

Unchecked and Uncooperative: How the Pentagon Has Thwarted Congressional Oversight of Security Cooperation Programs

Description

When the administration of President Joe Biden redeployed US forces to Somalia in May 2022, it [promised](#) that those forces would not be “directly engaged” in combat operations. They would instead support their Somali partners to “enable a more effective fight” against al-Shabaab, a regional al-Qaeda affiliate.

Since the redeployment, however, US forces have conducted a [steady stream of airstrikes](#) against al-Shabaab fighters. By January, the Department of Defense was reporting multiple strikes each week.

It should come as no surprise that the Department of Defense’s work [by, with, and through](#) foreign partners, or “security cooperation,” has again embroiled US forces in Somalia’s conflict. In a [recent report](#) by the Brennan Center for Justice at NYU Law, I detail how security cooperation “under authorities like 10 U.S.C. Â§ 333, 10 U.S.C. Â§ 127e, and Â§ 1202 of the 2018 National Defense Authorization Act (NDAA)” can [enable or involve hostilities](#), including those that are not authorized by Congress.

The only surprising thing about US forces’ renewed hostilities in Somalia is the extent to which the Department of Defense has disclosed them to the public.

As the Brennan Center report explains, the Department of Defense has typically failed to notify the public, as well as key decisionmakers in Congress, when US forces end up in security cooperation-enabled hostilities. In interviews conducted for the report, congressional staffers expressed frustration that they were not even told the full range of countries in which the Department of Defense engages in security cooperation. The transparency regarding Somalia is the exception, not the rule.

The public and especially Congress need better visibility into the Department of Defense’s security cooperation programs and the hostilities they may enable. This information is critical to informed debate on US involvement abroad and Congress’s constitutional role in deciding when, where, and against whom the country is at war. Congress has made efforts to engage in relevant oversight,

particularly in recent years. But the White House and Department of Defense have not fully complied with, and in some cases have simply ignored, congressional reporting requirements that apply to the conduct of hostilities, sensitive military operations, and security cooperation under §§ 333, 127e, and 1202.

Hostilities Reporting

For decades, Congress has required the executive branch to notify lawmakers when US forces engage in hostilities or are put in situations where hostilities appear imminent. In 1973, toward the end of the Vietnam War, lawmakers learned that the executive branch had secretly expanded the reach of the conflict into Cambodia and Laos. A bipartisan supermajority in Congress responded by enacting [the War Powers Resolution](#) over President Richard Nixon's veto. The War Powers Resolution sought to curb US forces' unauthorized and undisclosed combat. It mandated that the White House promptly notify lawmakers of any new or imminent hostilities conducted without prior congressional approval. It also required that the White House give lawmakers biannual updates on the status of ongoing hostilities, including those already approved by Congress.

But neither of the War Powers Resolution's reporting requirements has had its desired effect. Shortly after the enactment of the War Powers Resolution, the executive branch issued [an interpretation](#) of the law that excluded from its scope "sporadic military or paramilitary attacks" and incidents in which US forces are "simply acting in self-defense." According to executive branch lawyers, combat of this nature would not rise to the level of an "introduction of United States Armed Forces into hostilities," as covered by the law. No matter that Congress [carefully crafted the law's language](#), pointedly using the word "hostilities" instead of "armed conflict" to cover a broad range of circumstances that involve or could involve combat—even "a state of confrontation in which no shots have been fired" or when US forces "accompany [partner] units on combat patrols."

The executive branch still abides by its dubious interpretation of the War Powers Resolution. Among other things, the White House has routinely refused or neglected to report low-intensity combat that takes place by, with, or through foreign partners. As the Brennan Center report details, US forces have gotten into firefights with a [broad range of groups](#) in the Philippines, in the course of training Philippine partners on undertaking counterterrorism operations. And in the context of the war on drugs, US forces deployed to train Colombian partners on conducting counternarcotics operations have [faced situations](#) where an attack on their base by the FARC, a guerrilla group, was "imminent." Yet these confrontations were [not reported](#) to Congress as new or imminent hostilities.

The executive branch also underreports its ongoing hostilities pursuant to the 2001 Authorization for Use of Military Force (AUMF). Although the White House submits the biannual reports required by the War Powers Resolution, the reports often omit details about when, where, and against whom US forces are engaging in combat operations with foreign partners. In June 2017, for instance, President Donald Trump's administration [reported](#) that US forces were deployed to Niger "to provide a wide variety of support to African partners conducting counterterrorism operations." In [preceding reports](#), the administration of President Barack Obama had told Congress that US forces in Niger [were supporting](#) "counterterrorism intelligence collection and intelligence sharing."

It is no surprise, given this characterization, that lawmakers were [taken aback](#) when Green Berets were ambushed and killed in Niger in October 2017. The Green Berets had been out in the field on a [kill-or-capture mission](#) with their Nigerian military partners, despite the White House's failure to indicate that US forces in Niger were directing or engaging in combat.

The Niger incident led lawmakers to wonder what else they had not been told about the executive branch's far-flung hostilities. It showed, beyond a shadow of a doubt, that War Powers Resolution reporting was broken. So Congress tried to plug the gaps.

In the years following, Congress enacted additional reporting requirements, ranging from provisions mandating one-off reports to those mandating regular updates on the executive branch's interpretation and implementation of its use-of-force authorities. As the Brennan Center report explains, the executive branch's compliance with these new requirements has been lackluster. To name a few examples, the White House and Department of Defense have delayed or otherwise failed to submit reports about operations conducted under the 2001 AUMF, collective self-defense, execute orders directing military operations, and the relationship between use-of-force authorities and §§ 333 and 127e.

The reports that have been submitted are often deficient. The White House's reports on the [legal and policy frameworks](#) for using force, for instance, have been [short and incomplete](#); the [most recent report](#) listed Afghanistan, Iraq, Syria, and Somalia as the only countries in which the United States had used force in 2021 and 2022, omitting any combat that occurred by, with, through, or on behalf of foreign partners elsewhere—such as in Mali, where US forces reportedly [came under attack](#) in 2022 while supporting a French-led counterterrorism effort.

Sensitive Military Operations Reporting

Even before the Niger incident, lawmakers had reason to believe they were receiving an incomplete accounting of US hostilities. In a [2012 article](#), University of Texas professor Bobby Chesney identified

serious oversight gaps caused by the “ongoing process of convergence” between Department of Defense operations and CIA covert action. Chesney explained that the Department of Defense had moved toward conducting “unacknowledged operations functionally equivalent to covert action” that, because they were conducted by US forces rather than the CIA, “escape[d] categorization as covert action” and thus escaped disclosure to Congress. If the CIA directed proxy forces into combat, it would need to report to the congressional intelligence committees. If the Department of Defense did the same thing, commanding foreign proxies created through “127e’s predecessor statute (1208 of the 2005 NDAA), it would not need to report to anyone.

Lawmakers were quick to respond. In 2013, Congress enacted a new reporting regime for sensitive military operations, [10 U.S.C. 130f](#). The law [originally required](#) the Department of Defense to provide the congressional defense committees with prompt notice of any “lethal operation or capture operation conducted . . . outside a theater of major hostilities.”

But, like the War Powers Resolution, 130f did not provide the information Congress anticipated. In 2019, a [congressional hearing](#) revealed that the Department of Defense had failed to submit timely and complete notifications under 130f. One lawmaker outright said that the Department of Defense “hasn’t complied consistently” with the law.

Although 130f notifications are highly classified, we can infer the nature of the Pentagon’s noncompliance from Congress’s repeated amendments to the law. In 2016, Congress [specified](#) that it needed information on combat operations “conducted by a foreign partner in coordination with [US] forces,” as well as combat operations “conducted by [US] forces outside a declared theater of active armed conflict in self-defense or in defense of foreign partners” — in other words, security cooperation-enabled hostilities. In 2018, Congress [emphasized](#) that it was asking for notice of *all* such operations conducted outside of Afghanistan, Iraq, or Syria. In 2021, Congress [clarified](#) that the Department of Defense must submit notice of combat operations “conducted by [US] forces to free an individual from . . . hostile foreign forces.”

This legislative history suggests that the Department of Defense has withheld the same information on low-intensity combat that the White House has refused to report under the War Powers Resolution — even though the purpose of 130f was to ensure that Congress would get this information. The Department of Defense has evidently chosen to read “lethal operation” narrowly, to avoid reporting a range of operations in which US forces and their partners can end up in hostilities. Given that the Department has split hairs between what constitutes a lethal operation versus a defensive or rescue operation, it is probable that its reading of 130f still omits some classes of operations that motivated Congress to enact the law in the first place.

Security Cooperation Reporting

Finally, each security cooperation authority has its own reporting regime. Based on this, and the fact that [Â§ 333](#), [127e](#), and [1202](#) are public authorities rather than [secret laws](#), it may be tempting to assume that Congress and the public are getting the information they need about security cooperation-enabled hostilities. But the reporting regimes for [Â§ 333](#), [127e](#), and [1202](#) provide incomplete information on how the authorities are being used. Moreover, [Â§ 127e](#) and [1202](#) materials are highly classified and distributed in a manner that prevents key lawmakers from even knowing that notifications exist.

Briefly, nothing in the reporting regime for [Â§ 333](#)—the global train-and-equip authority—would give Congress a sense of whether US forces deployed to run a [Â§ 333](#) program are likely to encounter adversaries while helping their foreign partners. To be fair, Congress shares some blame for this deficiency: Section 333 does not require the Department of Defense to disclose its partner forces, adversaries, the location where US forces are stationed, or any overlapping execute orders allowing US forces to undertake combat operations on top of training on a base. But even when [Â§ 333](#) requires relevant information, like the identity of the specific partner that US forces will train, the Department of Defense has on occasion omitted the information from submissions to Congress. All of this information could have helped Congress foresee the Niger incident—which involved US forces deployed to conduct a [Â§ 333](#) train-and-equip program. Lawmakers, however, were left in the dark.

By comparison, the reporting requirements for [Â§ 127e](#)—an authority that allows US forces to command [foreign partners as surrogates](#) for conducting counterterrorism operations—are fairly comprehensive. In the wake of the Niger incident, they were amended to ensure that Congress would receive information on where, with whom, against whom, and on what legal basis US forces might be engaging in combat. (The Niger incident [also involved](#) a [Â§ 127e](#) team, which was supposed to join the [Â§ 333](#) team but was delayed by poor weather conditions.)

Nevertheless, [Â§ 127e](#) oversight falters. Although Congress expanded the scope of the reporting requirements, it did not fix a critical issue with how [Â§ 127e](#) materials are distributed: Under the law, reports and notifications are submitted only to the congressional defense committees, not the foreign affairs committees that have jurisdiction over matters of war and peace. And even if Congress had required submission to the foreign affairs committees, the Department of Defense often designates [Â§ 127e](#) materials as “sensitive compartmented information,” which prevents the vast majority of legislative offices from actually accessing them. There is little reason for these materials, which cover basic details like where, with whom, and on what legal basis [Â§ 127e](#) programs are run, to be so heavily classified to the point of frustrating congressional oversight. Reporting for [Â§ 1202](#)—another surrogate force authority, though for great power competition—suffers from the same distribution

problem, largely nullifying any value that Â§ 1202 reporting would otherwise have.

Reform or Repeal

The Department of Defense officials contacted for the Brennan Center report were quick to blame Congress for any breakdown in war powers oversight. Officials accused lawmakers of being â??asleep at the wheel,â?• failing to pay attention to the steady metastasis of US combat outward from Iraq and Afghanistan to places as distant as [Mauritania](#), [Kenya](#), and the [Philippines](#).

But the truth is, Congress has enacted and repeatedly updated a broad range of oversight mechanisms to help it understand how US forces are engaging in combat. These mechanisms have been ignored or neutered by executive branch policymakers and lawyers, across Democratic and Republican administrations. Through this secrecy, a handful of White House and Department of Defense officials have removed US hostilities across Africa and Asia from democratic debate and have frustrated Congressâ??s constitutional role of deciding when, where, and against whom the country is at war. Congress, the public, and especially our service membersâ??who swear to support and defend the Constitutionâ??are owed more. If the executive branch refuses to report its hostilities by, with, and through foreign partners, Congress must reform or repeal the Department of Defenseâ??s security cooperation authorities.

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The views expressed are those of the authors and do not reflect the official position of the United States Military Academy, Department of the Army, or Department of Defense.

Photo: US Army Special Forces soldiers train Senegalese troops in Tahoua, Niger. Credit: US Africa Command.

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