Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations

This report is provided consistent with Section 1264 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018.[1] It provides an update to the legal, factual, and policy bases for the "Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations," originally published on December 5, 2016 ("original report"). Consistent with Section 1264, this report contains a classified annex. If a particular item or topic area from the original report is not covered in this update or its classified annex, it remains unchanged from the original report.

Countries in Which the United States Has Used or Is Using Military Force

Consistent with the War Powers Resolution, the President provides a periodic report to Congress every six months on the status of the situations in which U.S. Armed Forces have been, among other things, introduced into "hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."[2] Including as described in the most recent periodic War Powers report, submitted on December 11, 2017, the United States has used military force in the following countries:[3]

- *Afghanistan:* Pursuant to the strategy that the President announced publicly on August 21, 2017, U.S. forces remain in Afghanistan for the purposes of stopping the reemergence of safe havens that enable terrorists to threaten the United States or its interests, supporting the Afghan government and the Afghan military as they confront the Taliban in the field, and creating conditions to support a political process to achieve a lasting peace. United States forces in Afghanistan are training, advising, and assisting Afghan forces; conducting and supporting counterterrorism operations against al-Qa'ida and against the Islamic State of Iraq and Syria (ISIS); and taking appropriate measures against those who provide direct support to al-Qa'ida, threaten U.S. and coalition forces, or threaten the viability of the Afghan government or the ability of the Afghan National Defense and Security Forces to achieve campaign success. The United States remains in an armed conflict, including in Afghanistan and against al-Qa'ida, ISIS, the Taliban, and the Taliban Haqqani Network, and active hostilities are ongoing.

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[1] National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91 (2017) ("NDAA for FY 2018").

[2] Joint Resolution Concerning the War Powers of Congress and the President, Pub. L. No. 93-148, 87 Stat. 555 (1973) ("War Powers Resolution").

[3] Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate providing a Supplemental Consolidated Report Consistent with the War Powers Resolution, December 11, 2017 ("2017 War Powers Report").

- *Iraq and Syria:* As part of a comprehensive strategy to defeat ISIS, U.S. Armed Forces are conducting a systematic campaign of airstrikes and other vital operations against ISIS forces in Iraq and Syria. U.S. Armed Forces have also carried out airstrikes and other necessary operations against al-Qa'ida in Syria. U.S. Armed Forces are also deployed to Syria to conduct operations against ISIS with indigenous ground forces. In Iraq, U.S. Armed Forces are advising and coordinating with Iraqi forces and providing training, equipment, communications support, intelligence support, and other support to select elements of the Iraqi security forces, including Iraqi Kurdish Peshmerga forces. Actions in Iraq are being undertaken in coordination with the Government of Iraq, and in conjunction with coalition partners. U.S. Armed Forces participating in the Defeat-ISIS campaign in Syria have taken a limited number of strikes against Syrian government and pro-Syrian government forces. These strikes were lawful measures to counter immediate threats to U.S. and partner forces while engaged in that campaign.

  Additionally, on April 6, 2017, U.S. forces in the Mediterranean Sea operating beyond the territorial sea of any state struck the Shayrat military airfield in Syria in response to the chemical weapons attack on Syrian civilians in southern Idlib Province, Syria, on April 4, 2017.

- *Yemen:* A small number of U.S. military personnel are deployed to Yemen to conduct operations against al-Qa'ida in the Arabian Peninsula (AQAP) and ISIS. U.S. Armed Forces continue to work closely with the Government of Yemen and regional partner forces to dismantle and ultimately eliminate the terrorist threat posed by those groups. United States forces have conducted a number of airstrikes against AQAP operatives and facilities in Yemen, and supported United Arab Emirates- and Yemen-led operations to clear AQAP from Shabwah Governorate. In October 2017, U.S. forces also conducted airstrikes against ISIS targets in Yemen for the first time.

- Separately, United States forces, in a non-combat role, have also continued to provide logistics and other support to the Saudi-led coalition combatting the Houthi insurgency in Yemen. The limited military and intelligence support that the U.S. military is providing to the Saudi-led coalition does not involve the introduction of U.S. Armed Forces into hostilities and thus does not trigger reporting under the War Powers Resolution.

- *Somalia:* In Somalia, U.S. forces are countering the terrorist threat posed by ISIS and al-Shabaab, an associated force of al-Qa'ida. United States forces have conducted a number of airstrikes against al-Shabaab as well as ISIS. United States forces also advise, assist, and accompany regional forces, including Somali and African Union Mission in Somalia (AMISOM) forces, during counterterrorism operations.

- *Libya:* United States forces have conducted a number of airstrikes against ISIS in Libya. These airstrikes were conducted in coordination with Libya's Government of National Accord.

- *Niger:* United States forces that were deployed to Niger to train, advise, and assist Nigerien partner forces were attacked on October 4, 2017 and on December 6, 2017, by elements assessed to be part of ISIS. United States and Nigerien partner forces responded with armed force in self-defense.

The Domestic Law Bases for the Ongoing Use of U.S. Military Force

- *Statutory Authorization: The 2001 AUMF*

    - The Scope of the 2001 AUMF: The classified annex contains more information on the application of the Authorization for Use of Military Force (2001 AUMF)[4] to particular groups and individuals.

- *Statutory Authorization: The 2002 AUMF:* Although the Authorization for Use of Military Force Against Iraq (2002 AUMF)[5] was mentioned in the original report with respect to its authorization to use force against ISIS in Iraq and in certain circumstances in Syria, the original report did not provide a full explanation of the scope of the 2002 AUMF.

  Under the relevant portions of the 2002 AUMF, "[t]he President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to . . . defend the national security of the United States against the continuing threat posed by Iraq."[6] Although the threat posed by Saddam Hussein's regime in Iraq was the primary focus of the 2002 AUMF, the statute, in accordance with its express goals, has always been understood to authorize the use of force for the related dual purposes of helping to establish a stable, democratic Iraq and for the purpose of addressing terrorist threats emanating from Iraq. After Saddam Hussein's regime fell in 2003, the United States continued to take military action in Iraq under the 2002 AUMF to further these purposes, including action against al-Qaida in Iraq (now known as ISIS). Then, as now, that organization posed a terrorist threat to the United States and its partners and undermined stability and democracy in Iraq. Congress ratified this understanding of the 2002 AUMF by appropriating funds over several years. Furthermore, although the Iraq AUMF limits the use of force to address threats to, or stemming from, Iraq, it (like the 2001 AUMF) contains no geographic limitation on where authorized force may be employed. Accordingly, the 2002 AUMF reinforces the authority for military operations against ISIS in Iraq and, to the extent necessary to achieve the purposes described above, in Syria or elsewhere.

- *The President's Constitutional Authority to Take Military Action in Certain Circumstances Without Specific Prior Authorization of Congress:* In addition to these statutes, Article II of

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[4] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, (2001) ("2001 AUMF").

[5] Authorization for Use of Military Force Against Iraq, Pub. L. No. 107-243, 116 Stat. 1498 (2002) ("2002 AUMF").

[6] *Id.* § 3(a)(1).

the Constitution provides authority for the use of military force in certain circumstances even without specific prior authorization of Congress. For example, on April 6, 2017, the President directed a military strike against the Shayrat military airfield in Syria pursuant to his authority under Article II of the Constitution to conduct foreign relations and as Commander in Chief and Chief Executive. United States intelligence indicated that Syrian military forces operating from that airfield were responsible for the chemical weapons attack on Syrian civilians in southern Idlib Province, Syria. The President directed this strike in order to degrade the Syrian military's ability to conduct further chemical weapons attacks and to dissuade the Syrian government from using or proliferating chemical weapons, thereby promoting regional stability and averting a worsening of the region's current humanitarian catastrophe. In directing this strike, the President acted in the vital national security and foreign policy interests of the United States. Congress was notified of this particular strike on April 8, 2017, in a Presidential report, consistent with the War Powers Resolution.

Working With Others in an Armed Conflict

The 2017 National Security Strategy and the 2018 National Defense Strategy continue to prioritize working by, with, and through allies and partners to achieve our national security objectives. This calls for partnerships with states, multinational forces, and in some cases, non-state actors that share U.S. interests. For example, 70 state partners (and 4 international organizations) are part of the Defeat-ISIS Coalition. United States-supported non-state actors in Syria were also critical in dismantling ISIS's self-proclaimed physical "caliphate."

- *Domestic Authorities and Limitations:*

Section 1232 of the NDAA for FY 2017,[7] as amended by Section 1231 of the NDAA for FY 2018, purports to limit "bilateral military-to-military cooperation" between the United States and Russia. The United States does not support Russia's military strategy in Syria, and U.S. military forces do not cooperate with Russian military forces. However, Section 1232 does not purport to limit military-to-military discussions with Russia to de-conflict military operations in Syria to reduce the risk of interference, miscalculation, or unintended escalation of military operations.

As described in the original report, the United States often supports its partners and allies by providing intelligence in furtherance of shared objectives. As appropriate, the United States takes a variety of measures, including diplomatic assurances, vetting, training, and monitoring, to promote respect for human rights and compliance with the law of armed conflict by the recipient of U.S. intelligence and to mitigate the risk that the intelligence will be used in violation of the law. Sharing must always be consistent with U.S. domestic law.

Application of Key Domestic and International Legal Principles to Key Theaters

[7] National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

- *Afghanistan:* Since October 7, 2001, the United States has conducted counterterrorism combat operations in Afghanistan. Pursuant to the strategy that the President announced publicly on August 21, 2017, U.S. forces remain in Afghanistan for the purposes of stopping the reemergence of safe havens that enable terrorists to threaten the United States, supporting the Afghan government and the Afghan military as they confront the Taliban in the field, and for the purpose of creating conditions to support a political process to achieve a lasting peace. United States forces in Afghanistan are training, advising, and assisting Afghan forces; conducting and supporting counterterrorism operations against al-Qa'ida and against ISIS; and taking appropriate measures against those who provide direct support to al-Qa'ida, threaten U.S. or coalition forces, or threaten the viability of the Afghan government or the ability of the Afghan National Defense and Security Forces to achieve campaign success. The United States remains in an armed conflict, including in Afghanistan and against al-Qa'ida, ISIS, the Taliban, and the Taliban Haqqani Network, and active hostilities are ongoing. The domestic and international legal bases for U.S. military operations and activities in Afghanistan remain unchanged from the original report.

- *Iraq*: Due to accelerated progress in the fight to defeat ISIS, the United States and the Defeat-ISIS Coalition are shifting focus in Iraq from combat operations to sustaining military gains. United States forces, however, continue to conduct airstrikes, and Iraqi security forces are still engaged in combat operations against remaining cells of ISIS. ISIS retains the ability to carry out lethal attacks, and it still poses a significant threat to civilians and the stability of the region. At the continued request and with the consent of the Government of Iraq, and with the continued authority provided by statute and the Constitution,[8] U.S. forces are advising and coordinating with Iraqi forces and are training, equipping, and building the capacity of select elements of the Iraqi security forces, including Iraqi Kurdish Peshmerga forces, to prevent the re-emergence of ISIS. The domestic and international legal bases for U.S. military operations and activities in Iraq remain unchanged from the original report.

- *Syria:* The United States and the Defeat-ISIS Coalition liberated 4.5 million people from ISIS oppression in 2017, and ISIS has lost 98 percent of the territory it once claimed in Iraq and Syria. The United States and U.S.-supported Syrian Democratic Forces (SDF) are engaged in liberating the middle Euphrates River valley in Syria. U.S. operations include continued airstrikes; advice and coordination to indigenous ground forces; and training, equipment, and other assistance in support of those indigenous forces. Despite this, ISIS continues to be able to carry out lethal attacks. Therefore, the United States continues to use force against ISIS and al-Qa'ida in other parts of Syria as well. After the middle Euphrates River valley is liberated, the United States will continue to conduct airstrikes against these terrorist groups in Syria and will continue to train, equip, and build the capacity of appropriately vetted Syrian groups pursuant to the authority provided by statute and the Constitution.[9]

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[8] NDAA for FY 2018, *supra* note 1, § 1222.

[9] *Id.* at § 1223.

The fight against ISIS continues, and it remains a regional and global threat through its ability to organize and inspire acts of violence throughout the world. Similarly, al-Qa'ida continues to pose a threat to the United States and to the security of our partners and allies. The domestic and international legal bases for U.S. military operations and activities against ISIS and al-Qa'ida in Syria remain unchanged from the original report.

In May and June 2017, as well as February 2018, the United States took strikes against the Syrian Government and pro-Syrian Government forces. These strikes were limited and lawful measures taken to counter immediate threats to U.S. or partner forces while engaged in the campaign against ISIS. As a matter of domestic law, the 2001 AUMF provides authority to use force to defend U.S., Coalition, and partner forces engaged in the campaign to defeat ISIS to the extent such use of force is a necessary and appropriate measure in support of counter-ISIS operations. As a matter of international law, necessary and proportionate use of force in national and collective self-defense against ISIS in Syria includes measures to defend U.S., Coalition, and U.S.-supported partner forces while engaged in the campaign to defeat ISIS.

- *Yemen:* In addition to conducting direct action against AQAP in Yemen as described in the original report, the United States has also conducted a limited number of airstrikes against ISIS in Yemen. The 2001 AUMF confers authority to use force against ISIS. As a matter of international law, we note that the airstrikes against ISIS have been conducted with the consent of the Government of Yemen in the context of its armed conflict against ISIS and also in furtherance of U.S. national self-defense.

  As described in the original report, since 2015, the United States has provided limited support to the Kingdom of Saudi Arabia (KSA)-led coalition military operations against Houthi and Saleh-aligned forces in Yemen. Authorized types of support continue to include intelligence sharing, best practices, and other advisory support when requested and appropriate. Additionally, the Arms Export Control Act (AECA) and associated delegations of authority provide the Secretary of State, primarily through the Foreign Military Sales program and through the Department of State's licensing of Direct Commercial Sales, the authority to provide or license defense articles and defense services to KSA, the United Arab Emirates (UAE), and other members of the KSA-led coalition. Many of these defense articles and defense services have been used in the conflict in Yemen. The domestic and international legal bases for limited U.S. military support to KSA-led coalition operations in Yemen remain unchanged from the original report.

- *Somalia:* In addition to conducting direct action against al-Qa'ida and al-Shabaab in Somalia as described in the original report, the United States has also conducted airstrikes against a limited number of ISIS terrorist targets in Somalia. The 2001 AUMF confers authority to use force against ISIS. As a matter of international law, we note that the airstrikes against ISIS have been conducted with the consent of the Government of Somalia in the context of its armed conflict against ISIS and also in furtherance of U.S. national self-defense.

- *Libya:* The United States has continued to conduct airstrikes against ISIS terrorist targets in Libya, including its desert camps and networks, to promote regional stability and contribute to the defeat of ISIS in Libya. The domestic and international legal bases for military direct action in Libya remain unchanged from the original report.

- *Niger:* At the request of the Government of Niger, the previous Administration approved, and the current Administration continued, the deployment of U.S. forces to Niger under the President's constitutional authority as Commander-in-Chief and Chief Executive and under certain statutory authorities of the Secretary of Defense to train, advise, and assist Nigerien partner forces. On October 4, 2017 and December 6, 2017, those U.S. forces and their Nigerien partner forces were attacked by forces assessed to be elements of ISIS, a group within the scope of the 2001 AUMF, and responded with force in self-defense. The Administration has concluded that this use of force was also conducted pursuant to the 2001 AUMF.

Targeting

United States Policies Regarding Targeting and Incidental Civilian Casualties: The United States remains committed to complying with its obligations under the law of armed conflict, including those that address the protection of civilians, such as the fundamental principles of necessity, humanity, distinction, and proportionality. In addition to American values and legal imperatives that guide U.S. forces in the protection of civilians, protecting civilians is fundamentally consistent with mission accomplishment and the legitimacy of operations. The United States continues, as a matter of policy, to apply heightened targeting standards that are more protective of civilians than are required under the law of armed conflict. These heightened policy standards are reflected in Presidential and other Executive Branch policies, military orders and rules of engagement, and the training of U.S. personnel. The classified annex contains additional information on this topic.

Capture and Detention of Individuals in Armed Conflict

The capture of terrorist suspects remains an essential part of U.S. counterterrorism strategy. The United States uses all available tools at its disposal, including law of armed conflict detention, the criminal justice system, and transfers to third countries. Maximizing intelligence collection and seeking the most appropriate long-term disposition are key factors in choosing the right tool or combination of tools, while always adhering to U.S. legal obligations, policies, and values. The classified annex contains additional information on this topic.

The President issued Executive Order (E.O.) 13823 on January 30, 2018, directing the Secretary of Defense, in consultation with the Secretary of State, the Attorney General, the Secretary of Homeland Security, the Director of National Intelligence, and the heads of any other appropriate executive departments and agencies, to recommend policies to the President regarding the disposition of individuals captured in connection with an armed conflict. The Executive Branch will inform Congress of any new policies approved by the President.

- *Scope of Military Detention Under Article II of the U.S. Constitution:* As discussed in the original report, the President as Chief Executive and Commander-in-Chief has constitutional authority to direct the use of military force in certain circumstances, without prior statutory authorization. Over two centuries of Executive Branch practice support this authority, supplying a "historical gloss on the 'executive Power' vested in Article II of the Constitution."[10] This authority has been the basis for using force in a number of instances discussed throughout the original report and in this update. If the President were to order operations in reliance on his constitutional authority to use military force abroad, that authority would include the power to detain individuals with whom the United States is engaged in hostilities so that they could not return to the battlefield for the duration of those hostilities.[11]

- *Review of Continued Detention of Detainees at Guantanamo Bay:* The President issued E.O. 13823 on January 30, 2018, revoking Section 3 of E.O. 13492 of January 22, 2009, which was never acted upon fully but which ordered the closure of detention facilities at U.S. Naval Station Guantanamo Bay. Detention operations at Guantanamo Bay are necessary because a number of the remaining detainees are being prosecuted by military commission, and the detention of others is necessary to protect against continuing, significant threats to the security of the United States, as determined by periodic reviews. Further, detention operations at Guantanamo Bay are legal, safe, humane, and conducted consistent with U.S. and international law. The E.O. provides that all detention operations at U.S. Naval Station Guantanamo Bay will continue to be conducted consistent with all applicable United States and international law. The E.O. also permits the transport and detention of new detainees to Guantanamo Bay when lawful and necessary to protect the United States and directs the Secretary of Defense, in consultation with the Secretary of State and the Attorney General, to recommend policies to the President governing the transfer of individuals to Guantanamo Bay.

  For those detainees at Guantanamo Bay not charged in or subject to a judgment of conviction by a military commission, E.O. 13823 retains the procedures for periodic review established in E.O. 13567 of March 7, 2011, which are described in the original report. The purpose of the periodic review is to determine whether continued law of war detention is necessary to protect against a significant threat to the security of the United States.

Prosecution of Individuals Through the Criminal Justice System and Military Commissions

Since the publication of the original report, the Department of Justice has successfully prosecuted a number of individuals for terrorism and terrorism-related offenses. Among others, Ibrahim Adam Huran, also known as Spin Ghul, was sentenced to life imprisonment for his role in attempting to murder American military personnel in Afghanistan and conspiring to bomb the

[10] *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003).

[11] *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 519-21 (2004) (plurality) ("[D]etention to prevent a combatant's return to the battlefield is a fundamental incident to waging war . . . ."); *id.* at 587 (Thomas, J., dissenting).

U.S. Embassy in Nigeria, and Ahmed Abu Khattala was convicted of federal terrorism charges stemming from his role in the 2012 attacks on U.S. facilities in Benghazi.