GlobalResearch
Center for Research on Globalization

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

By Katherine Yon Ebright
Global Research, January 06, 2023
Brennan Center for Justice 3 November 2022

Region: USA
Theme: Intelligence

***

Introduction

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

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

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

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

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

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

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

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

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

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

Through these security cooperation provisions, the Department of Defense, not Congress,

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

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

I. History and Overview of Constitutional War Powers

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

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

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

Early History

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

Adams acknowledged Congress's wartime enactments, and the Supreme Court enforced them when American vessels exceeded their scope.[12] The Supreme Court

affirmed Congress's power to wage a war "limited in place, in objects, and in time."[13] Early presidents were careful not to overstep their authority, even when they acted unilaterally to defend the country from foreign threats. In 1801, while Congress was out of session, President Jefferson invoked his inherent constitutional authority to prevent the Barbary States from detaining and ransoming American merchants. The day after Congress returned, however, Jefferson dutifully apprised Congress of his deployment of American vessels to the Mediterranean, the circumstances that had given rise to the deployment, and the conduct of the vessels. He then sought and received Congress's express permission to "go beyond the line of defense" in countering the Barbary States.[14]

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

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

The Cold War

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

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

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

information picked up from irregular sources."[21]

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

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

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

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

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

September 11 and Its Aftermath

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

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

But the 2001 AUMF was not limited to Afghanistan.Indeed, it had no geographic or temporal limitation. As Bush said on September 20, 2001, two days after signing the 2001 AUMF into law, "There are thousands of terrorists in more than 60 countries. . . . Our war on terror begins with al-Qaeda, but it does not end there." Contrary to the stated purpose of the 2001 AUMF — preventing those responsible for September 11 from perpetrating future acts of terrorism against the United States — Bush's purpose was to ensure that "every terrorist group of global reach has been found, stopped, and defeated."[35]

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

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

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

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

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

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

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

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

Click here to read the full report.

*

Note to readers: Please click the share buttons above. Follow us on Instagram and Twitter and subscribe to our Telegram Channel. Feel free to repost and share widely Global Research articles.

Featured image is from The Unz Review

Articles by: Katherine Yon Ebright