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“The Use of Force: Strategic, Political, and Legal Considerations”
Committee on Foreign Relations, U.S. Senate

Mr. Chairman, Ranking Member Cardin, and members of the Committee, thank you for inviting me to testify today about the law applicable to the use of military force by the United States. It was a privilege to appear before the Committee in June to discuss congressional authorizations for the use of military force against terrorist groups, and I’m delighted to return to discuss the broader set of domestic and international law rules governing use of force. This Committee and Congress have a key constitutional role in authorizing and overseeing the deployment and use of U.S. armed forces.

I served as Senior Associate Counsel to the President and Legal Adviser to the National Security Council from 2001-2005 and later as Legal Adviser to the State Department from 2005-2009 during the George W. Bush Administration. During these eight years, I spent a substantial amount of time advising the President and senior national security policy officials on the domestic and international law applicable to the use of force against the Taliban and Al Qaida and associated groups in various countries; against the government of Saddam Hussein in Iraq; and to address other threats to our national security. I also had extensive discussions with officials from other countries about these issues.

When a President and his national security advisers consider the use of military force in or against another country, they must take into account domestic and international laws governing the use of force. As a matter of U.S. law, these laws include the U.S. Constitution and laws passed by Congress, including the War Powers Resolution of 1973. As a matter of international law, the rules include the U.N. Charter, treaties governing the use of military force, and certain principles of customary international law.

As the head of government and Commander-in-Chief of the armed forces of a nation committed to the rule of law, the President must follow these domestic and international legal rules.¹ I hope

¹ See John B. Bellinger III, “Law and the Use of Force: Challenges for the Next President,” Sixth Annual Lloyd Cutler Rule of Law Lecture, November 20, 2016.

that President Trump's legal and policy advisers have educated him on the legal rules that govern his actions.

It is also important that the President and Executive branch officials explain the legal and policy basis for any use of force by the United States. When I was Legal Adviser of the State Department, I gave numerous speeches about the domestic and international law authority for U.S. military operations against Al Qaida and the Taliban.² Obama Administration officials gave many similar speeches. In December 2016, President Obama issued a report that described the domestic and international bases for the United States' ongoing use of military force overseas and the legal and policy frameworks his Administration had developed to govern such uses of force and related national security operations, such as detention, transfer, and interrogation operations.³

Congress also has an important role to play regarding war powers and the use of force. Congress should insist that the President comply with applicable domestic and international legal rules and explain the legal basis for actual or potential uses of force and military operations. Congress should authorize the President to use military force when appropriate. And Congress should exercise appropriate oversight of military operations, consistent with the President's role as Commander-in-Chief.

Separate from his authority to use force, the President also has constitutional authority to deploy the U.S. military in other countries and the Secretary of Defense has statutory authority to train and equip the security services of foreign countries.

Domestic Law Authority

A. Constitutional Authority

Under Article II of the Constitution, the President has broad authority as Commander-in-Chief and Chief Executive to order the use of force by the U.S. military. His Article II powers include authority not only to order the use of military force to defend the United States and U.S. persons against actual or anticipated attacks but also to advance other important national interests.

<https://www.lawfareblog.com/my-lloyd-cutler-rule-law-lecture-law-and-use-force-challenges-next-president>

² See, e.g., "Legal Issues in the War on Terrorism," Address at the London School of Economics, October 31, 2006 <https://www.state.gov/s/l/2006/98861.htm>

³https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf

Presidents of both parties have deployed U.S. forces and ordered the use of military force, *without congressional authorization*, on numerous other occasions.⁴ For example, President George H.W. Bush ordered U.S. troops to Panama in 1989 to protect U.S. citizens and bring former President Noriega to justice. President Clinton ordered the deployment of U.S. forces to Haiti in 1994 and U.S. participation in NATO bombing campaigns in Bosnia and Kosovo in 1995 and 1999. President Obama ordered the U.S. military to participate in the bombing campaign of Libya in 2011.

The Department of Justice's Office of Legal Counsel has written numerous opinions, under both Republican and Democratic Presidents, determining that the President has the power to commit troops and take military actions to protect a broad array of national interests, even in the absence of a Congressional authorization, including for the purpose of protecting regional stability, engaging in peacekeeping missions, and upholding U.N. Security Council Resolutions. For example, the Office of Legal Counsel concluded that the President had the power, without congressional authorization, to deploy U.S. forces and use military force in Somalia in 1992, in Haiti in 1994, in Bosnia in 1995, in Iraq in 2002, and in Libya in 2011.⁵

Of course, in addition to the powers granted to the President in Article II, Article I of the Constitution gives to Congress the authority to "declare War."⁶ But this authority has never been interpreted – by either Congress or the Executive – to require congressional authorization for every military action, no matter how small, that the President may initiate. Indeed, the War Powers Resolution itself, implicitly recognizes that a President may order the U.S. military into hostilities without congressional authorization, provided that he notifies Congress within 48 hours and ceases the use of force after sixty days unless he receives congressional authorization.

⁴ See Barbara Salazar Torreon, Cong. Research Service, *Instances of Use of United States Armed Forces Abroad, 1798-2017* (October 12, 2017).

⁵ See, e.g., *Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C. 6 (1992); *Deployment of United States Armed Forces into Haiti*, 18 Op. O.L. C. 173 (1994); *Proposed Deployment of United States Armed Forces into Bosnia*, 19 Op. O.L.C. 327 (1995); *Authority of the President Under Domestic and International Law to Use Military Force Against Iraq* (October 23, 2002); *Authority to Use Military Force in Libya* (April 1, 2011)

⁶ Congress has issued eleven declarations of war: Great Britain (1812); Mexico (1846); Spain (1898); Germany (1917); Austria-Hungary (1917); Japan (1941); Germany (1941); Italy (1941); Bulgaria (1942); Hungary (1942); Romania (1942).
https://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/WarDeclarationsbyCongress.htm

In several opinions, the Office of Legal Counsel has acknowledged that the “declare War” clause may impose a potential restriction on the President’s Article I powers to commit the U.S. military into a situation that rises to the level of a “war.”⁷ This possible limitation appears only to have been recognized by OLC under Democratic Administrations; war powers opinions written by OLC during Republican Administrations do not appear to have recognized that the “declare war” clause places any restriction on the President’s Article II powers. And even during Democratic Administrations, OLC has stated that whether a particular planned engagement constitutes a “war” for constitutional purposes “requires a fact-specific assessment of the “anticipated nature, scope, and duration” of the planned military operations” and that “This standard generally will be satisfied only by prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period.” OLC determined that this standard was not met with respect to President Clinton’s use of the U.S. military in Haiti in 1994 and in Bosnia in 1995 or President Obama’s use of the U.S. military in Libya in 2011.

Although OLC has yet to identify a specific situation where the “declare war” clause would limit the President’s independent authority to order the use of military force and require congressional authorization, this does not mean that such circumstances will never exist. If a President wished to order the U.S. military to launch a prolonged or substantial military engagement that is not in response to an attack or clearly imminent attack and that would expose the U.S. military, U.S. civilians, or U.S. allies to significant risk of harm over a substantial period, there is a strong argument that the President may be required to seek congressional approval. It would certainly be prudent for him to do so.

B. Congressional Authorization

Although the President has broad constitutional authority to order the use of force without congressional authorization, Presidents of both parties have generally preferred to seek congressional authorization, if it is possible to secure, for any prolonged or substantial use of force.

President George W. Bush, for example, sought and secured congressional authorization for the use of force against terrorist groups in 2001 (“2001 AUMF”) and against Iraq in 2002 (“2002

⁷ Deployment of United States Armed Forces into Haiti, 18 Op. O.L. C. 173 (1994); Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327 (1995); Authority to Use Military Force in Libya (April 1, 2011).

AUMF”). President George H.W. Bush sought and secured a congressional authorization for the use of force against in Iraq in 1991.

In my previous testimony before this Committee in June 2017, I urged Congress to pass a new AUMF that repeals the 2001 Authorization to Use Military Force against terrorist groups and the 2002 Authorization to Use Military Force in Iraq and replaces them with a comprehensive new AUMF that authorizes the use of force against the Taliban, Al Qaida, and ISIS.⁸ I applaud Chairman Corker’s continued efforts to draft a new authorization, as well as the new draft AUMF introduced by Senators Kaine and Flake.

C. War Powers Resolution

When authorizing the use of force or deployment of U.S. armed forces, Presidents must also take into account the War Powers Resolution of 1973. Section 4 of the War Powers Resolution requires the President to notify Congress within 48 hours after U.S. armed forces are introduced 1) into “hostilities” or where hostilities are imminent; 2) into the territory, airspace or waters of a foreign nation, while “equipped for combat”; 3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation. Section 5(b) of the Resolution requires the President to terminate any introduction or use of US armed forces into hostilities within 60 days unless Congress issues a specific authorization.⁹ Presidents of both parties have concluded that some parts of the War Powers Resolution are unconstitutional, though all Presidents have tried to act “consistent with” the Resolution’s provisions, including by submitting regular reports to Congress.

Presidents have struggled in particular with the Resolution’s 60-day termination requirement. President Obama continued the use of U.S. military force against Libya for more than 60 days in 2011 after concluding (over the purported advice of the Justice Department and Defense Department) that U.S. military operations did not constitute “hostilities” within the meaning of the Resolution. He later continued the use of U.S. military force against ISIS in Iraq and Syria for more than 60 days in 2014 after concluding that the use of force against ISIS was authorized by congress under the 2001 AUMF, even though al Qaida had distanced itself from ISIS.

On several occasions, members of Congress or of the public have sued the President for allegedly violating the War Powers Resolution by using force for longer than sixty days without

⁸ https://www.foreign.senate.gov/imo/media/doc/062017_Bellinger_Testimony.pdf

⁹ The 60-day termination provision applies only to the introduction of U.S. armed forces into hostilities or imminent hostilities, not to the introduction of U.S. armed forces equipped for combat.

specific congressional authorization. The courts have generally dismissed these suits, finding that the legislators or members of the public lack standing or that the suits raise non-justiciable political questions.¹⁰

I have previously recommended that this Committee revise and update the War Powers Resolution. The Committee should review the valuable 2008 report of the National War Powers Commission, a bi-partisan commission chaired by former Secretaries of State James Baker and Warren Christopher, which called the War Powers Resolution “impractical and ineffective.”¹¹ The Commission stated that no President has treated the Resolution as mandatory and that “this does not promote the rule of law.” They recommended the Resolution be repealed and replaced with a mandatory consultation process. In 2014, Senators McCain and Kaine introduced the War Powers Consultation Act of 2014 to implement the Commission’s recommendations; their bill was referred to this Committee.¹²

International Law Rules

When considering whether to use U.S. military force, the President and his advisers must also consider international law rules, including the treaties to which the United States is a party. As leaders of a nation committed to the rule of law, Republican and Democratic Presidents have generally tried to comply with these rules. Although international law rules constrain a President’s flexibility to use force, Presidents have found that our close allies and coalition partners – such as Australia, Canada, the United Kingdom and other European countries -- are committed to following international law and expect the United States to do so as well. Moreover, if the United States does not comply with its international law obligations regarding the use of force, it is hard for the U.S. Government to criticize other governments, such as Russia or China or Syria, when they do not do so. It is true that certain international rules do not apply well to modern challenges – such as threats from terrorists, rogue governments that develop nuclear weapons, and governments that commit human rights atrocities against their nationals – but Presidents of both parties have still generally tried to abide by international law when authorizing the use of force in or against another country.

¹⁰ See, e.g., *Campbell v Clinton*, 52 F. Supp 2d 34 (DDC 1999)(dismissing suit against President Clinton relating to NATO bombing campaign in Serbia)(citing cases); *Smith v. Obama*, 217 F. Supp 3d 283 (DDC 2016)(dismissing suit against President Obama relating to operations against ISIS in Iraq and Syria) (appeal pending).

¹¹ <http://web1.millercenter.org/reports/warpowers/report.pdf>

¹² <http://thehill.com/blogs/floor-action/senate/195704-senate-bill-amends-war-powers-act>

The key international law rules governing the use of force are set forth in the U.N. Charter, a treaty which the United States ratified in 1945 after nearly unanimous (89-2) approval by the Senate. Article 2(4) of UN Charter prohibits the use of force against or in another UN member state unless authorized by the Security Council or the state itself consents to the use of force (for example, against a terrorist group operating in its territory). Article 51, however, recognizes that every State has an inherent right to use force in individual or collective self-defense to respond to an armed attack. The United States interprets this “inherent right” to include a right to use force in anticipatory self-defense to prevent an imminent attack. The George W. Bush and Obama Administrations have stated that the concept of “imminence” must be interpreted flexibly with respect to contemporary threats such as terrorism and nuclear weapons, and that whether a particular threat poses an “imminent” threat of an armed attack will depend on the facts and circumstances.¹³

State consent, Security Council authorization, and self-defense are the only legal bases recognized in the UN Charter for a state to use force in or against another state. The UN Charter does not specifically permit a state to intervene in another state for humanitarian purposes. The United Kingdom and a few other countries have asserted that international law permits the use of force to prevent a humanitarian catastrophe in limited circumstances, but the United States and the majority of other countries do not recognize an international law right of humanitarian intervention.

The foregoing international rules govern when a state may initiate the use of force (so called “jus ad bellum,” or law relating to the beginning of war). The United States is also party to dozens of other treaties relating to the conduct of military operations during hostilities (so-called “jus in bello,” or law in war). These treaties include, among others, the Hague Conventions of 1907, the Geneva Conventions of 1949, and the U.N. Convention on Certain Conventional Weapons, and its Protocols on Blinding Lasers, Incendiary Devices, and Explosive Remnants of War.

During the conduct of military operations, the United States also complies with principles of customary international law governing military operations, such as the principles of distinction, necessity, and proportionality.

¹³ See, e.g., The National Security Strategy of the United States, <https://georgewbush-whitehouse.archives.gov/nsc/nss/2002/>; Report on the Legal and Policy Frameworks Guiding the United States Use of Military Force and Related National Security Operations, https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf

Legal Bases for Use of Force in Syria or North Korea

On April 6, 2017, President Trump ordered air strikes against a Syrian air base after reports that the Syrian government used chemical weapons against Syrian civilians. He subsequently sent a War Powers report to congress stating that he was acting in the “vital national security and foreign policy interests of the United States, pursuant to my constitutional authority to conduct foreign relations and as Commander in Chief and Chief Executive.”¹⁴ There would have been no justification for the air strikes under the 2001 or 2002 AUMFs, and the President did not cite any statutory authority.

The Trump Administration has never cited any international law basis for the air strikes in Syria and it would have been difficult to do so because there is no legal basis under the U.N. Charter. Although President Trump and Trump Administration officials stated that the air strikes were in response to Syria’s use of chemical weapons, I believe the Trump Administration should still have provided – and still should provide -- a more detailed statement of the facts and factors that it believed justified the use of force. When President Clinton, without U.N. authorization, authorized air strikes against Serbia in 1999 in order to protect Kosovars from attack by Serb forces, his Administration cited a variety of humanitarian factors that the Administration believed justified the attacks. When the United States uses military force, especially under controversial circumstances, it should explain the legal basis for its actions. When the United States does not do so, it appears to act lawlessly and invites other countries to act without a legal basis or justification.

With respect to North Korea, President Trump has constitutional authority as Commander-in-Chief and Chief Executive to order the use of military force against North Korea if he concludes that the use of force is necessary to protect important national interests. These interests could include defense of the United States, its nationals, or U.S. allies or the maintenance of regional stability in Asia. Consistent with previous precedents and legal opinions from both Republican and Democratic Administrations, he could do so even without congressional authorization. However, if the use of military force would clearly be substantial and prolonged or would pose a substantial risk to U.S. forces or American civilians, it could require Congressional approval consistent with Congress’ authority in Article I to “declare war.” Under international law, if the Security Council had not approved a use of force against North Korea, the President would have to conclude that the use of force was in self-defense of the United States or its allies in response either to an actual armed attack or an attack the President determined to be imminent. As noted above, both the Bush and Obama Administrations have taken a more flexible position regarding

¹⁴ <https://www.whitehouse.gov/the-press-office/2017/04/08/letter-president-speaker-house-representatives-and-president-pro-tempore>

what constitutes an “imminent” threat when dealing with rogue states and terrorist groups, although some other states disagree with the U.S. approach.¹⁵ It is certainly clear that North Korea’s development of nuclear weapons and repeated launching of ballistic missiles capable of reaching the United States pose a very serious threat to the United States. Even if the United States were justified in initiating the use of force in self-defense against North Korea, to be consistent with international law, any such use of force would have to be proportionate to the threat posed by North Korea.

Train and Equip Authority

In addition to the laws that govern the President’s use of military force and commitment of U.S. armed forces into hostilities, Congress should recognize that different laws govern the deployment of the U.S. military in foreign countries for purposes other than combat.

Under Article II of the Constitution, the President has power as Commander-in-Chief and Chief Executive to deploy the U.S. military abroad for various purposes.

Congress has also given the Secretary of Defense specific statutory authorization to use the U.S. military to “train and equip” foreign security forces. For many decades, Congress had authorized the State Department to provide foreign assistance to other countries by training their military forces. After the 9-11 attacks, starting in 2006, Congress began including additional authorization to the Department of Defense in the annual National Defense Authorization Act to train and equip foreign security forces. This authority was included in annual NDAA’s until 2016, when it was permanently added as Section 333 of Title 10 of the U.S. Code.¹⁶ A separate

¹⁵ Some have argued that the restrictions in the U.N. Charter on the initiation of the use of force would not apply to North Korea because the United States remains in a state of ongoing armed conflict with North Korea since the Korean War. Although North Korea and the United States signed an Armistice Agreement in 1953, North Korea has violated the armistice and has also announced on several occasions that it would not observe the armistice, which might arguably provide a legal basis for the United States to continue to use force against North Korea. See Charlie Dunlap, “Assessing the legal case for the use of force against North Korea; Is “armistice law” a factor?” <https://sites.duke.edu/lawfire/2017/09/17/assessing-the-legal-case-for-the-use-of-force-against-north-korea-is-armistice-law-a-factor/> (assessing arguments made by others). With more than sixty years of intervening peace between the United States and North Korea, it would be a very hard to conclude that a state of armed conflict still exists between the two countries.

¹⁶ 10 U.S.C. 333(a) provides:

provision, 10 U.S.C 127(e), authorizes the Secretary of Defense to provide support to foreign groups that provide support ongoing military operations by U.S. special forces.

These “train and equip” authorities do not authorize the use of force by U.S. military personnel engaged in training foreign forces. However, U.S. military personnel in other countries are given authority by the Secretary of Defense to use force to defend themselves; the scope of these authorities are specified in the Rules of Engagement for particular missions.

U.S. Military Operations In Niger

After the tragic incident in Niger last month in which several members of the U.S. military were killed, some members of Congress, including members of this Committee, have asked what was the legal basis for the presence of members of the U.S. military in Niger. Some members have asked whether the Defense Department believed that the 2001 AUMF authorized the deployment of the U.S. military to Niger.

In the October hearing before this Committee, Secretary of Defense Mattis clarified that U.S. military members were operating on a “train and equip” mission under Title 10 of the U.S. Code.

(a) Authority.—The Secretary of Defense is authorized to conduct or support a program or programs to provide training and equipment to the national security forces of one or more foreign countries for the purpose of building the capacity of such forces to conduct one or more of the following:

(1)

Counterterrorism operations.

(2)

Counter-weapons of mass destruction operations.

(3)

Counter-illicit drug trafficking operations.

(4)

Counter-transnational organized crime operations.

(5)

Maritime and border security operations.

(6)

Military intelligence operations.

(7)

Operations or activities that contribute to an international coalition operation that is determined by the Secretary to be in the national interest of the United States

Secretary Mattis was presumably referring to the authority provided to the Secretary of Defense in 10 U.S.C. 333 to train and equip foreign security forces.

Accordingly, the U.S. forces in Niger were not operating pursuant to the 2001 AUMF, because their purpose was not to use military force against persons or groups associated with the groups responsible for the 9-11 attacks, but rather to train and equip Niger's security forces. The legal basis for the force that the U.S. forces did use was not the 2001 AUMF but rather the authority given to them by the Secretary of Defense and their commanders to defend themselves. As Secretary Mattis indicated, it is possible that the mission of U.S. forces in Niger could change and that the U.S. military could begin direct counterterrorism operations against terrorist groups in Niger. If the President determines that persons or groups in Niger are associated with Al Qaida or ISIS, then the U.S. military would have authority under the 2001 AUMF to use force against them.

Although the U.S. military personnel in Niger have not been operating under the authority of the 2001 AUMF, the Obama and Trump Administrations have still notified Congress in ten reports under the War Powers Resolution about the deployment of the U.S. military in Niger, presumably because the forces are "equipped for combat" even if they have not been (until last month) engaged in hostilities. President Obama first notified Congress in February 2013 that he had deployed 100 U.S. military personnel to support U.S. counterterrorism objectives. In eight additional war powers reports, President Obama reported that the number of U.S. military personnel in Niger had increased to 575 by December 2016. In June 2017, President Trump reported that the number of U.S. military personnel in Niger was 645.

The State and Defense Departments also provide reports to Congress on train and equip programs.

Conclusion

In conclusion, I applaud this Committee's renewed interest in Presidential and congressional war powers. Although the President has broad authority under the Constitution to order the use of military force, Congress also has a vital role to play.