," *East African*, December 22, 2021, https://www.theeastafrican.co.ke/tea/news/east-africa/security-forces-clash-in-somalia-threaten-peace-3660788; and Brennan Center interviews, Wesley Morgan, January and July 2022.

54 Khalif, "Security Forces' Clash"; and Schwartz, "Way Forward in Somalia."

55 U.S. Africa Command, "U.S. Diplomat: 'We Do Not Plan, Direct or Coordinate' Military Ops for Somalia Government," March 13, 2010, https://www.africom.mil/article/7261/us-diplomat--34-we-do-not-plan-direct-or-coordinat; and Phil Stewart, "U.S. Discloses Secret Somalia Military Presence, Up to 120 Troops," Reuters, July 2, 2014, https://www.reuters.com/article/us-usa-somalia/exclusive-u-s-discloses-secret-somalia-military-presence-up-to-120-troops-idINKBN0F800V20140703. News of the United States' relationship with the Puntland Security Force broke in 2012, after the United Nations noticed an unusual number of American cargo planes in Somalia and investigated. Eli Lake, "Obama's Not-So-Secret Terror War," *Daily Beast*, July 13, 2017, https://www.thedailybeast.com/obamas-not-so-secret-terror-war?ref=scroll.

56 Phillips, "Caught in a Political Crossfire."

57 Abdulkadir Khalif, "Puntland Soldiers Turn Weapons on Each Other," *East African*, December 25, 2021, https://www.theeastafrican.co.ke/tea/news/east-africa/puntland-soldiers-turn-weapons-on-each-other-3662910; Phillips, "Caught in a Political Crossfire"; and "Clashes in Northeast Somalia Force Thousands to Flee," Al Jazeera, December 25, 2021, https://www.aljazeera.com/news/2021/12/25/clashes-northeast-somalia-security-forces-thousands-flee.

58 Michael M. Phillips, "U.S. Military Urges Biden to Place Commandos in Somalia as Militant Threat Worsens," *Wall Street Journal*, March 10, 2022, https://www.wsj.com/articles/u-s-military-urges-biden-to-place-commandos-in-somalia-as-militant-threat-worsens-11646914851.

59 Schwartz, "Way Forward in Somalia"; and Amanda Sperber, "The Danab Brigade: Somalia's Elite, US-Sponsored Special Ops Force," Pulitzer Center, August 11, 2020, https://pulitzercenter.org/stories/danab-brigade-somalias-elite-us-sponsored-special-ops-force. Although the Danab Brigade was officially inaugurated in 2014, the United States had been supporting the development and expansion of the force since 2011. Paul D. Williams, *Fighting for Peace in Somalia: A History and Analysis of the African Union Mission (AMISOM), 2007–2017* (New York: Oxford University Press, 2018), 245–46.

60 Sperber, "Danab Brigade."

61 Amanda Sperber, "U.S.-Assisted Raid in Somalia Killed Two Civilians, Villagers Say," *In These Times*, September 4, 2019, https://inthesetimes.com/features/us-military-somalia-raid-civilian-deaths.html.

62 W. J. Hennigan, "U.S. Special Operations Forces Face Growing Demands and Increased Risks," *Los Angeles Times*, May 25, 2017, https://www.latimes.com/nation/la-na-special-operations-20170525-story.html.

63 Charlie Savage and Eric Schmitt, "Biden Approves Plan to Redeploy Several Hundred Ground Forces into Somalia," *New York Times*, May 16, 2022, https://www.nytimes.com/2022/05/16/us/politics/biden-military-somalia.html.

64 Charlie Savage, Eric Schmitt, and Mark Mazzetti, "Obama Expands War with Al Qaeda to Include Shabab in Somalia," *New York Times*, November 27, 2016, https://www.nytimes.com/2016/11/27/us/politics/obama-expands-war-with-al-qaeda-to-include-shabab-in-somalia.html.

65 Ryan Goodman, "Obama's Forever War Starts Now," *Foreign Policy*, February 12, 2015, https://foreignpolicy.com/2015/02/12/obamas-forever-war-starts-now-aumf-isis-islamic-state.

66 The Obama administration published a list of associated forces in late 2016. More recently, in mid-2019, the legal adviser to the Department of State recited the same list of associated forces in a congressional hearing when explaining that "only certain terrorist groups fall within the scope of the 2001 AUMF." See White House, "Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force" (2016), 5; and *Reviewing Authorities for the Use of Military Force, Hearing Before the Senate Foreign Relations Committee*, 116th Cong., Senate hearing 116-388 (July 24, 2019) (statement by Legal Adviser Marik A. String), https://www.foreign.senate.gov/hearings/reviewing-authorities-for-the-use-of-military-force-072419. It is possible that the executive branch treats ISS as inseverable from and a part of ISIS — the Islamic State *of Iraq and Syria* — but that would represent a departure from how al-Qaeda affiliates such as al-Qaeda in the Arabian Peninsula (AQAP) and al-Qaeda in the Islamic Maghreb (AQIM) were treated. AQAP and AQIM were separately designated as associated forces.

67 Prior to al-Shabaab's designation as an associated force, certain strikes on al-Shabaab targets were justified by those targets' close personal connections to al-Qaeda, which supposedly rendered them "dual-hatted" members of both terrorist groups. These strikes, however, were pinprick strikes — few and far between. See Robert Chesney, "What Is the Domestic Law Basis for U.S. Airstrikes Supporting AMISOM in Somalia?," *Lawfare*, July 31, 2015, https://www.lawfareblog.com/what-domestic-law-basis-us-airstrikes-supporting-amisom-somalia.

68 Sperber, "Danab Brigade"; Brennan Center interviews, Wesley Morgan, January and July 2022; and Brennan Center interview, former Department of Defense official, January 2022.

69 Sperber, "Danab Brigade." A § 333 report from 2018 shows that the Department of Defense spent at least $57.2 million to train and equip the Danab Brigade between 2015 and 2018. The same report proposes an additional $9.5 million in spending. See Charles W. Hooper, director, Defense Security Cooperation Agency, letter to Hon. Edward Royce, chairperson, House Committee on Foreign Affairs, March 13–15, 2018 (letter and attachment on file with author) (hereinafter § 333 Quarterly Report, March 2018).

70 Brennan Center interviews, Wesley Morgan, January and July 2022 (discussing the Puntland Security Force); and Ido Levy and Abdi Yusuf, "The 'Lightning' Brigade: Security Force Assistance and the Fight Against al-Shabaab," *Studies in Conflict & Terrorism* (2022): 12 (discussing the Danab Brigade). Although the Department of Defense has funded the whole Danab Brigade, at least at times, it has exercised operational control over just a handful of units of the force, or a fraction of the force's 1,000 fighters. Brennan Center interview, former Department of Defense official, August 2022.

71 *The Authorizations for the Use of Military Force: Administration Perspective, Hearing Before the Senate Foreign Relations Committee*, 115th Cong., Senate hearing 115-639 (October 30, 2017) (response by Secretary of State Rex Tillerson to question submitted by Sen. Cory Booker), https://www.govinfo.gov/content/pkg/CHRG-115shrg37142/html/CHRG-115shrg37142.htm.

72 In spoken English, § 333 is often referred to as *triple three*.

73 10 U.S.C. § 301 (2018); and 22 U.S.C. § 2403 (1996).

74 Brennan Center interview, former Department of Defense official, January 2022; and Brennan Center interviews, congressional staffers, January 2022.

75 See, e.g., § 333 Quarterly Report, March 2018; David J. Trachtenberg, deputy undersecretary of defense, letter to Hon. Edward Royce, chairman, House Committee on Foreign Affairs, July 5, 2018 (letter and attachment on file with author) (hereinafter § 333 Notifications, FY18 Tranche 7); and Report in Response to S. Rep. 116-126, Department of State, April 6, 2020 (report on file with author) (hereinafter Sahel Report).

76 See, e.g., Department of Defense, "Strategic Evaluation: U.S. Maritime Security Cooperation in the Gulf of Guinea (2007–2018)," May 18, 2021, https://open.defense.gov/Portals/23/Documents/Security_Cooperation/Maritime_Security_Cooperation_Gulf_of_Guinea_2007-2018.pdf; Inspector General, Department of Defense, "Audit of the DoD's Management of Global Train and Equip Program Resources Provided to U.S. Africa Command Partner Nations," July 21, 2021, https://www.oversight.gov/sites/default/files/oig-reports/DoD/DODIG-2021-102.pdf; and Congressional Research Service, "U.S. Security Assistance to Ukraine," updated June 24, 2022, https://crsreports.congress.gov/product/pdf/IF/IF12040 (acknowledging the provision of support to Ukraine under § 333).

77 Other authorities may be limited in time, geographic reach, purpose, or types of permissible assistance. The Indo-Pacific Maritime Security Initiative, for instance, is a time-limited authority that allows the Department of Defense to provide training, equipment, supplies, and small-scale construction to Indo-Pacific countries for the purpose of increasing their maritime security, domain awareness, and regional cooperation. National Defense Authorization Act for Fiscal Year 2022 (hereinafter NDAA for FY 2022), Pub. L. 117-81, § 1241 (2021). For information on additional authorities that allow the provision of training and equipment, see Defense Security Cooperation Agency, "Building Partner Capacity Programs," last accessed September 20, 2022, https://samm.dsca.mil/chapter/chapter-15.

78 § 333 Quarterly Report, March 2018; and § 333 Notifications, FY18 Tranche 7. In fiscal years 2016 and 2017, the Department of Defense ran § 333 programs in 30 countries, ranging from Trinidad and Tobago to Indonesia. See Government Accountability Office, "DOD Should Fully Address Security Assistance Planning Elements in Global Train and Equip Project Proposals," May 2018, 12, https://www.gao.gov/assets/gao-18-449.pdf.

79 § 333 Notifications, FY18 Tranche 7, 4–5, 16–17, 22–23, 26–28.

80 Brennan Center interview, former Department of Defense official, January 2022; and Brennan Center interviews, congressional staffers, January 2022.

81 Brennan Center interviews, congressional staffers, January 2022.

82 Maj. Ryan Fisher, ed., *Operational Law Handbook* (Charlottesville, VA: U.S. Army Judge Advocate General's Legal Center and School, 2022), 107, https://tjaglcs.army.mil/documents/35956/56931/2022+Operational+Law+Handbook.pdf/4e10836e-2399-eb81-768f-7de8f6e03dc5?t=1652119179075.

83 Fisher, ed., *Operational Law Handbook*. Although some commentators have suggested that collective self-defense is a recent theory of presidential power, the theory actually predates the war on terror. See, e.g., Rita Siemion and Kate Kizer, "How Dangerous — and How New — Is the Defense Department's 'Collective Self-Defense' Theory?," *Just Security*, October 30, 2018, https://www.justsecurity.org/61273/dangerous-and-new-is-defense-departments-collective-self-defense-theory. It is likely, however, that the theory has developed and been used more expansively throughout the war on terror, particularly as the Department of Defense's security cooperation authorities have grown. Compare Maj. Richard M. Whitaker, ed., *Operational Law Handbook* (Charlottesville, VA: U.S. Army Judge Advocate General's Legal Center and School, 1997), https://www.pegc.us/archive/DoD/docs/OPLAW_JA_422_1997.pdf with Fisher, ed., *Operational Law Handbook* (2022).

84 Although collective self-defense exists in international law — allowing one country to militarily protect another without violating the UN Charter's prohibition on the use of force — nothing translates this international law concept into U.S. domestic law. International law has no power to diminish Congress's constitutional role in declaring war and authorizing the use of force.

85 Kevin Sieff, "The Pentagon Said It Killed Islamist Militants in Somalia. Turns Out They Were Allies," *Washington Post*, November 10, 2016, https://www.washingtonpost.com/world/africa/after-initial-denial-pentagon-discovers-it-killed-10-allies-in-drone-strike-in-somalia/2016/11/10/8231421e-a770-11e6-ba46-53db57f0e351_story.html.

86 Stimson Study Group on Counterterrorism Spending, *Counterterrorism Spending: Protecting America While Promoting Efficiencies and Accountability*, May 2018, 27, http://stimson.org/wp-content/files/file-attachments/CT_Spending_Report_0.pdf (tabulating security cooperation expenditures from 2001 to 2017).

87 See the section of this report titled "September 11 and Its Aftermath."

88 Robinson et al., *U.S. Special Operations Forces in the Philippines*, 128, https://www.rand.org/content/dam/rand/pubs/research_reports/RR1200/RR1236/RAND_RR1236.pdf.

89 One Department of Defense official described visiting such a base shortly after it had taken fire and still "had [its] weapons focused on a certain hillside." Brennan Center interview, Department of Defense official, April 2022. See Robinson et al., *U.S. Special Operations Forces in the Philippines*, 53; and Barry M. Stentiford, *Success in the Shadows: Operation Enduring Freedom — Philippines and the Global War on Terror, 2002–2015* (Fort Leavenworth, KS: Combat Studies Institute Press, 2018), 50, https://www.armyupress.army.mil/Portals/7/combat-studies-institute/csi-books/success-in-the-shadows.pdf (explaining that U.S. forces were stationed in "more volatile" parts of the Philippines).

90 Robinson et al., *U.S. Special Operations Forces in the Philippines*, 70.

91 Joe Penney, "Clinton, Counter-Insurgency and Hegemony," Al Jazeera, November 15, 2011, https://www.aljazeera.com/opinions/2011/11/15/clinton-counter-insurgency-and-hegemony.

92 "First Two US Soldiers Killed in Philippines Since 2002," *Christian Science Monitor*, September 29, 2009, https://www.csmonitor.com/World/Global-News/2009/0929/first-two-us-soldiers-killed-in-philippines-since-2002.

93 This report uses the term *forward operating base* to include what the Department of Defense may refer to as a forward operating base, forward operating site or location, cooperative security location, or contingency location. See generally Joint Chiefs of Staff, *Department of Defense Dictionary of Military and Associated Terms*, Joint Publication 1-02 (November 8, 2010, as amended through February 15, 2016), 83, https://irp.fas.org/doddir/dod/jp1_02.pdf.

94 David Vine, *Base Nation: How U.S. Military Bases Abroad Harm America and the World* (New York: Metropolitan Books, 2015), 299. According to a former Department of Defense official, "SOF [special operations forces] aren't going to be placed anywhere we don't expect something important happening. Many of the deployed SOF are deployed with tactical intent, where they can do the most good — not necessarily where they'll get into a fight, though there was a strong culture of wanting to be in the action." Brennan Center interview, former Department of Defense official, August 2022.

95 Vine, *Base Nation*, 310–11; and Nick Turse, "U.S. Military Says It Has a 'Light Footprint' in Africa. These Documents Show a Vast Network of Bases," *Intercept*, December 1, 2018, https://theintercept.com/2018/12/01/u-s-military-says-it-has-a-light-footprint-in-africa-these-documents-show-a-vast-network-of-bases.

96 Staff Sgt. Jeff Clements, "U.S. Soldiers Saves [*sic*] Lives in Kenya," Combined Joint Task Force—Horn of Africa, August 3, 2022, https://www.hoa.africom.mil/article/24983/us-soldiers-saves-lives-in-kenya (describing security patrols around a cooperative security location in Kenya); and Brennan Center interview, former Department of Defense official, August 2022.

97 The International Crisis Group explains that, even before the 2001 AUMF was applied to al-Shabaab, the scope of U.S. forces' combat in Somalia had grown due to excessive uses of unit and collective self-defense. Its report describes a U.S. attack — supposedly conducted in collective self-defense — on an al-Shabaab training camp that reportedly killed 150 al-Shabaab fighters. See International Crisis Group, *Overkill: Reforming the Legal Basis for the U.S. War on Terror*, United States Report No. 5, September 17, 2021, 13–15, https://www.crisisgroup.org/united-states/005-overkill-reforming-legal-basis-us-war-terror.

98 "U.S. Strikes Iran-Backed Militias in Iraq, Syria," *Iran Primer*, updated July 9, 2021, https://iranprimer.usip.org/blog/2021/jun/28/us-strikes-iran-backed-militias-iraq-syria (cataloging U.S. strikes on Iran-backed militia groups in Iraq and Syria).

99 Brennan Center interview, congressional staffer, January 2022.

100 Brennan Center interview, former Department of Defense official, January 2022. See also Maj. Anthony V. Lenze, "Are We Allowed to Be There? Understanding Mission Authority in the Context of the Fatal Niger Ambush," *Army Lawyer*, no. 2 (2019): 39. Execute orders are discussed at greater length in the context of § 127e.

101 Brennan Center interview, former Department of Defense official, January 2022.

102 Department of Defense, "Oct. 2017 Niger Ambush: Summary of Investigation," May 10, 2018, https://dod.defense.gov/portals/1/features/2018/0418_niger/img/Oct-2017-Niger-Ambush-Summary-of-Investigation.pdf.

103 Department of Defense, "Oct. 2017 Niger Ambush," 1.

104 *Authorizations for the Use of Military Force: Administration Perspective, Hearing Before the Senate Foreign Relations Committee* (2017).

105 White House, "Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations" (unclassified), October 2019, 7, https://www.state.gov/wp-content/uploads/2019/10/Report-to-Congress-on-legal-and-policy-frameworks-guiding-use-of-military-force-.pdf; and Brennan Center interview, former Department of Defense official, January 2022.

106 Department of Defense, "Oct. 2017 Niger Ambush," 2.

107 It is possible that the executive branch treats IS-GS as inseverable from and a part of ISIS, though, as discussed, that would represent a departure from how AQAP and AQIM were treated.

Brennan Center interview, former Department of Defense official, January 2022; and Brennan Center interviews, congressional staffers, January 2022.

108 § 333 Notifications, FY18 Tranche 7, 22–23. In addition to § 333, the Department of Defense has the authority to assist Ukraine under the Ukraine Security Assistance Initiative, established through § 1250 of the 2016 NDAA. The Ukraine Security Assistance Initiative allows the Department of Defense to provide training, equipment, and other assistance for a broad array of defensive purposes, including "[t]o support the Government of Ukraine in defending itself against actions by Russia and Russian-backed separatists." National Defense Authorization Act for Fiscal Year 2016, Pub. L. 114-92, § 1250(a)(3) (2015).

109 § 333 Notifications, FY18 Tranche 7, 22–23.

110 That said, if U.S. forces were to conduct train-and-equip missions in regions with active fighting, the constitutional authority to engage in collective self-defense could quickly come into play.

111 Nick Turse, "U.S.-Trained Officers Have Led Numerous Coups in Africa," *Intercept*, March 9, 2022, https://theintercept.com/2022/03/09/intercepted-podcast-africa-coup.

112 Daniel R. Mahanty, "The 'Leahy Law' Prohibiting US Assistance to Human Rights Abusers: Pulling Back the Curtain," *Just Security*, June 27, 2017, https://www.justsecurity.org/42578/leahy-law-prohibiting-assistance-human-rights-abusers-pulling-curtain. Leahy vetting is not a rubber-stamp process. Foreign forces, at both the individual and unit levels, have been denied Department of Defense assistance based on their human rights record. See Michael J. McNerney et al., *Improving Implementation of the Department of Defense Leahy Law* (Santa Monica, CA: RAND Corporation, 2017), 50, https://www.rand.org/pubs/research_reports/RR1737.html.

113 10 U.S.C. § 362(a)(2) (as amended 2016).

114 10 U.S.C. § 333(b) (as amended 2021).

115 *Managing Security Assistance to Support Foreign Policy, Hearing Before the Senate Foreign Relations Committee*, 115th Cong., Senate hearing 115-666 (September 27, 2017) (Lt. Gen. Charles Hooper). See also *Department of Defense Plans and Programs Relating to Counterterrorism, Counternarcotics, and Building Partnership Capacity, Hearing Before the Subcommittee on Emerging Threats and Capabilities, Senate Armed Services Committee*, 112th Cong., Senate hearing 112-182 (April 12, 2011) (describing the "dual-key concurrence mechanism" as a "particularly important feature of section 1206 [the predecessor to § 333] that drives deliberate coordination between departments in the executive branch, optimizing the value of [U.S.] assistance programs to foreign partners").

116 *Managing Security Assistance to Support Foreign Policy, Hearing Before the Senate Foreign Relations Committee* (2017).

117 *Managing Security Assistance to Support Foreign Policy, Hearing Before the Senate Foreign Relations Committee* (2017).

118 Brennan Center interview, former Department of Defense official, January 2022.

119 Robinson et al., *U.S. Special Operations Forces in the Philippines*, 66; and Brennan Center interview, Department of Defense official, April 2022 (explaining that U.S. forces were "more constrained" in areas of the Philippines where the Moro Islamic Liberation Front operated).

120 Brennan Center interview, congressional staffer, January 2022.

121 Brennan Center interview, congressional staffer, January 2022.

122 Brennan Center interview, congressional staffer, January 2022.

123 10 U.S.C. § 301(1) (as amended 2016).

124 See, e.g., § 333 Notifications, FY18 Tranche 7; and Brennan Center interview, congressional staffer, January 2022.

125 Brennan Center interview, congressional staffer, January 2022.

126 § 333 Notifications, FY18 Tranche 7, 12–13, 20–21, 44–45.

127 § 333 Notifications, FY18 Tranche 7, 33–35, 36–37, 38–40, 41–43.

128 § 333 Notifications, FY18 Tranche 7, 22, 24.

129 § 333 Quarterly Report, March 2018.

130 Before it was codified at 10 U.S.C. § 333, the global train-and-equip authority was set forth in § 1206 of the NDAA for 2006. *Department of Defense Plans and Programs Relating to Counterterrorism, Counternarcotics, and Building Partnership Capacity, Hearing Before a Subcommittee of the Senate Armed Services Committee* (2011).

131 10 U.S.C. § 383.

132 10 U.S.C. § 101(a)(16).

133 10 U.S.C. § 383(d).

134 10 U.S.C. §§ 383(b)(1)(C), (d)(2).

135 Department of Defense, "Strategic Evaluation: U.S. Maritime Security Cooperation in the Gulf of Guinea"; and Department of Defense, "Strategic Evaluation: State Partnership Program," March 23, 2022, https://open.defense.gov/Portals/23/Documents/Security_Cooperation/State_Partnership_Program.pdf.

136 Brennan Center interview, congressional staffer, January 2022; and Brennan Center interview, Department of Defense official, January 2022.

137 In 2013, Congress defined sensitive military operations as "a lethal operation or capture operation conducted . . . outside a theater of major hostilities pursuant to [the 2001 AUMF] or [] any other authority." National Defense Authorization Act for Fiscal Year 2014, Pub. L. 113-66, § 1041 (2013). In 2016, Congress revised the definition of sensitive military operations to include operations "conducted by a foreign partner in coordination with [U.S.] forces" and operations "conducted by [U.S.] forces outside a declared theater of active armed conflict in self-defense or in defense of foreign partners." National Defense Authorization Act for Fiscal Year 2017 (hereinafter NDAA for FY 2017), Pub. L. 114-328, § 1036 (2016). Again in 2018, Congress revised the definition to specify that it wanted notifications for all acts of unit or collective self-defense occurring outside of Afghanistan, Iraq, and Syria. John S. McCain National Defense Authorization Act for Fiscal Year 2019 (hereinafter NDAA for FY 2019), Pub. L. 115-232, § 1031 (2018). Most recently, in 2021, Congress changed the definition to clarify that the Department of Defense must report operations "conducted by [U.S.] forces to free an individual from the control of hostile foreign forces." NDAA for FY 2022, § 1042.

138 10 U.S.C. § 130f.

139 NDAA for FY 2019, § 1031 (codified at 10 U.S.C. § 130f(f)).

140 NDAA for FY 2019, § 1212.

141 National Defense Authorization Act for Fiscal Year 2020 (hereinafter NDAA for FY 2020), Pub. L. 116-92, § 1754 (2019).

142 NDAA for FY 2022, § 1031.

143 *Evaluation of the Department of Defense's Counterterrorism Approach, Hearing Before the House Committee on Armed Services*, 116th Cong., HASC no. 116-3 (February 6, 2019), 12–13, https://www.congress.gov/116/chrg/CHRG-116hhrg35336/CHRG-116hhrg35336.pdf.

144 *The Fiscal Year 2020 National Defense Authorization Budget Request from the Department of Defense, Hearing Before the House Armed Services Committee*, 116th Cong., HASC no. 116-17 (March 26, 2019), 48, https://www.congress.gov/116/chrg/CHRG-116hhrg36878/CHRG-116hhrg36878.pdf.

145 NDAA for FY 2020, S. 2792, § 1282(1) (as introduced by Sen. Jack Reed, September 21, 2021) (withholding 25 percent of the Department of Defense's operation and maintenance budget until submission of the report required by § 1754 of the NDAA for FY 2020).

146 Congressional Study Group on Foreign Relations and National Security, "Transparency and War Powers," Brookings Institution, December 30, 2020, https://www.brookings.edu/research/transparency-and-war-powers ("Arguably the keystone of the modern war powers reporting system, [the War Powers Resolution's] reporting obligation has been relatively widely complied with, to the point that administrations have generally made most such notices available to the public as well as Congress.").

147 War Powers Resolution, Pub. L. 93-148 (1973).

148 See Brian Finucane, "Failure to Warn: War Powers Reporting and the 'War on Terror' in Africa," *Just Security*, October 4, 2021, https://www.justsecurity.org/78450/failure-to-warn-war-powers-reporting-and-the-war-on-terror-in-africa/.

149 Lydia Chavez, "U.S. Steps Up Use of Spying Places in Salvador War," *New York Times*, March 30, 1984, https://www.nytimes.com/1984/03/30/world/us-steps-up-use-of-spying-planes-in-salvador-war.html ("The Ambassador [Thomas R. Pickering] also confirmed three incidents in which American advisers came under hostile fire recently. Those incidents were made known only after Senator Jim Sasser, Democrat of Tennessee, had heard of them and asked the Pentagon for a report.").

150 Reiss Center on Law and Security, "War Powers Resolution Reporting Project," last accessed September 20, 2022, https://warpowers.lawandsecurity.org/reports/?search=.

151 Reiss Center on Law and Security, "War Powers Resolution Reporting Project." Although the Bush administration submitted two reports notionally under § 4(a)(1), both reports covered congressionally authorized hostilities: the starts of the wars in Afghanistan and Iraq. See "Report on Military Actions Taken to Respond to the Threat of Terrorism," H.R. Doc. 107-131 (October 9, 2001); and "Report Consistent with the War Powers Resolution Regarding the Use of Military Force Against Iraq," H.R. Doc. 108-54 (March 24, 2003), https://assets.ctfassets.net/6hn51hpulw83/2JTm47sRDE9isHQhQCnHzC/b98855543763bcb8b6aed2ba6710caf7/20030321-W_Bush.pdf.

152 "Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization," 4A Op. O.L.C. 185, 194 (1980), https://www.justice.gov/file/22351/download.

153 Congress drafted the law to cover "hostilities," not "armed conflict," because the former was viewed as "broader in scope" than the latter. H.R. Rep. No. 287, 93rd Cong., 1st sess. (1973), 7.

154 "Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization," 194.

155 In spoken English, § 127e is often referred to as *127-echo*. Before it was codified at § 127e, the authority was set forth at § 1208 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (hereinafter NDAA for FY 2005). Pub. L. 108-375, § 1208 (2004).

156 That said, § 127e partners may also — or even primarily — be pursuing their own military objectives. Given the fungibility of money and other forms of U.S. support, § 127e programs can thus result in indirect U.S. support for partner forces' operations that the Department of Defense has no authority to conduct. Indeed, it is possible to read § 127e as affirmatively authorizing the Department of Defense to support partner forces' other operations, as long as these forces play some role in facilitating U.S. counterterrorism operations. This reading could in theory enable the department to outsource operations against adversaries that it lacks the authority to combat, all while framing these operations as support for partner forces. However, none of the former or current Department of Defense personnel interviewed for this report indicated that § 127e partners could be directed to conduct operations beyond those to combat terrorism.

157 Linda Robinson, Austin Long, Kimberly Jackson, and Rebeca Orrie, *Improving the Understanding of Special Operations: A Case History Analysis* (Santa Monica, CA: RAND Corporation, 2018), 112, https://www.rand.org/content/dam/rand/pubs/research_reports/RR2000/RR2026/RAND_RR2026.pdf.

158 Robinson et al., *Improving the Understanding of Special Operations*, 112–13.

159 Robinson et al., *Improving the Understanding of Special Operations*, 114–16.

160 NDAA for FY 2005, § 1208.

161 *Hearing on Fiscal Year 2015 National Defense Authorization Budget Request from the U.S. Special Operations Command and the Posture of the U.S. Special Operations Forces, Subcommittee on Intelligence, Emerging Threats and Capabilities, House Armed Services Committee*, 113th Cong., HASC no. 113-89 (March 13, 2014) (statement of Adm. William H. McRaven), https://www.govinfo.gov/content/pkg/CHRG-113hhrg87621/html/CHRG-113hhrg87621.htm.

162 Joseph L. Votel and Eero Keravuori, "The By-With-Through Operational Authority," *Joint Force Quarterly* 89 (2nd quarter 2018): 40, https://ndupress.ndu.edu/Portals/68/Documents/jfq/jfq-89/jfq-89_40-47_Votel-Keravuori.pdf?ver=2018-04-11-125441-307 (emphasis in original). See also J. Patrick Work, "Fighting the Islamic State By, With, and Through: *How* Mattered as Much as *What*," *Joint Force Quarterly* 89 (2nd quarter 2018): 56–62, https://ndupress.ndu.edu/Portals/68/Documents/jfq/jfq-89/jfq-89_56-62_Work.pdf.

163 Votel and Keravuori, "By-With-Through Operational Authority," 42, 46.

164 Maj. Daniel W. Hancock III, "Funding Surrogate Forces in the Fight Against Terrorism," *Military Law Review* 228, no. 1 (2020): 36.

165 *Evaluation of the Department of Defense's Counterterrorism Approach, Hearing Before the House Armed Services Committee* (2019) (statement of Maj. Gen. James B. Hecker). Like Maj. Gen. Hecker in the cited congressional testimony, U.S. forces often refer to § 127e partners as "surrogates" or "surrogate forces." Brennan Center interviews, Wesley Morgan, January and July 2022. This report, however, abides by the language historically used by members of Congress: § 127e "partners" or "partner forces."

166 Morgan, "Behind the Secret U.S. War in Africa." On a 2020 podcast episode, Maj. Gen. J. Marcus Hicks, the former head of special operations forces in Africa, described using a security cooperation authority — presumably § 127e — to "assess, select, train, equip, and then command and control and have full incentive authority over [partner] forces by the ability to pay them and fire them if they fail to achieve [U.S.] mission objectives." Irregular Warfare Initiative, "Proxy Wars, Part 1: War Through Local Agents in Africa," *Irregular Warfare Podcast* no. 6, YouTube, July 31, 2020, https://www.youtube.com/watch?v=7W7iemfwOXI.

167 Joint Chiefs of Staff, *Foreign Internal Defense*, Joint Publication 3-22 (August 17, 2018, validated February 2, 2021), I-11, https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_22.pdf?ver=2018-10-10-112450-103. The combatant commands may limit U.S. forces' conduct beyond what is prescribed by Department-wide policies. Certain commands have required U.S. forces on advise, assist, accompany missions to stay at the last point of cover and concealment until their partners have cleared the area or are taking heavy casualties and need support. Brennan Center interview, Wesley Morgan, July 2022.

168 Joint Chiefs of Staff, *Foreign Internal Defense*, I-11.

169 Helene Cooper, "Navy SEAL Who Died in Somalia Was Alongside, Not Behind, Local Forces," *New York Times*, May 9, 2017, https://www.nytimes.com/2017/05/09/world/africa/somalia-navy-seal-kyle-milliken.html.

170 International Crisis Group, *Overkill*, 19n134.

171 Brennan Center interview, Department of Defense official, April 2022.

172 Joint Chiefs of Staff, *Joint Planning*, Joint Publication 5-0

(December 1, 2020), I-18, https://irp.fas.org/doddir/dod/jp5_0.pdf; and Joint Chiefs, *Department of Defense Dictionary of Military and Associated Terms*, 83.

173 Military affairs are exempt from the rulemaking procedures set forth in the Administrative Procedure Act. 5 U.S.C. § 553(a)(1) (1966).

174 Brennan Center interview, Department of Defense official, May 2022. If U.S. forces undertake a mission that exceeds what an EXORD allows, their mission violates the Purpose Statute, which limits agency spending to authorized activities. Lenze, "Are We Allowed to Be There?," 38; and Brennan Center interview, Department of Defense official, April 2022.

175 An EXORD is not necessary for U.S. forces to engage in unit or collective self-defense, as a general matter. The bounds of permissible self-defense will instead be defined by the applicable rules of engagement. Brennan Center interview, Department of Defense official, May 2022. An EXORD is necessary insofar as U.S. forces use unit or collective self-defense to launch a § 127e program. Brennan Center interview, Department of Defense official, April 2022.

176 Brennan Center interviews, Department of Defense officials, April and May 2022.

177 Brennan Center interviews, Department of Defense officials, April and May 2022.

178 Brennan Center interview, former Department of Defense official, January 2022; and Brennan Center interview, Department of Defense official, May 2022.

179 Brennan Center interviews, Department of Defense officials, May and August 2022 ("If you're patrolling up near the border and accompanying a partner force . . . and you run into a group of armed men on motorcycles, how do you know . . . they're AUMF'able? You don't, the answer is you just can't.").

180 Brennan Center interview, Department of Defense official, April 2022.

181 Brennan Center interviews, former Department of Defense officials, January and August 2022.

182 Both the Obama and Trump administrations issued presidential policy guidance on "direct action" involving lethal force outside areas of active hostilities. This guidance may affect how U.S. forces engage in the field, but it has no clear bearing on how partner forces engage. The use of § 127e partner forces to conduct combat missions would likely be viewed as "indirect action." See Department of Justice, "Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities," May 22, 2013, https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download; and "Principles, Standards, and Procedures for U.S. Direct Action Against Terrorist Threats," last accessed July 7, 2022, https://www.aclu.org/sites/default/files/field_document/2021-4-30_psp_foia_final.pdf.

183 Brennan Center interview, congressional staffer, January 2022. Other congressional staffers echoed this concern. Brennan Center interviews, congressional staffers, January and May 2022.

184 Brennan Center interview, congressional staffer, January 2022.

185 Brennan Center interview, congressional staffer, January 2022.

186 Brennan Center interview, former Department of Defense official, January 2022; and Brennan Center interview, Department of Defense official, April 2022.

187 Morgan, "Behind the Secret U.S. War in Africa."

188 See footnote 66.

189 Savell, "2001 Authorization for Use of Military Force," 2 (listing programs in Cameroon, Kenya, Libya, Mali, Mauritania, Niger, Nigeria, and Tunisia); Nick Turse and Sean D. Naylor, "Revealed: The U.S. Military's 36 Code-Named Operations in Africa," Yahoo News, April 17, 2019, https://www.yahoo.com/now/revealed-the-us-militarys-36-codenamed-operations-in-africa-090000841.html (listing numerous programs in Somalia); and Turse and Speri, "How the Pentagon Uses a Secretive Program to Wage Proxy Wars" (listing programs in Afghanistan, Egypt, Iraq, Lebanon, and Yemen).

190 Turse and Naylor, "U.S. Military's 36 Code-Named Operations in Africa."

191 See generally Savell, "2001 Authorization for Use of Military Force" (compiling information from presidential and Department of Defense statements, periodic reporting under the War Powers Resolution, Congressional Research Service reports, and investigative journalism).

192 Nick Turse and Alice Speri, "Even After Acknowledging Abuses, the U.S. Continued to Employ Notorious Proxy Forces in Cameroon," *Intercept*, March 9, 2022, https://theintercept.com/2022/03/09/cameroon-military-abuses-bir-127e.

193 During the Trump administration, the Philippines was added to the president's biannual reports under the War Powers Resolution. Compare Donald J. Trump, letter to the Speaker of the House of Representatives and the president pro tempore of the Senate, June 6, 2017, https://trumpwhitehouse.archives.gov/briefings-statements/text-letter-president-speaker-house-representatives-president-pro-tempore-senate (Philippines not listed) with Donald J. Trump, letter to the Speaker of the House of Representatives and the president pro tempore of the Senate, December 11, 2017, https://www.lawfareblog.com/document-white-house-dec-11-war-powers-report (Philippines listed). The Philippines continues to appear in the biannual reports submitted by the Biden administration. See Joseph R. Biden, letter to the Speaker of the House of Representatives and the president pro tempore of the Senate, December 7, 2021, https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/07/letter-to-the-speaker-of-the-house-and-president-pro-tempore-of-the-senate-regarding-the-war-powers-report-2. Furthermore, there is a standing counterterrorism EXORD for the Philippines, and a report from the Department of Defense Office of Inspector General shows that there are classified "train, advise, assist, and equip" activities in the Philippines. See Department of Defense, "Military Operations and Activities Necessary for the Safety of Life or the Protection of Property (National Security)," February 6, 2018, https://irp.fas.org/agency/dod/milops-2018.pdf; and Inspector General, Department of Defense, "DoD Efforts to Train, Advise, Assist, and Equip the Armed Forces of the Republic of the Philippines," January 31, 2019, 4–6, https://media.defense.gov/2020/Jan/21/2002237157/-1/-1/1/dodig-2019-048%20(redacted).pdf.

194 Brennan Center interview, congressional staffer, January 2022.

195 Brennan Center interview, former Department of Defense official, May 2022; and Brennan Center interview, congressional staffer, January 2022 (discussing this potential pathway in the context of § 1202 programs, which mirror § 127e programs in the context of great power competition).

196 *Somalia's Current Security and Stability Status, Hearing Before the Subcommittee on Africa and Global Health Policy, Senate Foreign Relations Committee*, 115th Cong., Senate hearing 115-757 (March 14, 2018); and "Somalia: US Accused of Killing 22 Troops in Air Strike," Al Jazeera, September 28, 2016, https://www.aljazeera.com/news/2016/9/28/somalia-us-accused-of-killing-22-troops-in-air-strike.

197 Sieff, "The Pentagon Said It Killed Islamist Militants in Somalia."

198 Section 127e could be applicable against a state actor or affiliate if the Department of Defense determined that such an actor was facilitating or engaging in acts of terror.

199 Brennan Center interview, Department of Defense official, April 2022. In a similar vein, a former Department of Defense official explained, "Guys we were deploying . . . didn't know from where their authorities were derived or the limits of those authorities. . . . [T]here was a common perception that 127-echo was a full package authority." Brennan Center interview, former Department of Defense official, August 2022.

200 Hancock, "Funding Surrogate Forces in the Fight Against

Terrorism," 31n43. A former Department of Defense official explained that assistance under § 127e is categorized as assistance to U.S. forces, not partner forces, because § 127e partners are supporting U.S. military operations. This exempts support under § 127e from the Leahy Law. The same official confirmed that, even if support under § 127e were viewed as assistance to partner forces, the Department of Defense would not apply Leahy vetting to § 127e partners that are irregular forces, groups, or individuals; these partners would not constitute a "foreign security force" covered by the Leahy Law. Brennan Center interview, former Department of Defense official, June 2022.

201 NDAA for FY 2020, § 1206.

202 Department of State, "Report to Congress on a Plan to Provide Consistency of Administration Authorities Relating to Vetting of Units of Security Forces of Foreign Countries," June 10, 2020, 4 (report on file with author).

203 As a matter of policy, the Department of Defense currently conducts some form of vetting for its § 127e partners. Brennan Center interview, Department of Defense official, May 2022. It is unclear how this vetting, which excludes the Department of State and has undisclosed procedures and parameters, compares with Leahy vetting. Moreover, the Department of Defense is free to abandon this policy in the future or under different leadership.

204 Government Accountability Office, "DOD's Consideration of Unintended Consequences, Perverse Incentives, and Moral Hazards in Security Force Assistance," briefing to staff of House Armed Services Committee, November 30, 2012, 16, https://www.gao.gov/assets/gao-13-241r.pdf.

205 NDAA for FY 2022, § 5703.

206 Political appointees have served as the ambassador to at least one country with known § 127e activity. See, e.g., Sam Dunklau, "US Senate Confirms Kyle McCarter, John Milhiser, to New Posts," NPR Illinois, January 3, 2019, https://www.nprillinois.org/statehouse/2019-01-03/us-senate-confirms-kyle-mccarter-john-milhiser-to-new-posts; and Kevin Namunwa, "The Successful Tech Giant Who Has Been Tipped to Be US Ambassador to Kenya," CIO Africa, December 9, 2021, https://cioafrica.co/the-successful-tech-giant-who-has-been-tipped-to-be-us-ambassador-to-kenya. See also Robbie Gramer, "Biden Taps Billionaire Campaign Donors for Ambassador Posts," *Foreign Policy*, December 20, 2021, https://foreignpolicy.com/2021/12/20/biden-ambassador-posts-billionaires-campaign-donors.

207 Brennan Center interviews, former chiefs of mission, May and June 2022. One former chief of mission recounted, "Nobody tells you, here's what a CONOPS briefing looks like. I don't know what I'm looking at. I wasn't in the military." Brennan Center interview, former chief of mission, May 2022.

208 Brennan Center interview, Wesley Morgan, January 2022.

209 Brennan Center interview, former Department of Defense official, January 2022; and Brennan Center interviews, former chiefs of mission, May and June 2022.

210 Although the United States never severed diplomatic relations with Somalia, there was no ambassador or other recognized chief of mission for the country from January 5, 1991, to August 9, 2016. See Office of the Historian, Department of State, "Chiefs of Mission for Somalia," last accessed July 7, 2022, https://history.state.gov/departmenthistory/people/chiefsofmission/somalia.

211 Brennan Center interview, former Department of Defense official, January 2022; and Brennan Center interviews, former chiefs of mission, May and June 2022.

212 Brennan Center interview, congressional staffer, January 2022.

213 It is unclear how much power international law has as a constraint. In 1989, executive branch lawyers promulgated an opinion that allows the president "to authorize actions inconsistent with Article 2(4) of the U.N. Charter," the international prohibition on the use or threat of force. "Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities," 13 Op. O.L.C. 163, 179 (1989), https://www.justice.gov/sites/default/files/olc/opinions/1989/06/31/op-olc-v013-p0163_0.pdf.

214 Brennan Center interview, Department of Defense official, June 2022; and Brennan Center interview, former Department of Defense official, January 2022.

215 Brennan Center interview, former Department of Defense official, January 2022.

216 Turse and Naylor, "U.S. Military's 36 Code-Named Operations in Africa"; and Turse, Sperber, and Mednick, "Inside the Secret World of US Commandos in Africa." Although it has been reported that the shuttered program took place with Ethiopian forces, it is possible that the program actually involved Mauritanian forces. Brig. Gen. Donald Bolduc, who told some journalists about the supposed Ethiopian program, told others a strikingly similar story about terminating a Mauritanian program. See Morgan, "Behind the Secret U.S. War in Africa"; and Brennan Center interview, Wesley Morgan, July 2022.

217 Turse and Naylor, "U.S. Military's 36 Code-Named Operations in Africa."

218 10 U.S.C. § 127e(d) (as amended 2021).

219 Brennan Center interview, congressional staffer, January 2022.

220 10 U.S.C. § 127e(d)(2) (as amended 2021).

221 NDAA for FY 2020, § 1041.

222 William M. Thornberry National Defense Authorization Act for Fiscal Year 2021 (hereinafter NDAA for FY 2021), Pub. L. 116-282, § 1051 (2021).

223 Compare NDAA for FY 2017, § 1203 with NDAA for FY 2020, § 1041. Further indicating that § 127e notifications might be deficient, a congressional staffer responsible for reviewing § 127e notifications expressed confusion about the relationship between EXORDs and § 127e programs, notwithstanding the fact that § 127e(d)(2) explicitly requires the Department of Defense to describe "relevant execute orders . . . related to the authorized ongoing operation." Brennan Center interview, congressional staffer, January 2022.

224 Brennan Center interview, congressional staffer, January 2022.

225 10 U.S.C. § 101(a)(16) (as amended 2021).

226 Brennan Center interviews, congressional staffers, January and May 2022.

227 Brennan Center interviews, congressional staffers, January and May 2022.

228 Brennan Center interviews, congressional staffers, January and May 2022.

229 Brennan Center interviews, congressional staffers, January and May 2022.

230 Brennan Center interview, congressional staffer, January 2022.

231 See generally Reiss Center on Law and Security, "War Powers Resolution Reporting Project."

232 War Powers Resolution, Pub. L. 93-148, § 8(c) (1973).

233 Section 383 requires the Department of Defense to engage in monitoring and evaluation of its "security cooperation programs and activities." Pursuant to 10 U.S.C. § 301, the Department of Defense's security cooperation programs and activities include "any program . . . of the Department of Defense with the security establishment of a foreign country to . . . build relationships that promote specific United States security interests." This description plainly covers § 127e programs with foreign forces, but its application to § 127e programs with irregular forces, groups, or individuals — who would not be considered a part of the security establishment of a foreign country — is less clear. Perhaps because some § 127e programs fall outside the § 301 definition, the Department of Defense chooses not to treat *any* § 127e programs as security cooperation activity for the

purposes of § 383. Notably, the Department of Defense treats § 127e programs as security cooperation activity in other contexts. See, e.g., Office of the Secretary of Defense, "Fiscal Year (FY) 2022 President's Budget: Justification for Security Cooperation Program and Activity Funding," May 2021, 3, https://open.defense.gov/Portals/23/Documents/Security_Cooperation/Budget_Justification_FY2022.pdf (acknowledging that § 127e activities are "consistent with the security cooperation definition"); and Defense Security Cooperation University, *Security Cooperation Programs*, fiscal year 2021, 155, last accessed September 20, 2022, https://web.archive.org/web/20220119135809/https://www.dscu.mil/documents/publications/security_cooperation_programs_handbook/security_cooperation_programs_handbook.pdf?id=1 (discussing § 127e as a "security cooperation" authority).

234 Brennan Center interview, congressional staffer, January 2022.

235 NDAA for FY 2019, § 1212.

236 NDAA for FY 2019, § 1212.

237 Brennan Center interviews, congressional staffers, January, May, and June 2022. See also *The Fiscal Year 2020 National Defense Authorization Budget Request*, *Hearing Before the House Armed Services Committee* (2019), 48 (Rep. Jason Crow questioning why the Department of Defense has not produced the required report).

238 NDAA for FY 2020, § 1744.

239 NDAA for FY 2022, § 1048.

240 White House, "Statement by the President on S. 1605, the National Defense Authorization Act for Fiscal Year 2022," December 27, 2021, https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/27/statement-by-the-president-on-s-1605-the-national-defense-authorization-act-for-fiscal-year-2022.

241 50 U.S.C. § 1549 (as amended 2019).

242 Scott R. Anderson and Benjamin Wittes, "We Filed Suit over Trump's Missing War Powers Report," *Lawfare*, June 9, 2020, https://www.lawfareblog.com/we-filed-suit-over-trumps-missing-war-powers-report. The Biden administration has filed timely § 1549 reports, though war powers advocates have challenged the sufficiency of these filings. See, e.g., Heather Brandon-Smith (@HBrandonSmith), Twitter, April 5, 2021, 10:06 a.m., https://twitter.com/HBrandonSmith/status/1379072993620549633 (criticizing filing from 2021); and Brian Finucane (@BCFinucane), Twitter, April 18, 2022, 11:35 a.m., https://twitter.com/BCFinucane/status/1516077944602611714 (criticizing filing from 2022). The unclassified portion of the most recent § 1549 report is just over one page long. In a one-sentence section entitled "Countries in Which the United States Used Military Force," the report says, "In 2021, the United States used military force in the following countries: Afghanistan, Iraq, Syria, and Somalia." In later sections, the report briefly recounts the Afghanistan withdrawal and current mission in Iraq. The report contains no information about U.S. uses of force in Syria or Somalia. It omits any mention of force used through or with § 127e partners, or on behalf of these and other partners in collective self-defense. See White House, "Report on the Legal and Policy Frameworks for the United States' Use of Military Force and Related National Security Operations," March 2022, 1–2, https://s3.documentcloud.org/documents/21639589/2021-1264-report.pdf.

243 50 U.S.C. § 1550 (2020).

244 "Report on Use of Military Force and Support of Partner Forces for the Following Periods: January 1, 2020, to June 30, 2020; July 1, 2020, to December 31, 2020; and January 1, 2021, to June 30, 2021," Department of Defense, March 3, 2022 (reports on file with author).

245 See page 14 on reporting requirements on unit and collective self-defense.

246 *Evaluation of the Department of Defense's Counterterrorism Approach, Hearing Before the House Armed Services Committee* (2019), 12 (Rep. Rick Larsen stating, "[T]hese execute orders relating to operations haven't been provided on a consistent basis. And to my understanding, we have been asking for at least a year. So you said it was kind of new for us to ask. I don't think a year makes it new. It gives us the impression that you are holding back . . . .").

247 *National Security Challenges and U.S. Military Activities in the Greater Middle East and Africa, Hearing Before the House Armed Services Committee*, 116th Cong., HASC no. 116-10 (March 7, 2019), 159, https://www.congress.gov/116/chrg/CHRG-116hhrg36296/CHRG-116hhrg36296.pdf.

248 S. Rep. 116-126, § 7039, 130–31 (2019).

249 See generally Sahel Report.

250 Savell, "2001 Authorization for Use of Military Force," 2.

251 Brennan Center interviews, congressional staffers, January and May 2022.

252 Brennan Center interviews, congressional staffers, January and May 2022.

253 Brennan Center interview, congressional staffer, January 2022. A former employee of the Congressional Research Service had a similar experience. She and her colleague had arranged a meeting to discuss § 127e. When they arrived to discuss the authority, they were "stonewalled" and informed that all relevant information "was classified above [their] level." Brennan Center interview, former Congressional Research Service employee, March 2022.

254 Robinson et al., *Improving the Understanding of Special Operations*, 115.

255 NDAA for FY 2021, § 1207 (increasing annual budget from $10,000,000 to $15,000,000); and NDAA for FY 2022, § 1203 (extending authority through 2025).

256 National Defense Authorization Act for Fiscal Year 2018 (hereinafter NDAA for FY 2018), Pub. L. 115-91, § 1202 (2017).

257 NDAA for FY 2018, § 1202(i).

258 *United States Special Operations Command's Efforts to Transform the Force for Future Security Challenges, Hearing Before the Subcommittee on Emerging Threats and Capabilities, Senate Armed Services Committee*, 115th Cong., Senate hearing 115-859 (April 11, 2018), 15, https://www.congress.gov/115/chrg/CHRG-115shrg43266/CHRG-115shrg43266.pdf.

259 Department of Defense, *Summary of the Irregular War Annex to the National Defense Strategy*, 2020, 2, https://media.defense.gov/2020/Oct/02/2002510472/-1/-1/0/Irregular-Warfare-Annex-to-the-National-Defense-Strategy-Summary.PDF.

260 NDAA for FY 2018, § 1202(i).

261 Senate Armed Services Committee, "Advance Policy Questions for Dr. Mark T. Esper, Nominee for Appointment to Be Secretary of Defense," 116th Cong. (July 16, 2019), 66, https://www.armed-services.senate.gov/imo/media/doc/Esper_APQs_07-16-19.pdf.

262 Senate Armed Services Committee, "Advance Policy Questions for Dr. Mark T. Esper."

263 See Department of Defense, *Summary of the Irregular War Annex to the National Defense Strategy*, 2 (listing China, Iran, and Russia as state adversaries that "increasingly seek to prevail through their own use of irregular warfare" and require a U.S. irregular warfare response). See also *Evolution, Transformation, and Sustainment: A Review of the Fiscal Year 2020 Budget Request for U.S. Special Operations Forces and Command, Hearing Before the House Armed Services Committee*, 116th Cong., HASC no. 116-30 (April 9, 2019) (statement of Rep. Elise M. Stefanik), 5, https://www.congress.gov/116/chrg/CHRG-116hhrg37497/CHRG-116hhrg37497.pdf ("[W]e are now also asking our special operations forces to position themselves to counter and mitigate nation-state threats such as Russia, China, North Korea, and other emerging national security threats.").

264 *The 2001 AUMF and War Powers: The Path Forward, Hearing Before the House Foreign Affairs Committee*, 117th Cong. (March 2, 2022). Still, the 2002 AUMF has been interpreted to allow hostilities against Iran-backed militias in Iraq and the Iranian officials who

support them. "Notice on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations," last accessed September 20, 2022, https://www.documentcloud.org/documents/6776446-Section-1264-NDAA-Notice.html.

265 One Department of Defense official confirmed that constitutional self-defense has been used as the basis for § 1202 programs. Brennan Center interview, Department of Defense official, June 2022.

266 Brennan Center interview, congressional staffer, January 2022.

267 The national-interest theory of self-defense is a largely unmoored doctrine that affords the president tremendous discretion. It can be argued that the national interests protected under this doctrine are limited to those previously identified by Congress. Even so, executive branch lawyers are quick to overread congressional statements and statutes to manufacture congressional support for the president's unilateral use of force. See Ebright, "Unilateral Use of Force."

268 Joint Chiefs of Staff, *Information Operations*, Joint Publication 3-13 (November 27, 2012, revised November 20, 2014), ix, https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_13.pdf.

269 Congressional Research Service, "Defense Primer: Information Operations," updated December 1, 2021, https://sgp.fas.org/crs/natsec/IF10771.pdf.

270 Department of Defense, "Military Operations and Activities Necessary for the Safety of Life or the Protection of Property (National Security)."

271 *The Defense Authorization Request for Fiscal Year 2023 and the Future Years Defense Program, Hearing Before the Senate Armed Services Committee*, 117th Cong. (April 5, 2022) (statement of Gen. Richard D. Clarke), https://www.armed-services.senate.gov/imo/media/doc/2022%20USSOCOM%20Posture%20-%20Clarke%20-%20SASC%20(5APR22)%20(FINAL).pdf.

272 *FY23 Budget Request for U.S. Special Operations Forces and Command, Hearing Before the Senate Armed Services Committee*, 117th Cong. (April 28, 2022) (statement of Gen. Clarke), YouTube, https://www.youtube.com/watch?v=b7NfNUNKZPg, at 16:15.

273 Brennan Center interview, Department of Defense official, June 2022.

274 Brennan Center interview, former Department of Defense official, May 2022.

275 10 U.S.C. § 167(k).

276 United States Special Operations Command, "Core Activities," last accessed September 20, 2022, https://www.socom.mil/about/core-activities.

277 Brennan Center interviews, Department of Defense officials, April and May 2022; and Brennan Center interview, former Department of Defense official, May 2022.

278 Section 1631(b) of the NDAA for 2020 "affirm[ed] that the Secretary of Defense is authorized to conduct military operations . . . in the information environment to defend the United States, allies of the United States, and interests of the United States." It also explained that such military operations "when appropriately authorized" may occur outside of areas of active hostilities. This language implies that the secretary of defense requires congressional authorization to conduct offensive information operations and information operations outside designated battlegrounds.

279 Missions of this nature, conducted on foreign soil without host country consent, could violate international law as an unlawful intervention or use of force. The conduct of the Department of Defense's § 1202 partners would likely be attributable to the United States under the "effective control" test articulated by the International Court of Justice in its Nicaragua v. United States (1986 I.C.J. 14) and Bosnian Genocide (2007 I.C.J. 2) judgments. See Oona Hathaway et al., "Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors," *Texas Law Review* 95 (2017): 548–54, https://texaslawreview.org/wp-content/uploads/2017/03/Hathaway.pdf. The effective control test is satisfied when a country provides support and instruction to a foreign or nonstate group in its conduct of specific operations. Hathaway et al., "Ensuring Responsibility." Not only was § 1202, like § 127e, designed to enable this very kind of support and instruction, but U.S. forces have also referred to their relationship with these partners as one of "operational control." Brennan Center interviews, Wesley Morgan, January and July 2022. Even if the executive branch does not view international law as a meaningful limitation on its ability to conduct military operations, the implications of a § 1202 program that operated in violation of international law would be significant. A foreign state may feel entitled in such circumstances to respond with force or undertake countermeasures against the United States directly.

280 Deputy Secretary of Defense, "Authority for Support of Special Operations for Irregular Warfare," August 3, 2018 (incorporating change, August 19, 2021), 2, https://irp.fas.org/doddir/dod/dtm-18-005.pdf (emphasis added).

281 Deputy Secretary of Defense, "Authority for Support of Special Operations for Irregular Warfare."

282 Brennan Center interviews, congressional staffers, January and May 2022.

283 NDAA for FY 2020, § 1631(d).

284 Brennan Center interviews, congressional staffers, January and May 2022.

285 Brennan Center interview, congressional staffer, January 2022.

286 One former ambassador suggested that the 2017 capture of Aba Goroma, a leader of Boko Haram in Cameroon, was a success attributable to the Department of Defense's work with Cameroonian partner forces. Brennan Center interview, former chief of mission, June 2022. Some Cameroonian reporting, however, described the capture as facilitated by a local "vigilance committee," which enabled the partner forces to make an arrest. See Alain N., "Lutte contre la secte terroriste Boko Haram: Arrestation de l'homme le plus recherché au Cameroun," 237 Actu, November 20, 2017, https://237actu.com/cameroun-lutte-contre-la-secte-terroriste-boko-haram-arrestation-de-l-homme-le-plus-recherche-au-cameroun. Regardless of how Aba Goroma was apprehended, the pursuit of Boko Haram leaders falls outside the scope of the 2001 AUMF: Boko Haram was founded in 2002, pursues targets in West and Central Africa, bears no responsibility for September 11, and has not been publicly identified as one of al-Qaeda's associated forces. To the extent that U.S. forces engaged or intended to engage in combat through or with partners against Boko Haram leaders, such hostilities were not approved by Congress.

287 Clarence Arthur Berdahl, *War Powers of the Executive in the United States*, vol. 9 (Urbana: University of Illinois, 1921), 70–71, 74; and Abraham Lincoln, "Speech in United States House of Representatives: The War with Mexico," January 12, 1848, in *The Collected Works of Abraham Lincoln*, ed. Roy P. Basler, vol. 1 (New Brunswick, NJ: Rutgers University Press, 1953), 431–32, https://papersofabrahamlincoln.org/documents/D200444b.

288 Berdahl, *War Powers of the Executive*, 9:70–71, 74.

289 War Powers Resolution, Pub. L. 93-148, § 2(c) (1973).

290 War Powers Resolution, Pub. L. 93-148, § 8(c).

291 S. Rep. 93-220, 264 (1973).

292 National Defense Authorization Act for Fiscal Year 2016, Pub. L. 114-92, § 1250 (2015).

293 NDAA for FY 2021, § 1256.

294 Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983); and Office of Legal Counsel, Department of Justice, "Effect of *INS v. Chadha* on 44 U.S.C. § 501," March 2, 1984, https://www.justice.gov/olc/page/file/936121/download.

295 See, e.g., Consolidated Appropriations Act, 2022, Title VI, H.R. 2471, 117th Cong. (2021); and Department of Defense and Full-Year Continuing Appropriations Act, §§ 1269, 1418, 2011, H.R. 1473, 112th Cong. (2011). See also Congressional Research Service, "Legislative Vetoes After *Chadha*," May 2, 2005, https://www.everycrsreport.com/files/20050502_RS22132_f3f5994e75ce9c1c1ac4aac4e3b019cfc61f2f38.pdf. Although most (if not all) post-*Chadha* prior-approval provisions have been enacted through appropriations laws, certain of these provisions have no clear relationship to the executive branch's use of funds. For instance, a provision from 2007 limits the Department of Homeland Security's ability to transfer aircraft to other administrative agencies without the prior approval of the appropriations committees. Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Title I, H.R. 2638, 110th Cong. (2007).

296 For another explanation as to why prior-approval provisions do not run afoul of *Chadha*, see Thomas M. Franck and Clifford A. Bob, "The Return of Humpty-Dumpty: Foreign Relations After the *Chadha* Case," *American Journal of International Law* 79 (October 1985): 925–27.

297 To be sure, vetting the full range of potential §§ 127e and 1202 partners could be challenging. It is unclear what standards should apply when investigating the background of an irregular force or a private individual. This is all the more reason why the Department of State, with its expertise in conducting human rights vetting and analyzing human rights abuses, should be involved in assessing §§ 127e and 1202 partners.

298 *Managing Security Assistance to Support Foreign Policy, Hearing Before the Senate Foreign Relations Committee* (2017) (question of Sen. Bob Corker and response by Lt. Gen. Charles Hooper).

299 Alexander Ward and Quint Forgey, "Some Americans Wanting Out of Afghanistan Not Reached by State, 4 Groups Say," *Politico*, November 16, 2021, https://www.politico.com/newsletters/national-security-daily/2021/11/16/some-americans-wanting-out-of-afghanistan-not-reached-by-state-4-groups-say-495122.

300 NDAA for FY 2020, § 1048.

301 H.R. 5410, 117th Cong. (2021); and S. 2391, 117th Cong. (2021).

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While this report applies a critical lens to U.S. military activity, it lays no blame at the feet of the men and women who serve this country honorably. Our service members deserve political leaders who are forthright with Congress and the American people about the risks and implications of U.S. operations abroad and who uphold the Constitution and the laws passed by Congress.

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