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Managing U.S. Security Partnerships

A Toolkit for Congress

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Executive Summary

Since 9/11, the United States has increasingly come to rely on foreign allies and partners to accomplish shared security objectives. But as the U.S. trains and advises partner militaries, sells arms to partner countries, and deploys its own forces alongside partner forces, policymakers in Congress have sought tools to make U.S. security cooperation more effective—and to rein in these security partners when they act contrary to U.S. interests.

Congress has a surprising variety of tools and authorities at its disposal to hold security partners accountable, shift their behavior, or restructure partnerships. This report describes authorities, funding, and other legislation related to U.S. security training and assistance programs, arms sales, and the use of force. While serving different purposes, these authorities and programs are all tools the U.S. government can use to enhance the security of critical partners and also leverage to change a security partners' behavior when it does not align with U.S. strategic interests.

We provide three sets of recommendations for Congress:

1. Increase Transparency via Reporting Requirements and Hearings

Congress can write reporting requirements into legislation that direct the relevant agency to submit reports to Congress on specific issues or questions. While reporting requirements do not directly alter how these authorities and programs are implemented, they can provide Congress and the public with important information about the management and effectiveness of U.S. security cooperation. Congress can also hold public hearings about the implementation and effectiveness of security assistance programs to elevate these issues and bring them to public attention.¹ These hearings, requests for information, and other mechanisms of informal influence can help Congress to more transparently define the costs and benefits of U.S. relationships with security partners, and to identify where these relationships are not serving U.S. national security interests effectively.²

More specifically, Congress can:

- ***Include Reporting Requirements for Acquisition and Cross Servicing Agreements (ACSAs):*** ACSAs allow the Department of Defense (DoD) to transfer military supplies and logistics support to partner country militaries. The United States provided aerial refueling to Saudi-led coalition aircraft in Yemen under an ACSA, for example, although DoD later said that refueling occurred for at least a year before an ACSA with

Saudi Arabia was formally in place.³ While partners are required to reimburse the United States for the supplies and services they receive via ACSAs, a Government Accountability Office (GAO) report found that DoD has not obtained reimbursement from security partners for “thousands of orders... valued at more than \$1 billion as of November 2019.”⁴ Congress should include reporting requirements around ACSAs and reimbursement.

- ***Require Funding for Assessment, Monitoring, and Evaluation (AM&E) and Clear Definitions of Effectiveness:*** Policymakers have associated a wide variety of objectives with security force assistance. These priorities are often overly-broad, and the success of these programs is difficult to measure.⁵ Congress could require relevant agencies to clearly lay out what objectives their programs are intended to achieve and a set of corresponding metrics of effectiveness. Congress could also include funding in each program’s budget that is explicitly earmarked for AM&E based on these effectiveness metrics.⁶
- ***Increase Transparency Around Arms Sales Notifications and Place Holds:*** Congress receives informal and formal notifications of arms sales to foreign countries above certain threshold dollar amounts. Congress can place a hold on arms sales and work with the State Department to resolve any concerns. Holds allow members of Congress and their staff time to gather information, build public awareness, and either negotiate the terms of a sale with the State Department or gather enough momentum to hold a vote to block the sale.
- ***Require Pre-Delivery Notification on Arms Sales:*** Congress does not typically receive notifications before the actual delivery of equipment once a sale has been formally notified and the contract finalized. The chair and ranking members of the Senate Foreign Relations Committee (SFRC) and the House Foreign Affairs Committee (HFAC) can request notification before delivery. This is important because Congress can vote to block an arms sale at any point during the process, not just during the formal notification period.
- ***Require Reporting on Title 10 Train and Assist Deployments:*** U.S. forces that are deployed under Title 10 training and assistance authorities could become engaged in hostilities, even if their primary mission is to train and assist foreign militaries.⁷ In these cases, Congress usually receives a presidential notification of a deployment under Title 10 train and assist authorities, but does not have a significant chance to offer input or authorize the use of force, even in situations where force may become necessary. Congress can require additional reporting from the Pentagon

on U.S. forces who may become engaged in hostilities. The House and Senate Armed Services Committees can use investigatory tools, including reporting requirements and hearings, to determine whether it has received complete and reliable information regarding these train and assist deployments.⁸

2. Use the Power of the Purse

Congress can use the power of the purse to place restrictions on the accounts it funds and may fund certain accounts while defunding others.

- ***Place Conditions and/or Restrictions on Security Assistance:*** Congress can restrict or place conditions on how U.S. security assistance is used by allies and security partners. Such conditions can discourage allies or security partners from pursuing certain policies.
- ***Defund the Authorizations for the Use of Force (AUMFs):*** Congress has the discretion to appropriate funding for deployments related to AUMFs. Congress has appropriated more than \$2 trillion in funding for operations in Afghanistan and Iraq as well as other operations related to the Global War on Terror (GWOT) through emergency supplemental bills since 9/11, namely the Overseas Contingency Operations (OCO) fund, which is operated jointly by the DoD and State Department on top of their annually appropriated base budgets.⁹
- ***Increase Funding for End-Use Monitoring Programs:*** Recipients of U.S. defense articles and services must agree to use them only for their intended purposes, to not transfer the title without the written consent of the U.S. government, to provide the same degree of physical security to the articles as the U.S. government does, and to allow U.S. officials to verify compliance with these terms. Congress appropriates funding for end-use monitoring programs to ensure that U.S. defense articles are used according to the terms of the transfer agreement. Congress can increase funding for end-use monitoring programs to monitor whether weapons are used for agreed-upon purposes or are transferred to unauthorized actors.
- ***Condition Future Arms Sales on Past Behavior:*** Congress could informally commit to condition future arms sales on the past behavior of recipient countries. For example, Congress could block sales to regimes that have been credibly found to commit violations of international humanitarian law or of end-use agreements. A robust end-use monitoring system could also expose violations of transfer agreements, providing Congress with

leverage to hold security partners to the terms of end-use monitoring agreements and to potentially limit or block future arms sales.

- ***Shift Focus from Equipment to Training:*** While building partner capacity is a primary goal of U.S. security assistance, U.S. policy tends to emphasize arms sales and the provision of materiel over training. Training may be relatively more effective in professionalizing partner militaries and ensuring that they actually have the technical capability to use the weapons they acquire effectively, as well as discouraging human rights violations. In order to shift emphasis towards training, Congress can appropriate more funding to International Military Education and Training (IMET) rather than Foreign Military Financing (FMF), and can include line-items in appropriations bills requiring assistance to be non-lethal or focused on training.

3. Invoke Existing Legislation

Several pieces of existing legislation provide an expedited route to holding a vote on a new bill, or otherwise serve as focal points to pass new legislation or repeal existing legislation.

- ***Use Section 502B of the Foreign Assistance Act (FAA) and the Leahy Law to Enforce Human Rights Provisions:*** Section 502B of the FAA provides an expedited route for Congress to request reporting on human rights violations from the State Department. Section 502B(c) authorizes either the House or Senate, or SFRC or HFAC, to request a report laying out a country's record on human rights and the steps the United States has taken to promote human rights in the country. After receiving such a report, Congress could "adopt a joint resolution terminating, restricting, or continuing security assistance" for the country.¹⁰ Congress can write the restrictions in this legislation as broadly or narrowly as it likes. This legislation is "privileged", meaning it comes up through the relevant committees for a vote on the floor more expeditiously.
- ***Invoke the War Powers Resolution (WPR) in Legislation:*** Congress can pass legislation regarding specific conflict contexts invoking the WPR, legislation passed in 1973 that reasserts Congress's role in use of force decisions.
- ***Vote to Block Problematic Arms Sales:*** Under the Arms Export Control Act (AECA), Congress can vote to block an arms sale via joint resolution. Joint resolutions to block arms sales are also considered privileged.

- ***Limit Use of the Presidential Emergency Waiver in Arms Sales:*** In May 2019, Secretary of State Mike Pompeo invoked a rarely-cited emergency waiver to circumvent Congress and push through a \$8.1 billion weapons sale with Saudi Arabia, the UAE, and Jordan. Congress can pass legislation limiting how the president may use this emergency provision in the future, helping to prevent the executive branch attempting to cut Congress out of the arms sales process.¹¹
- ***Repeal (and Replace) the AUMFs:*** Critics have argued that the 2001 AUMF, has been stretched well beyond its original intent. Any replacement AUMF should include sunset provisions limiting the expansion of the authorization over time, and/or requirements that the authorization must be periodically affirmed via legislation in Congress in order to remain in force.¹²

Introduction

The United States has increasingly come to rely on allies and security partners to accomplish shared security objectives.¹³ The United States engages with security partners around the world through training and advising partner militaries, arms sales to partner countries, and the use of force alongside partner forces, among other means. At the same time, policymakers have grappled with what tools they can use to rein in these security partners. In recent years, Congress has, on a bipartisan basis, invoked the War Powers Resolution (WPR) and attempted to limit arms sales to Saudi Arabia and the United Arab Emirates (UAE) in response to the humanitarian destruction of the war in Yemen. While this legislation was vetoed by the president, it has nevertheless raised questions about what other existing congressional authorities could be used as tools to hold partners accountable, shift their behavior, or restructure security partnerships entirely.

This report is a briefing on the tools that Congress has at hand to leverage beneficial changes in the behavior of U.S. security partners. As policymakers consider what Congress should do next—or what a new administration might do differently—this toolkit can be a resource for members of Congress and their staff, executive branch policymakers, researchers, and advocates to make creative use of existing tools.

This report does not set out to exhaustively list each way that the United States engages with security partners—indeed, because there are so many authorities and funding sources on the books for these relationships, to do so would be an immense undertaking. Instead, it attempts to provide a broad overview of these authorities and funding sources, one that bridges the silos between security force assistance, the export of U.S.-manufactured arms to foreign governments, and the use of U.S. armed forces in hostilities alongside partner forces, three areas of U.S. security policy that are typically considered separately. While serving different purposes, what these authorities and programs have in common is they are **tools that the U.S. government has to enhance the security of critical partners—and to use as leverage to change the behavior of security partners when it does not align with U.S. strategic interests**. Other forms of support for foreign governments that could also serve as leverage for the United States in bilateral relationships, such as economic development aid or humanitarian support, are outside the scope of this report.

Additionally, Congress has some measure of authority over all of the authorities and programs discussed here, by passing legislation to authorize and provide guidance for such programs and appropriating funding. As a 2014 Supreme Court decision noted, the executive branch does not have “unbounded power” over U.S. foreign policy.¹⁴ Rather than ceding this authority to the executive branch,

Congress can and should play a critical role in managing bilateral U.S. relationships with our security partners.

The Case for the This Approach

As the rest of this report shows, there are a myriad of authorities and programs related to U.S. security partners that Congress is responsible for authorizing and funding.¹⁵ This can lead to incoherent policy outcomes, where for example the goals and outcomes of bilateral training programs or arms sales are not in accord with the United States' broader strategic objectives. As Dafna Rand and Stephen Tankel wrote, "the glut of new authorities, occasional confusion about their purpose, and lack of predictability contribute to poor synchronization across the interagency. These factors also fuel the propensity to deploy security assistance and cooperation based on which authorities are available or most flexible, as opposed to choosing the right program for the problem."¹⁶ Mapping these assorted tools and looking at them as a portfolio in each bilateral relationship can allow policymakers to take **a more comprehensive approach to the United States' relationships with key security partners.**

This approach can also **help policymakers to assess the purpose and efficacy of these security relationships.** As many analysts have noted, there are few agreed-upon metrics or approaches to measure whether security assistance actually works in the ways that its proponents say it does.¹⁷ Instead, too often these relationships fall into an unproductive dynamic where U.S. policymakers are afraid of cutting off, reducing, or reforming U.S. assistance to these countries for fear of damaging the relationship, instead of using this assistance as both a carrot and stick to encourage these countries to behave in ways that are conducive to U.S. policy goals.

This report will also be a **useful toolkit** for policymakers and activists looking to assess and even **end the United States' so-called "endless wars"** in Afghanistan, Iraq, Yemen, and elsewhere. Many of the funding sources listed in Part I have been used to fund U.S. engagement with country partners in these wars; the arms sales discussed in Part II have provided materiel for partner countries fighting these wars; and U.S. forces that have directly engaged in these conflicts under the authorities are discussed in Part III. Congress can play an important oversight role by "question[ing] existing military and political strategies and test[ing] assumptions about how the fight is going" and can "lobby for a needed change of course, elevate the voice of stakeholders set aside by the executive branch, [and] press for an end to failing wars."¹⁸ During a presidential administration that is unwilling to use U.S. leverage to check the behavior of U.S. security partners, Congress can use these tools to exert such pressure. Even when a presidential administration is more sympathetic to these goals, Congressional action can serve as a useful source of additional leverage.

Finally, there are proposals for wholesale reforms to U.S. security sector assistance, notably including the flip-the-script proposal for reforming the arms sales process.¹⁹ Over the long-term, it makes a great deal of sense to work towards such reforms to how Congress conducts oversight of security sector assistance. In the short-term, however, there are existing authorities and levers that Congress can use to affect U.S. security assistance. In a deeply polarized Congress that has had trouble passing legislation in recent years, it is remarkable that legislation around the use of force and arms sales has garnered bipartisan support from members of Congress as divergent in their views as Sen. Bernie Sanders (I-Vt.) and Rep. Matt Gaetz (R-Fla.). These transpartisan coalitions provide hope that Congress can use these tools to have concrete effects on cooperation with security partners.²⁰

Part I of this report reviews many of the most important U.S. **security cooperation and assistance** programs and how they are authorized and funded by Congress; Part II looks at Congress's role in **arms sales** to foreign governments; and Part III reviews Congress's role in the **use of U.S. armed forces abroad**. Each part also includes several recommendations for Congress. An "additional reading" section highlights resources that provide a deeper discussion of these areas.

Part I: U.S. Security Cooperation and Assistance

What is It?

The U.S. government distinguishes among a number of different programs that fall under the umbrella of security cooperation, including security force assistance, foreign internal defense (FID), and security sector assistance.²¹ While this terminology may be useful at the technical level, at the policy level, it tends to obscure the broader picture. This section considers programs that provide military training, advising, and equipment to allied and partner militaries, using terms like security cooperation and security assistance interchangeably to refer to such programs.²²

According to Security Assistance Monitor, in 2019 the United States had 167 security aid programs with 87 recipients with a total of \$18.81 billion in funding.²³ The United States also had 20 training programs in 137 countries with a total of more than 14,000 trainees. Since 2013, these U.S. training programs have produced more than 485,000 trainees.²⁴ Funding for foreign security assistance has more than doubled in the budget since 9/11, reflecting how these programs were ramped up in the context of the Global War on Terror.²⁵

Title 22 authorities fall under State Department auspices, while Title 10 authorities are controlled by the Department of Defense (DoD).²⁶

For each program, this report includes a short description of what it does, the stated purpose of the program, how the program is authorized, which agencies are involved in implementation of the program, and Fiscal Year 2020 (FY20) funding levels.

The Washington Office on Latin America's (WOLA) Defense Oversight Research Database provides an up-to-date guide on all authorities and programs through which the United States provides assistance to foreign military, police, or paramilitary forces.²⁷

Key Title 22 Security Cooperation and Assistance Programs:

- *International Military Education and Training (IMET):*

- **Description:** IMET provides training and education on a grant basis to students from allied and security partner countries.²⁸ IMET funds training for non-U.S. personnel at U.S. facilities and

outside of the United States for professional military education and technical training.²⁹

- **Purpose:** IMET is intended to strengthen partner forces' capabilities and enhance interoperability for joint operation, enhance mil-mil relations, provide professional military education, increase understanding and communication between the United States and its security partners, and provide training to foreign personnel around human rights and the importance of democratic values such as the military's role in a civilian-led government.³⁰
- **Authorization/Implementation:** Authorized by Section 541 of the Foreign Assistance Act (FAA) of 1961. The State Department determines which countries will have IMET programs, but programs are implemented by DoD.³¹
- **FY20 Funding:** \$100 million³²

• ***International Narcotics and Law Enforcement (INCLE):***

- **Description:** INCLE “provides equipment, training and services to foreign countries for counternarcotics and anti-crime efforts,” including law enforcement training and in limited instances, weaponry to provide defensive arms to aircraft used in counternarcotics operations, although a 15-day congressional notification is required in these instances. INCLE funds may also provide economic development assistance.³³
- **Purpose:** To support country- and global-level law enforcement programs to counteract transnational crime including money laundering, narcotics trafficking, and terrorism-related issues. INCLE funds support programs like the Partnership for East Africa Counterterrorism and the Trans-Sahara Counterterrorism Partnership.³⁴
- **Authorization/Implementation:** Authorized by section 481 of the FAA of 1961. Overseen by the State Department.
- **FY20 Funding:** \$945.35 million³⁵

• *Foreign Military Financing (FMF) (see Part II for more):*

- **Description:** FMF provides other countries with grants and loans to make government-to-government purchases of U.S.-made defense articles and defense-related services via the Foreign Military Sales (FMS) program (see Part II). FMF also less frequently funds Direct Commercial Sales (DCS) between other countries and private U.S. companies.³⁶
 - **Purpose:** FMF is intended to enhance the military capabilities of security partners; promote coalition efforts, especially in counter-terrorism and enhance interoperability; and support the U.S. industrial base.³⁷
 - **Appropriation/Implementation:** Authorized by the Arms Export Control Act, as amended. The State Department determines which countries have an FMF program; FMF is implemented by DoD's Defense Security Cooperation Agency (DSCA).³⁸
 - **FY20 Funding:** \$5,370.9 million³⁹
-

• *Peacekeeping Operations (PKO):*

- **Description:** Supports regional stability operations and multilateral peacekeeping that is not funded through the UN.⁴⁰
 - **Purpose:** In spite of its name, this program is often used to support East African forces conducting counter-terrorism operations, for example against al-Shabaab in Somalia.⁴¹
 - **Authorization/Implementation:** Authorized under section 551 of the FAA.⁴²
 - **FY20 Funding:** \$291,435 million
-

• *Non-Proliferation, Anti-Terrorism, Demining & Related Programs (NADR):*

- **Description:** NADR provides support for U.S. security assistance efforts to police, military, and civilian government actors.
- **Purpose:** NADR provides assistance in four areas: counter-terrorism, nonproliferation, regional stability, and humanitarian

assistance. Programs supported by NADR include the Humanitarian Demining Program and the Antiterrorism Assistance Program, which provides CT training to law enforcement agencies in other countries.

- **Authorization/Implementation:** Authorized by section 571 of the FAA;⁴³ overseen by the State Department.⁴⁴
- **FY20 Funding:** \$707.15 million⁴⁵

Key Title 10 Security Cooperation and Assistance:

• *Train and Equip Authority (section 1206/section 2282)—availability of these funds expired in late 2017; these authorities have been subsumed by Section 333 (see below):*

- **Description:** Section 1206/2282 authority provided DoD the authority to provide equipment, training, and transportation to foreign military and security forces to perform counter-terrorism operations or participate in stability operations with U.S. armed forces. Section 1206 train and equip funding was appropriated through the DoD Operations and Maintenance account.⁴⁶
- **Purpose:** From 2005 through 2009, train and equip funds were primarily allocated towards counter-terrorism equipment and training. Starting in FY12, some funds shifted towards cooperation in stability operations with U.S. forces, especially for the International Security Assistance Force (ISAF) in Afghanistan.
- **Appropriation/Implementation:** Temporary authority consistently renewed by Congress since 2005. Implemented by DoD, but the Secretary of State must provide concurrence.⁴⁷

• *Building Partner Capacity (Section 333):*

- **Description:** Replacing section 1206, section 333 train and equip authorities allow for training and equipping partner country security forces for counter-terrorism operations, counter-transnational crime operations, and other security operations including international coalition operations in the interests of the United States.

- **Authority/Implementation:** Authorized under Title 10. Programs require the concurrence of DoD and the State Department.⁴⁸
 - **FY20 Funding:** \$1,208.729 million
-

• ***Combatant Commander Initiative Fund (CCIF):***

- **Description:** The CCIF allows the Chairman of the Joint Chiefs to provide funds to combatant commanders upon request for unforeseen contingencies, prioritizing “activities that would enhance the war fighting capability, readiness, and sustainability of the forces assigned to the commander requesting the funds.” Authorized activities related to foreign forces include joint exercises and military education and training.⁴⁹
 - **Purpose:** CCIF is intended to build U.S. Special Operations Forces (SOF) capabilities in partner countries, build interoperability with partner forces, enhance partner countries’ counter-terrorism capabilities, and build mil-mil contacts.⁵⁰
 - **Funding/Implementation:** Authorized by Section 166a. Implemented by DoD/combatant commanders.
-

• ***Global Security Contingency Fund (GSCF):***

- **Description:** GSCF provides the State and DoD with flexible funding pooled across the agencies to support capacity building for allies and security partners. GSCF “provides train and equip assistance to enhance the capabilities” of partner militaries and security forces and to participate in military operations consistent with U.S. policy objectives.
- **Purpose:** Increase U.S. flexibility to respond to security challenges; build partner capacity to confront shared challenges; develop independent security partners.⁵¹
- **Authority/Implementation:** Authorized in the FY12 NDAA; a joint program with DoD managed by the State Department. State transfers appropriations to the GSCF from FMF, INCLE, and peacekeeping operations programs. DoD transfers its share of appropriations to GSCF from the operations and maintenance

account. Per the authorizing legislation, DoD can contribute no more than 80 percent of the annual GSCF budget, while the State Department must contribute at least 20 percent.⁵²

• **Section 127E:**

- **Description:** Formerly known as Section 1208 funding, Section 127E authorizes DoD to support foreign forces, irregular groups, or individuals engaged in supporting counter-terrorism operations conducted by U.S. SOF.⁵³
 - **Purpose:** Section 127E funding has reportedly been used to fund classified special operations programs.⁵⁴
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• **Section 1202:**

- **Description:** Section 1202 funding authorizes DoD support to foreign forces, irregular forces, or individuals supporting irregular warfare operations by U.S. SOF.⁵⁵
 - **Purpose:** This authority is intended to build capacity to counter U.S. adversaries in “grey zone” conflicts.⁵⁶
-

• **Joint Combined Exchange Trainings (JCET):**

- **Description:** JCET authorizes training deployments for U.S. SOF to train alongside the armed forces of partner countries, which typically “resemble joint exercises, with some coursework.”⁵⁷ JCET has received criticism for human rights abuses allegedly carried out by foreign troops who received training.⁵⁸
 - **Purpose:** The main purpose of JCET trainings must be to train U.S. forces, but JCET funds can also cover the expenses incurred by the partner country’s forces as a result of the training.
 - **Authorization/Implementation:** Authorized by section 322 of Title 10, U.S. Code, as amended.⁵⁹ Implemented by DoD.
 - **FY20 Funding:** \$59.006 million⁶⁰
-

There are several country- and region-specific funds authorized under Title 10 as well. Examples of such funds include:⁶¹

- **Indo-Pacific Maritime Security Initiative (MSI)**
- **Pakistan Counterinsurgency Capability Fund (PCCF)**
- **PKO/African Peacekeeping Rapid Response Partnership (APRRP)**
- **Ukraine Security Assistance Initiative (USAI)**

Other DoD Programs: Acquisition and Cross-Service Agreements (ACSAs)

Formerly known as the “NATO Mutual Support Act,” the ACSA statute allows DoD to “acquire logistics support, supplies, and services directly from or provide them to a foreign government or organization.”⁶² ACSAs therefore allow for the transfer of military supplies and logistics support to partner country militaries outside of the security force assistance programs listed above, and instead fall within DoD’s appropriated budget.

According to the Office of the Secretary of Defense, “Such logistics support ‘transfers’ come into play primarily during wartime, combined exercises, training, deployments, contingency operations, humanitarian or foreign disaster relief operations, certain peace operations under the UN Charter, or for unforeseen or exigent circumstances. As a result, ACSA authority is almost always exercised by the Unified Combatant Commands.”⁶³

ACSAs are negotiated on a bilateral basis between the United States and its NATO allies or other security partners. The agreement must be negotiated and signed before a partner may receive U.S. transfers. ACSAs are not intended to be a grant program; rather, they “must primarily benefit the interest of DoD forward deployed commands and forces.” They are not supposed to be a routine source of supply and may not be used when the desired service or materiel is available via U.S. commercial services.⁶⁴ As of the end of FY18, the United States had 118 ACSAs.⁶⁵

The United States provided aerial refueling to Saudi-led coalition aircraft in Yemen under an ACSA, although DoD later said that refueling occurred for at least a year before an ACSA with Saudi Arabia was formally in place.⁶⁶

Other Relevant Legislation: Section 502B of the 1961 Foreign Assistance Act (FAA)

The 1961 Foreign Assistance Act (FAA) is the legislative cornerstone of U.S. foreign assistance programs and policies.⁶⁷ Section 502B of the FAA directs that “no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.”⁶⁸

As part of the annual budget proposal, section 502B directs the Secretary of State to provide Congress with “a full and complete report... regarding the observance of and respect for internationally recognized human rights in each country proposed as a recipient of security assistance.”⁶⁹ Congress can also request reporting from the State Department under 502B. After requesting such reporting, Congress can “adopt a joint resolution terminating, restricting, or continuing security assistance for such a country.”⁷⁰

The Leahy Law

The Leahy Law consists of two statutory provisions—one that applies to the State Department (section 620M of the 1961 FAA) and one to the Department of Defense (Section 362, Title 10 of the U.S. Code)—that prohibit funding to units of foreign security forces where there is credible information that implicates the unit in gross violations of human rights (GVHRs).⁷¹

GVHRs include:

- Torture or cruel, inhuman, or degrading treatment or punishment;
- Prolonged detention without charges or trial;
- Disappearing persons;
- War crimes;
- Crimes against humanity
- Evidence of acts that may constitute genocide; and,
- “Other flagrant denial of the right of life, liberty, or the security of the person.”⁷²

The Department of State is tasked with vetting a unit and its commander when the unit is designated to receive assistance. The U.S. embassy in the unit’s home

country is in charge of initial vetting, while the Department of State typically conducts an additional analysis, using both open source and classified documents.

Exceptions that allow the resumption of assistance to a unit under the DoD statute include:

- If the Secretary of Defense in consultation with the Secretary of State determines that a country is taking remedial steps; or,
- If U.S. assistance is needed to assist in national security or humanitarian emergencies.

What Can Congress Do?

1. *Recommendation: Reporting Requirements and Hearings on SFA Programs*

Congress has periodically written “reporting requirements” into the National Defense Authorization Act (NDAA) and other relevant legislation that require agencies like the State Department and DoD to submit reports to Congress on specified topics. The annual NDAA is considered a “must-pass,” meaning it “provides a vehicle for mandating what committees otherwise seek through informal means.”⁷³ While reporting requirements do not directly alter how security assistance programs are implemented, they can provide Congress and the public with important information on the management and effectiveness of U.S. security cooperation.

Congress can also hold public hearings with public officials to elicit information about the implementation and effectiveness of security assistance programs and to identify and bring public attention to potential issues.⁷⁴ Congress can use hearings, requests for information, and other mechanisms of informal influence to change the public narrative, test political assumptions, and more transparently define the costs and benefits of these programs.⁷⁵

ACSA Reporting Requirements. Congress may include reporting requirements for ACSAs. A recent GAO report found that the DoD’s poor recordkeeping and late notifications from the State Department “have limited the accuracy and timeliness of information provided by Congress on ACSA.”⁷⁶ Management weaknesses mean that DoD has not been able to obtain reimbursement from security partners for “thousands of orders...valued at more than \$1 billion as of November 2019.”⁷⁷ The GAO recommended that Congress require DoD to improve oversight and seek payment from foreign partners for overdue orders.

For example, as of September 2019, Saudi Arabia reportedly had not paid back \$181 million that it owed for aerial refueling services that facilitated airstrikes in Yemen. Pentagon attorneys told Congress that United States Central Command (USCENTCOM) provision of aerial refueling services for Saudi Arabian aircraft was operating under a provisional ACSA that had not been finalized and therefore Congress had not been notified.⁷⁸ Congress could require detailed reporting on such cases and hold public hearings.

Measuring the Effectiveness of Security Assistance. Several analysts have noted that there is little analytical clarity around whether security assistance is actually effective in achieving its stated goals. In part, this is a question of priorities: Policymakers have associated a number of objectives with security force assistance, from inducement to promote cooperation and interoperability with U.S. forces to building partner capabilities and ability to deal with mutually shared threats. Often these priorities are in tension. Furthermore, the success of these programs is empirically difficult to measure.⁷⁹

Congress could include a requirement for security assistance programs that the relevant agency must clearly lay out what the program is intended to achieve and a set of corresponding metrics of effectiveness. Congress could include funding in each program's budget that is explicitly earmarked for assessment, monitoring, and evaluation (AM&E). AM&E should specifically evaluate whether programs and transfers meet their stated goals. This would increase transparency around these programs and give members of Congress the ability to eliminate programs that aren't working without jeopardizing U.S. policy objectives.

For example, the FY16 NDAA added requirements that DoD must establish a monitoring and evaluation framework.⁸⁰ In response, DoD released its Instruction on Monitoring and Evaluation the following year.⁸¹ Some have noted that while these requirements are a good first step, they still fall short of the more stringent requirements placed on U.S. foreign aid.⁸² Additionally, military advising and other forms of operational support are not subjected to the same level of evaluation.⁸³

2. Recommendation: Conditions/Restrictions on Security Assistance

Congress can restrict or place conditions on how U.S. security assistance is used by allies and security partners. Such conditions can discourage allies or security partners from pursuing particular policies. To take one example, Sen. Chris Van Hollen (D-Md.) filed an amendment to the FY21 NDAA that would prohibit Israel from using U.S. security assistance funding to facilitate the annexation of territory in the West Bank.⁸⁴

3. Recommendation: Use Section 502B of the FAA and the Leahy Law to Enforce Human Rights Provisions

The president must make a declaration in order for Section 502B of the FAA to take effect, cutting off aid to a country in the case of human rights violations. However, the executive branch has never complied with this provision.⁸⁵ The Leahy Law was written because section 502B was seen as too expansive and rarely implemented.

However, 502B does provide an expedited route for Congress to request reporting on human rights violations from the State Department. Section 502B(c) authorizes either the House or Senate, or HFAC or SFRC, to request a report laying out a country's record on human rights, the steps the United States has taken to promote rights in the country, and whether "in the opinion of the Secretary of State... extraordinary circumstances exist which necessitate a continuation of security assistance" for the country.⁸⁶ If Congress does not receive the report within the 30-day window, "no security assistance shall be delivered" to that country until the report is submitted. Once Congress has received the report, Congress can "adopt a joint resolution terminating, restricting, or continuing security assistance" for the country.⁸⁷ Congress can write the restrictions in this legislation as broadly or narrowly as it likes. The joint resolution is considered privileged—privileged matters interrupt the normal course of business, and therefore come up through the relevant committees for a floor vote in a more expedited manner. Because it is guaranteed to receive a floor vote, privileged legislation can be useful because it requires members of Congress to go on the record on their position via their vote—this, in turn, means that each member will need to learn about the issue and gives constituents the opportunity to weigh in. Additionally, floor votes tend to generate more media coverage and public awareness of the issue.

Holding a vote on such legislation can be useful even if it fails to pass or is vetoed by the president, by registering Congress's disapproval and shining light on an issue. For example, in June 2019, Sens. Chris Murphy (D-Conn.) and Todd Young (R-Ind.) introduced a privileged resolution to request such a report on Saudi Arabia after Secretary of State Pompeo declared an emergency in order to sell arms to Saudi Arabia and the UAE.⁸⁸ The senators hoped to use the legislation to force a vote in accordance with 502B(c).⁸⁹

While other members of Congress have recently introduced similar legislation, Section 502B(c) does not "appear to have been used to any meaningful effect in recent years," according to *Lawfare's* Scott Anderson.⁹⁰ Notably, this may be because 502B(c) "raises constitutional concerns."⁹¹

Finally, via the appropriations process, Congress can increase funding for Leahy vetting through funding for Diplomacy and Consular Programs (D&CP) funds for the State Department Bureau of Democracy, Human Rights, and Labor.⁹²

4. Recommendation: Shift Focus from Equipment to Training

One of the primary goals of U.S. security force assistance is to build partners' capacity. Yet U.S. security force assistance has tended to emphasize the provision of materiel over training. On the demand side, many partner governments want access to cutting-edge military equipment as a mark of status and prestige.⁹³ At the same time, on the supply side, the military-industrial complex creates incentives for Congress to facilitate weapons sales abroad. However, training may be relatively more effective in professionalizing partner militaries, ensuring that they actually have the technical capability to effectively use the weapons they acquire, and discouraging human rights violations.

In order to shift the relative emphasis in U.S. security force towards training, Congress can appropriate more funding to IMET rather than FMF, and can include line-items in appropriations bills requiring assistance to be non-lethal or focused on training.

Part II: Arms Sales

What is it?

Congress has the ability to regulate government-to-government weapons transfers and private sale of weapons to foreign countries. Congress also appropriates funding to finance foreign countries' purchases of U.S.-manufactured weapons.

The Arms Export Control Act (AECA)

Passed in 1976, the Arms Export Control Act (AECA) gives the president the authority to regulate the export and import of defense articles and services. Executive Order 11958 delegated this authority to the State Department, which is the lead agency on arms sales regulation.⁹⁴

The AECA also says that end-use monitoring programs for arms exports should identify exports that are high risk and seek reasonable assurance that the recipient country is complying with its contractual agreements. The president must provide a report to Congress on monitoring of end-use activities, and must notify Congress if a recipient country violates the AECA.⁹⁵ While it is rare for a president to present such a notification to Congress, it has happened before. For example, President George W. Bush notified Congress in 2007 that Israel may have violated the AECA with its use of American-supplied cluster munitions in the 2006 war in Lebanon. Administrations have even imposed consequences for such violations: The Reagan administration put a temporary ban on sales of cluster munitions to Israel when a congressional investigation found that Israel had used cluster weapons in civilian areas in Lebanon in 1982.⁹⁶

The Leahy Law says that no assistance may be provided under the AECA “to any unit of the security forces of a foreign country if the Secretary of State has credible information that such unit has committed a gross violation of human rights.”⁹⁷

Foreign Military Sales (FMS)

Foreign military sales (FMS) are authorized under Section 3 of the AECA.⁹⁸ FMS are government-to-government sales of major defense items. Purchases made through Foreign Military Financing (FMF; see below) are regulated under the FMS process except for purchases made by Egypt and Israel.⁹⁹

Congress must be formally notified of an FMS sale worth \$14 million or more (or defense articles or services worth at least \$50 million) 30 calendar days before the finalization of the sale under Section 36(b) of the AECA.¹⁰⁰ For NATO allies, Australia, Japan, Israel, New Zealand, and South Korea, there is a 15-calendar day notification window and the threshold value is higher.¹⁰¹

The State Department traditionally submits an informal or preliminary notification to the Congressional committees of primary jurisdiction for arms sales—SFRC and HFAC—before the executive branch takes any further action on the sale. Since 2012, the State Department has used a tiered review process, where the relevant committees receive an informal notification between 20 and 40 calendar days before receiving a formal notification.¹⁰² Informal notifications allow the State Department to consult with members prior to the formal notification period in a confidential process. These consultations allow Congress to have its concerns addressed and the State Department to ensure that a sale is more likely to pass through Congress, all while protecting the United States’ bilateral relationship with a given country by keeping Congress’s concerns confidential.¹⁰³

When the chairs and ranking members of both committees have received this informal notification, their staff review the sale, and may ask for briefings from the State Department, try to get reassurances from the State Department and recipient country about how arms may be used, and/or add conditions or restrictions to a contract. At the end of this process, each of the four offices may decide to “clear” the State Department to move forward on the formal notification process of the sale, or place a “hold.” Placing a “hold” means that the office does not clear the sale and that issues may therefore come up during the formal notification process; however, these holds are a courtesy, so the administration has the legal authority to “blow” a hold, meaning they trigger the formal notification process anyway despite Congress’ objections.

Once the State Department has approved a sale and it has been informally cleared by these four offices, the Defense Security Cooperation Agency (DSCA) provides Congress with formal notification. The chair of the SFRC and the speaker of the House are legally required to receive these notifications; DoD also typically provides the notifications to the HFAC when it is submitted to the Speaker as a courtesy.¹⁰⁴ The formal notification starts the 30-day clock.¹⁰⁵ The Congressional notification stage typically marks the first time in the process that information around a specific sale becomes public.

Congress must pass a joint resolution of disapproval to proactively block an arms sale once it has been formally notified; if Congress fails to do so, the sale can move forward. Congress can also pass legislation modifying, conditioning, or permitting a sale through the regular legislative process at any point.¹⁰⁶

Once they have received a formal notification, members of the Senate and House may introduce a joint resolution forbidding a particular sale. SFRC and HFAC then hold hearings on the legislation, and if the joint resolution of disapproval receives a majority of either the Senate or House committee's support, it may be moved to the floor for consideration.

In the Senate, the legislation is privileged, so if the SFRC fails to report the resolution for floor consideration within 10 calendar days, a supportive senator can discharge the legislation to the floor. The legislation's privileged status also means that there are various limits placed on debate so the legislation will receive an expeditious floor vote. In the House, this legislation is slightly more complicated: it still receives precedence over most other legislation, but the AECA has no provision for discharge from HFAC if the committee does not report the resolution to the floor for a vote. This means that HFAC must vote affirmatively to move the legislation to the House floor.¹⁰⁷

The successful passage of a joint resolution of disapproval requires the support of two-thirds of both chambers in order to override the expected presidential veto. While this is a high barrier to passage—indeed, Congress has never successfully blocked a sale via a joint resolution of disapproval—legislation to block an arms sale gets a privileged vote.¹⁰⁸ Congress has never successfully blocked a proposed sale through a joint resolution.¹⁰⁹

The president can also waive Congressional review periods if the administration determines that there is a national security emergency. In this case, the president must submit a “detailed justification for this determination, including a description of the emergency circumstances” to Congress.¹¹⁰ In May 2019, the Trump administration formally notified Congress of an immediate sale to Saudi Arabia and the UAE. In the justification for the determination, Secretary of State Pompeo wrote that “The rapidly-evolving security situation in the region requires an accelerated delivery of certain capabilities to U.S. partners in the region... Such transfers, whether provided via the FMS system, or through the licensing of Direct Commercial Sales (DCS), must occur as quickly as possible in order to deter further Iranian adventurism in the Gulf and throughout the Middle East.”¹¹¹

The DSCA posts notices of certification notifying Congress of possible arms sales on its website.¹¹² The Forum on the Arms Trade also has a useful notification tracker.¹¹³

Direct Commercial Sales (DCS)

DCS denotes private sales between U.S. manufacturers and foreign purchasers with little U.S. government involvement, beyond monitoring and approval of transfers. As with FMS, Congress must be notified of a DCS at least 30 calendar days before an export license is issued. Jeff Abramson of the Arms Control

Association notes that DCS “are not as transparent [as FMS], in part because any public notification is obscure or functionally comes after the initial review period has passed;” That is, while Congress receives notification of a sale under FMS before the contract has been finalized, whereas for DCS, the manufacturer first concludes a contract and its term and only then does the company apply for an export license. Congress is therefore essentially only able to approve or reject a DCS sale.¹¹⁴

→ WHAT IS THE DIFFERENCE BETWEEN FMS AND DCS?

Foreign militaries that purchase U.S. defense services and equipment must do so with DoD as an intermediary via the FMS process. Foreign governments do not make deals directly with U.S. manufacturers; instead, DoD handles procurement and delivery. Personnel at U.S. embassies promote the sale of U.S. defense items and services and are typically tasked with managing FMS agreements.¹¹⁵ DCS involves sales from U.S. manufacturers to private foreign entities or individuals. DoD is not directly involved in DCS except for monitoring and regulation of transfers.

End-Use Monitoring

Under the AECA, all defense items exported to a foreign country require a bilateral agreement covering the end-use of the items.¹¹⁶ According to the State Department, end use monitoring “is an important component to protecting sensitive U.S. military and intelligence technologies.”¹¹⁷

Recipients must agree to use the articles and services only for their intended purposes and not to transfer the title without the written consent of the U.S. government.¹¹⁸ Recipients must also agree to provide the same degree of physical security to the articles as the U.S. government would, and to allow U.S. officials to verify compliance with these terms.

Congress appropriates funding for end-use monitoring programs managed by DoD to ensure that U.S. defense articles are used according to the terms of the transfer agreement. The Golden Sentry program provides end-use monitoring through FMS, while Blue Lantern monitors DCS. Golden Sentry is implemented by DoD and by Security Cooperation Organization (SCO) personnel assigned to U.S. embassies. Blue Lantern is implemented by the State Department’s Directorate of Defense Trade Controls and U.S. embassy personnel.¹¹⁹ The State

Department publishes an annual end-use monitoring report summarizing Blue Lantern’s activities.¹²⁰

The State Department is required to notify Congress of substantial violations of end-use agreements under Section 3 of the AECA.¹²¹

→ WHAT IS THE U.S. MUNITIONS LIST (USML)?

The U.S. Munitions List (USML) regulates the export of U.S.-manufactured weapons by “designat[ing] certain defense articles, services, and data subject to control under the AECA.”¹²² Under the AECA, “the President is authorized to designate those items which shall be considered as defense articles and defense services... and to promulgate regulations for the import and export of such articles and services.”¹²³ These designated items are the USML.

Weapons on the list are organized by category and once designated, require an export license issued by the State Department. Items may be designated as either having no predominantly civil applications, or having both civil and military applicability. The designation of the latter dual-use items is regulated by the Commerce Department.

The State Department, with advice from DoD, determines which items must appear on the list. Congress has oversight over changes to the USML but may not block revisions to the list.¹²⁴

→ WHAT IS THE COMMERCE DEPARTMENT’S ROLE IN ARMS SALES (AND WHAT IS THE COMMERCE CONTROL LIST/600 SERIES)?

Traditionally both the State Department and Commerce Department have played a role in regulating U.S. arms exports: While the State Department regulated the export of military equipment, the Commerce Department has been tasked with regulating dual-use items. However, under the Export Control Reform Initiative (ECRI) launched in August 2010, licensing authority for more types of military equipment has been transferred to the Commerce Department.¹²⁵ Proponents of the ECRI argued that it would streamline and reduce redundancies in the export control process. However, critics contend

that “the State Department employs more vigorous oversight powers than the Commerce Department;” the transfer therefore weakens the regulation of firearms exports.¹²⁶ Additionally, most items licensed by the Commerce Department are not subject to Congressional notification requirements.¹²⁷ In January 2020, for example, the Trump administration published new rules that moved export controls of assault-style firearms, sniper rifles, semi-automatic pistols, and ammunition from the State Department’s jurisdiction to the Commerce Department.¹²⁸

Arms exports that are regulated by the Commerce Department are also called the Commerce Control List or the “600 series.” Arms in the 600 series were previously on the USML but subsequently moved to the Commerce Department’s list.¹²⁹

Foreign Military Financing (FMF)

FMF is a program that provides financing, by grant or direct loan, for foreign militaries to purchase U.S. weapons, training, and services through FMS (see above).¹³⁰ The AECA as amended authorizes the financing of procurement of defense articles and services. The State Department determines which countries may have FMF programs. FMS is executed by DoD.¹³¹

What Can Congress Do?

1. Recommendation: Standardize and Increase Transparency around Congressional Notification

Under the terms of the AECA, “a major weapons sale proceeds unless Congress enacts a law to stop it. If Congress fails to pass a resolution of disapproval, and to override the inevitable veto, then the arms transfer can be finalized,” as Diana Ohlbaum and Rachel Stohl note.¹³²

While there is therefore a high barrier for Congress to affirmatively block an arms sale, there are several things Congress can do to standardize and increase transparency around the arms sales notification process and to negotiate the specifics of sales with the State Department before they are formalized. These measures can provide more information about the efficacy of arms sales as part of a broader U.S. security strategy, increase public awareness, and place pressure on the executive branch to in turn push U.S. security partners to change their behavior. For an administration that shares the goal of changing these partners’

behavior, these types of congressional measures can be a useful form of leverage to induce change.¹³³

Place Holds. Congress can place a hold on an arms sale before it has received a formal notification from the State Department. Informally, if the SFRC or HFAC raises concerns about an arms sale or export license, the State Department may extend the review period until the concerns can be resolved.¹³⁴ These two committees can initiate and support “efforts during this pre-notification period in order to hold or amend” arms sales.¹³⁵

Because Congressional holds are not legislated, but are a courtesy that has been maintained as a norm, the executive is not required by law to respect them. Nevertheless, holds can be useful because they allow Congress to negotiate the terms of a sale with the executive, and give Congress time to gather information, build public awareness, and gather momentum to potentially block an arms sale via legislation. Congress can publicize impending deals via this mechanism: for example, Sen. Robert Menendez (D-N.J.), Ranking Member of SFRC, recently announced that the Trump administration is working on a deal to sell Saudi Arabia precision-guided missiles.¹³⁶

Hold Hearings on Large and/or Problematic Sales. While some Congressional staff deal with arms sale notifications on a day-to-day basis, discussions around notifications become public less often. In order to draw attention and engagement around arms sales, the HFAC and SFRC could instate an informal rule that arms sale notifications above a certain dollar amount, or to a list of pre-designated problematic partners (such as non-democratic regimes, or those that have been credibly accused of human rights violations), will automatically trigger an open hearing.¹³⁷

Build Congressional Capacity to Monitor Arms Sales. Congressional staff are responsible for monitoring and responding to hundreds of notifications each year. Appropriating more capacity towards this task would allow members and committees to be more strategic about selecting arms sales for informational holds and to negotiate with the State Department on the details of individual sales. Building Congressional capacity to monitor arms sales notifications will therefore require dedicated resources, including staff time.¹³⁸

Require Pre-Delivery Notification. Congress does not typically receive notifications before the delivery of equipment once a sale has been negotiated.¹³⁹ However, Congress can vote to block an arms sale at any point up to the delivery of items or services, including in the period after a sale has been finalized.¹⁴⁰ The chair and ranking members of SFRC and HFAC could therefore request notification before delivery. Congress gave itself the authority to receive such pre-delivery notifications at least 30 days before delivery in 2014 by writing it into the AECA.¹⁴¹ However, this type of notification may have only been invoked one

time, by Sens. Bob Corker (R-Tenn.) and Ben Cardin (D-Md.) in November 2015 regarding the potential sale of air-to-ground weapons to Saudi Arabia.¹⁴²

The chairs and ranking members of these committees could standardize pre-delivery notifications in order to make the entire process more transparent.¹⁴³ Additionally, because the DCS process is less transparent than FMS, “Congress could insist that, or possibly take it upon themselves to make, these potential DCS transactions more transparent.”¹⁴⁴

2. Recommendation: Vote to Block Specific Arms Sales

Vote to Block Problematic Sales. Congress can vote to block an arms sale via joint resolution. Again, while there is a high barrier to legislatively block arms sales, a vote can serve as a focal point for public attention and can serve as leverage to change security partner behavior.

Limit Use of the Presidential Emergency Waiver. In response to President Trump’s use of the emergency waiver in 2019, both the House and Senate have introduced legislation seeking to limit how the president may use such a waiver. Legislation introduced by Sen. Menendez would limit the use of an emergency waiver to NATO, NATO-member countries, and Australia, Japan, the Republic of Korea, Israel, and New Zealand. Congress can continue efforts to pass such legislation.¹⁴⁵

3. Recommendation: Increase Funding Levels for End-Use Monitoring Programs

Via the appropriations process, Congress could increase funding for end-use monitoring programs Blue Lantern and Golden Sentry.

Condition Future Sales on Past Behavior. Congress could pledge to condition future arms sales on past behavior. For example, Congress could block sales to regimes that have been credibly found to commit violations of international humanitarian law or that have been found to violate end-use agreements. For example, in 2017 Congressman Ted Lieu introduced legislation that would have placed conditions on air-to-ground munitions sales to Saudi Arabia related to avoiding civilian casualties, facilitating humanitarian aid, and targeting U.S.-designated terrorist organizations. Similarly, the SAFEGUARD Act, S. 4712, introduced in September 2020 by Sens. Bob Menendez, Patrick Leahy, and Tim Kaine, would mandate that “No sale, export, or transfer of defense articles or defense services may occur to any country if the Secretary of State has credible information that the government of such country has committed or is committing genocide or violations of international humanitarian law after the date of the enactment of this Act.”

A 2019 CNN investigation found that “Saudi Arabia and its coalition partners [in Yemen] have transferred American-made weapons to al-Qaeda-linked fighters... in violation of their agreements with the United States.”¹⁴⁶ A more robust and

universal end-use monitoring system could more easily expose these types of violations, providing Congress with leverage to hold security partners to the terms of end-use monitoring agreements.

4. Recommendation: Hold Foreign Military Sales to the Same Standards as Other Kinds of Security Assistance

Under the FAA and the Leahy Law, U.S. security assistance can be restricted or cut off if it is determined that the recipient country or unit is implicated in human rights violation. Congress could require the inclusion of more stringent terms in bilateral FMS, for example by prohibiting recipient countries from using weapons and equipment in certain conflicts.

Part III: Use of Force

What is It?

The constitution divides war powers between the executive and legislative branches, granting Congress the authority to declare war and provide support for U.S. armed forces under Article I.¹⁴⁷ Article II specifies that the president is commander in chief of U.S. armed forces.¹⁴⁸ However, what these powers mean for the use of force are not entirely clear: the Congressional Research Service notes that “there as long been controversy over whether [the president] is constitutionally authorized to send forces into hostile situations abroad without a declaration of war or other congressional authorization.”¹⁴⁹

The War Powers Resolution (WPR)

Since 1973, when it was enacted over President Richard Nixon’s veto, the WPR has been the primary mechanism that Congress has to enforce transparency on the executive with regards to the use of force and “assert its own constitutional role.”¹⁵⁰

The WPR has several requirements related to the use of force:

Section 4(a). Section 4(a) of the WPR enumerates reporting requirements to Congress. These requirements are the WPR’s “core means of providing transparency and ensuring Congress has the necessary information to make decisions regarding how the nation’s armed forces are used abroad.”¹⁵¹ It requires the president to notify Congress whenever U.S. armed forces are introduced “(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances; (2) into the territory, airspace or waters of a foreign nation, while equipped for combat,” with a few limited exceptions; “or (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation.” This reporting must be provided within 48 hours of the triggering event in the absence of a declaration of war.

Section 5(b) and (c). The president’s submission of this reporting triggers a 60-day clock, which can be extended to 90 days under certain circumstances. At the end of this period, the president must cease the use of these U.S. armed forces unless Congress votes to authorize a continued engagement.¹⁵²

In the 1980’s, Congress adopted separate provisions that allowed it to propose a joint resolution related to the removal of U.S. forces. This legislation is considered via expedited procedures.¹⁵³

Section 3. Section 3 of the WPA requires that the president “in every possible instance... consult with Congress before introducing” U.S. forces into hostilities or imminent hostilities.”¹⁵⁴ The meaning of consultation was left fairly general in the final version of the legislation, although the House report clarified that the House had considered and rejected the notion that “consultation should be synonymous with merely being informed. Rather, consultation in this provision means that a decision is pending on a problem and members of Congress are being asked by the President for their advice and opinions.”¹⁵⁵

Authorizations for the Use of Military Force (AUMFs)

Congress has declared war 11 times in five conflicts; however, Congress has not formally declared war since June 4, 1942, when it declared war against Bulgaria, Hungary, and Romania. Instead, it has passed use-of-force statutes via joint resolutions that are typically “narrower in scope” than a declaration of war, according to the Constitution Project.¹⁵⁶ The AUMF passed in 2001 and another AUMF passed in 2002 are the two most recent use-of-force resolutions.

2001 AUMF

The 2001 AUMF was passed in the week after September 11, 2001. It authorized the president to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”¹⁵⁷

Since its passage, the 2001 AUMF has become “the central statutory enactment related to the war on terrorism,”¹⁵⁸ as executive branch officials have interpreted this AUMF to authorize the use of force against al-Qaeda and the Taliban outside of Afghanistan—including ISIS, beginning in 2014, which the Obama administration argued counted as a “successor force” of al-Qaeda since al-Qaeda was a predecessor to ISIS—ISIS could not qualify as an “associated force” of al-Qaeda since they were fighting each other at the time.¹⁵⁹ As of February 2018, administrations have invoked the 2001 AUMF to justify 41 operations in 19 countries, according to the Congressional Research Service. Administrations also often cite the 2001 AUMF in conjunction with other legal justifications, further obscuring which authorities are covered by the 2001 AUMF.¹⁶⁰

Critics have argued that because the 2001 AUMF has been interpreted so broadly and has no sunset clause, it has effectively served as a blank check for war.¹⁶¹ Advocates concerned that the United States has been involved in forever wars since 2001 see the 2001 AUMF as these wars’ central domestic legal component. Other critics have called for the AUMF to be repealed and replaced rather than just repealed, arguing that the AUMF “is outdated and fails to provide

appropriate legal authorization or characterize the threats to American national security with adequate precision.”¹⁶²

2002 AUMF

The 2002 AUMF authorizes the president to use force in order to “(1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.”¹⁶³

The 2002 AUMF was originally intended to authorize the 2003 U.S. invasion of Iraq. However, both the Obama and Trump administrations have since cited the 2002 AUMF as a reinforcing authority for operations conducted against ISIS, usually in tandem with the 2001 AUMF.¹⁶⁴ At the same time, the Obama administration said that it supported the repeal of 2002 AUMF “since it is no longer used for any U.S. government activities.”¹⁶⁵

What Can Congress Do?

1. Recommendation: Invoke the War Powers Resolution in legislation

Congress can pass legislation with regards to specific conflict contexts invoking the WPR. It should be noted that the obstacles facing successful passage of such legislation are very high. It will be difficult for Congress to invoke the WPR with regards to a conflict that an administration claims is authorized by statute. However, such legislative efforts can still provide benefits in terms of exercising leverage on the executive branch—and on U.S. security partners, who often take Congress’s approval seriously—when invoked.

The WPR has faced a number of challenges since it was enacted in 1973, namely expansive interpretations by presidential administrations of existing authorizations for the use of force and narrow interpretations of key terms in the WPR, such as the term “hostilities.”¹⁶⁶ Presidents have introduced armed forces into hostilities without reporting to Congress, and Congress has been reluctant to push back by initiating procedures to enforce the WPR.¹⁶⁷ The automatic withdrawal provision of section 5(b) has received some blame for this issue, since it has made presidents reluctant to formally report to Congress, thereby triggering the 60-day clock.¹⁶⁸ The 60-day clock has also been “misconstrued to give the President a sixty-day ‘free pass’ to use force without congressional authorization and to allow congress to do nothing.”¹⁶⁹

Thus, even if Congress does not assert its authorities under the WPR in the broadest sense, there is still considerable room for Congress to exert oversight over the use of force in hostilities.

Congress passed legislation in 2018 and 2019 seeking to end U.S. support for the Saudi-led coalition's intervention in Yemen (note that the legislation drew a distinction between the war against the Houthis and the counter-terrorism war in Yemen). While the president vetoed the legislation passed by both houses in 2019, this is a useful example of how Congress can constructively use the WPR to gain leverage over an administration in a particular conflict (see Appendix).

2. Recommendation: Demand WPR Reporting and Investigate Deployments of U.S. Forces Under Title 10

U.S. forces that are deployed under Title 10 training and assistance authorities could become engaged in hostilities even if their primary mission is to train and assist foreign militaries. Congress can demand reporting pursuant to the WPR on U.S. forces that are deployed under Title 10 and that may become engaged in hostilities. Congress, and specifically the House and Senate Armed Services Committees, can use their investigatory tools, including reporting requirements and holding hearings, to determine whether it has received complete and reliable information from the executive regarding Title 10 deployments.¹⁷⁰

In 2019, U.S. forces were deployed in at least 65 countries conducting counterterrorism-related training, according to the Costs of War Project.¹⁷¹ Many of these deployments have the potential to become engaged in hostilities even if that is not their primary mission. In these cases, Congress is notified of a Title 10 deployment, but does not have a significant chance to offer input or authorize the use of force, even in situations where force may become necessary.

An incident in October 2017 in Niger, when four U.S. soldiers were killed and two more wounded in an ambush by a terrorist group affiliated with the Islamic State, aptly illustrates this problem. U.S. troops had been deployed to Niger since 2013 under Title 10, and the forces were on a reconnaissance patrol linked to U.S. counterterrorism operations in the Greater Sahel when they were ambushed.¹⁷² While Trump administration officials initially asserted that U.S. forces were operating in Niger under Title 10 authorities, they reversed course in March 2018, arguing then that the 2001 AUMF applied to these forces at the time of the attack. In this case, Congress had been notified, consistent with the WPR, that U.S. troops that were equipped for combat in Niger.¹⁷³

3. Recommendation: Repeal (and possibly replace) the 2001 and 2002 AUMFs

Repeal and Replace. Critics, including many members of Congress, have argued that the 2001 AUMF has been stretched well beyond its original intent. In a 2017 hearing, ranking member of the HFAC representative Eliot Engel noted “I was here when we passed this measure nearly 16 years ago and I have to say that none of us envisioned we would still be relying on it nearly two decades later to fight an enemy that didn’t even exist when the Twin Towers came down. It’s essentially become a blank check.”¹⁷⁴

Some members of Congress have proposed repealing the 2001 and 2002 AUMFs and replacing them with an authorization for the use of force that specifies combatants, including the Islamic State.¹⁷⁵ However, replacement bills must be carefully written so that they are not in practice as expansive as the existing AUMFs. For instance, a 2018 bill introduced by Sens. Bob Corker (R-Tenn.) and Tim Kaine (D-Va.) intended to “reaffirm the domestic legal basis” for ongoing conflicts against the Taliban and al-Qaeda while reasserting Congress’s role in use of force.¹⁷⁶ However, critics of this legislation have argued that the replacement actually grants the executive broader authority rather than reasserting Congress’s role in authorizing and conducting oversight of the use of force.¹⁷⁷ Specifically, analysts worried that because the bill required Congress to affirmatively vote to remove a new set of associated forces added by the president, as the bill allowed—and that the affirmative vote would then be subject to a presidential veto—it actually passed additional responsibility to the executive to decide whether and how to expand the scope of the AUMF.

A replacement AUMF should also include sunset provisions limiting the expansion of the authorization over time, and/or requirements that the Authorization must be periodically affirmatively voted on by Congress in order to remain in force.¹⁷⁸ Additionally, a replacement should be more specific about who is targeted, prohibit the targeting of “associated forces” without explicit Congressional approval, and specify which country or countries force where force is permitted to be used.

4. Recommendation: Defund and Conduct Oversight of the AUMFs

Even if Congress is not able to repeal the AUMFs, it can defund execution of the AUMFs and conduct oversight.

Defund. In addition to passing the AUMFs themselves, Congress has the discretion to appropriate funding for the AUMFs. Congress has provided much of the past annual funding for operations in Afghanistan and Iraq through the use of emergency supplemental bills, namely the Overseas Contingency Operations (OCO) fund, which is operated jointly by the DoD and State Department on top of their annually appropriated base budgets.¹⁷⁹

For example, in the past Congress has added amendments to appropriations legislation to prohibit the use of funds appropriated to DoD pursuant to the AUMFs, although these amendments have always been defeated.¹⁸⁰

Continued Oversight. Congress can also conduct continued oversight of the use of force. According to the Constitution Project, authorization does not mean the end of Congress’s duties around the use of force: these duties “continue as long as the use of force continues. Congress should not only conduct continuing oversight of the strategic uses of force, but also collect the information necessary to decide on supplemental appropriations.”

Conclusion

The United States has increasingly relied on security partners to accomplish shared security objectives. Because the United States provides its security partners with security assistance and weapons sales and sometimes deploys U.S. military personnel on the ground to fight alongside partners, it has considerable leverage to change the behavior of its security partners when it does not align with, or is even harmful towards, U.S. interests. At the same time, in many cases policymakers have few metrics to measure whether these partnerships are successful. Some are even calling for a fundamental rethink of some of the United States' long-standing partnerships. Congress has a critical role to play in the relationship between the United States and its security partners. By increasing transparency around these relationships via reporting requirements and hearings, using the power of the purse, and invoking existing legislation, Congress can use the existing authorities and tools at its disposal to manage relationships with our security partners.

Additional Reading

Security Assistance

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Use of Force

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Congress and National Security Oversight

Richard Fontaine and Loren DeJonge Schulman, *Congress's Hidden Strengths: Wielding Informal Tools of National Security Oversight*, Center for a New American Security, July 2020: <https://www.cnas.org/publications/reports/congress-hidden-strengths>.

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Appendix: Yemen and the WPR

On March 26, 2015, Saudi Arabia and a coalition of nine Arab states, with logistical support from the United States, the United Kingdom, and France, launched an intervention on behalf of the internationally-recognized government of Yemen. The Trump administration notified Congress that “United States Armed Forces, in a non-combat role, have continued to provide military advice and limited information, logistics, and other support to regional forces combating the Houthi insurgency in Yemen. U.S. forces are present in Saudi Arabia for this purpose.”¹⁸²

On December 13, 2018, shortly after the murder of journalist Jamal Khasogghi, the Senate voted to adopt S.J.Res. 54, a joint resolution to “direct the removal of United States Armed forces from hostilities in the Republic of Yemen that have not been authorized by Congress.”¹⁸³ The legislation invoked Section 1013 of the Department of State Authorization Act FY84 and FY85 rather than the WPR.¹⁸⁴ The bill specifically noted “This joint resolution shall not affect any military operations directed at Al Qaeda,” and was intended to apply specifically to U.S. support for the Saudi-led coalition’s operations against the Houthis. S.J.Res. 54 passed the Senate 56-41, but no action was taken in the House before the end of the 115th Congress. Section 1013 expedited procedures only apply in the Senate, so the resolution was not privileged in the House.¹⁸⁵

On a parallel track, Rep. Ro Khanna (D-Calif.) introduced H.ConRes. 138 in the House in September 2018. This legislation specifically referenced Section 8(c) of the WPR, which the bill language noted “defines the introduction of United States Armed Forces to include ‘the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.’”¹⁸⁶

Similar legislation regarding U.S. support for the coalition’s war in Yemen had been introduced in Congress from 2015 through 2017, but had not passed.

In January 2019 at the start of the 116th Congress, Rep. Khanna introduced H.J.Res. 37, with identical language to S.J.Res.54. This time, the bill passed the House in February 2019, 248-177. Sen. Sanders introduced a companion bill in the Senate, S.J.Res. 7, which passed with bipartisan support 53-45.¹⁸⁷

President Trump vetoed the legislation in April 2019, asserting in his veto message that “this resolution is an unnecessary, dangerous attempt to weaken my constitutional authorities, endangering the lives of American citizens and brave service members, both today and in the future.”¹⁸⁸ The administration had also expressed disagreement with the legislation over the meaning of hostilities

in the WPR. A letter from acting general counsel to the State Department asserted that hostilities are only “a situation in which units of U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces,” which is not happening in the campaign against the Houthis.¹⁸⁹

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